DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

[redacted] on behalf of

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No: 2012-0596

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a [redacted], who presently attends a DCPS senior high school. On August 29, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a FAPE by failing to provide Parent with access to records including to a January 3, 2012 IEP, failing to conduct a comprehensive psychological evaluation as ordered by the October 23, 2011 HOD, failing to conduct the audiological and auditory processing evaluations recommended by a speech/language evaluation and/or the January 3, 2012 MDT, failing to implement a revised IEP for Student following the October 23, 2011 HOD and/or provide Student with 26.5 hours of specialized instruction outside general education during school years 2011/12 and 2012/13, failing to provide Student with a location of services capable of implementing the IEP revised on January 3, 2012, and failing to provide Student with ESY for Summer 2012. As relief for these alleged violations of IDEA, Petitioner requested a finding of a denial of FAE, funding for a private placement with transportation and/or funding of independent tutoring services until a suitable out of general education placement can be identified, funding for independent comprehensive psychological, audiological and auditory processing evaluations at market rate; an MDT meeting upon completion of the independent evaluations to review and revise Student's program as appropriate, and compensatory education.

On September 12, 2012, DCPS filed its Response, which primarily asserted the following defenses: (i) Petitioner failed to request access to Student's records but was recently provided with a copy of Student's IEP, DCPS conducted the psychological evaluation in December 2011 and reviewed the report at Student's January 2012 meeting, DCPS's failure to complete the

audiological and auditory processing assessments do not rise to the level of anything more than a procedural violation, DCPS has provided appropriate programming to Student, DCPS has provided and continues to provide an appropriate location of services that can implement the IEP and provide FAPE, ESY was not required for Student, and Petitioner and her advocate failed to request ESY.

The parties concluded the Resolution Meeting process by participating in a resolution session on September 24, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline began on September 29, 2012 and will end on November 12, 2012, which is the HOD deadline.

On September 12, 2012, the District of Columbia filed a Partial Motion to Dismiss Petitioner's Administrative Due Process Complaint, seeking the dismissal of two of Petitioner's claims on grounds of res judicata.

On September 20, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on September 25, 2012.

By their respective letters dated October 29, 2012, Petitioner disclosed forty-six documents (Petitioner's Exhibits 1-46), and DCPS disclosed thirty-three documents (Respondent's Exhibits 1-33).

On November 2, 2012, Petitioner filed an Opposition to the Motion to Dismiss.

The hearing officer convened the due process hearing on November 5, 2012.[1] As an initial matter, Petitioner withdrew from consideration its first claim regarding the provision of records. With respect to its second claim, Petitioner acknowledged that DCPS had completed the required psychological evaluation for Student, but Petitioner continued to assert that DCPS failed to review that evaluation at Student's January 2012 MDT meeting. Thereafter, all of DCPS's documents and Petitioner's Exhibits 12-46 were admitted without objection, and Petitioner's Exhibits 1-11 were admitted over objection. As a final preliminary matter, after discussion concerning its partial motion to dismiss, DCPS withdrew its motion.

With the preliminary matters resolved, the hearing officer received Petitioner's opening statement, at which point Petitioner indicated that it had not secured an acceptance for Student at a nonpublic school and was instead requesting 6 hours per week of tutoring for 52 weeks, in addition to several other items. DCPS waived its opening statement but answered relevant questions the hearing officer asked. The hearing officer then received Petitioner's testimonial evidence, DCPS's closing evidence, and closing statements from both parties prior to bringing the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C.

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

§§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to review Student's December 2011 psychological evaluation at Student's January 2012 MDT meeting?

2. Did DCPS deny Student a FAPE by failing to conduct audiological and auditory processing evaluations called for by a speech/language evaluation and the 1/3/12 MDT?

3. Did DCPS fail to implement a revised IEP for Student following the 10/23/11 HOD and/or fail to provide Student with 26.5 hours per week of specialized instruction outside of general education for SY 11/12 and SY 12/13 to date?

4. Did DCPS fail to provide a location of services capable of implementing Student's 1/3/12 IEP?

5. Did DCPS deny Student a FAPE by failing to provide ESY during Summer 2012?

FINDINGS OF FACT[2]

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

1. Student is a [redacted], who presently [redacted] at a DCPS senior high school. This DCPS high school is not Student's neighborhood school. Parent did not want Student to attend the neighborhood high school, so she placed Student at her current school at the beginning of SY 11/12.[3]

2. On October 23, 2011, and Independent Hearing Officer ("IHO") ordered DCPS to, *inter alia*, revise Student's IEP so as to provide her with 26.5 hours of specialized instruction outside general education per week within 15 school days; complete a comprehensive psychological assessment, including an adaptive measure; fund an independent speech and language assessment of Student; and convene a meeting of

[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] *See* Complaint at 1; testimony of Parent.

student's IEP team, including Petitioner, to review the assessments, and review and revise Student's IEP to reflect the recommendations in the assessments.[4]

3. On November 15, 2011, an independent audiologist/speech-language pathologist conducted a speech language evaluation of Student. The evaluation revealed that Student has no problems in the physical production of speech. Student's overall language abilities were found to be abnormal when compared with her same age peers. However, Student's Full Scale IQ score was reported to be 69 on previous cognitive testing, and when these cognitive limitations are taken into account, the only area of language deficits for Student are in the areas of grammar – namely, morphology and syntax. The evaluator also noted that Student required many repetitions of verbal material presented to her orally regardless of the complexity of the material. This finding, together with a previously reported discrimination in noise problem, suggests that Student may have auditory processing deficits that could affect her abilities to understand verbally presented material in social situation and in academic settings. Therefore, the evaluator recommended a comprehensive audiological evaluation to rule out hearing loss, as well as a comprehensive auditory processing assessment. The auditory processing evaluation will help uncover (i) specific areas of difficulty Student may be having when taking in verbal information and trying to making sense of that information, (ii) how to accommodate Student, and (iii) what treatments are needed for Student to function to her potential in the classroom.[5]

4. On December 19, 2011, DCPS conducted a comprehensive psychological reevaluation of Student. The evaluator determined that Student's "low average cognitive ability (Reynold's Intellectual Assessment NIX = 81), well below average W-J III Total Achievement Standard Score (41) in reading, math and written language, and [Student's] failing grades in six subjects prescribed in her current academic curriculum, validates . . . that a verbal processing deficit still affects [Student's] achievement in reading, math and written language." On the other hand, the evaluator concluded that Student's "social emotional development and adjustment is functional and age-appropriate."[6]

5. On January 3, 2012, DCPS convened an MDT/IEP meeting for Student. The purpose of the meeting was "HOD review assessments, revise IEP." The team, *inter alia*, reviewed Student's school-based psychological evaluation, DCPS agreed to request an independent auditory processing assessment if DCPS could not complete one, the IEP was reviewed and revised to a full-time out of general education IEP, and the team determined to place Student in all available resource classes to accommodate the IEP.[7]

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[4] Respondent's Exhibit 5 at 18-19.
[5] Respondent's Exhibit 12; Petitioner's Exhibit 23; testimony of independent audiologist/speech-language pathologist.
[6] Respondent's Exhibit at 13 and 18.
[7] Petitioner's Exhibit 32; Respondent's Exhibit 14; testimony of Parent.

6. Student's January 3, 2012 IEP lists her primary disability classification as Specific Learning Disability ("SLD") and requires Student to receive 26.5 hours per week of specialized instruction outside general education and 60 minutes per week of speech-language pathology outside general education. Among the following choices for ESY -- Yes, No, Not Yet Determined, the team checked "No" for ESY services. The present levels of performance listed for the academic areas of mathematics, reading, and written expression are derived from Student's 10/15/2010 Woodcock Johnson-III assessment.[8]

7. On March 21, 2012, DCPS held another MDT meeting to "complete the remaining requirements of the HOD," which included a review of Student's compensatory education assessment and the discussion and determination of placement and compensatory education. Also on March 21, 2012, DCPS issued a Compensatory Education Services Authorization for Student, which authorized Student to receive 24 hours of speech language services and 144 hours of specialized instruction services from an independent provider of Parent's choice. The services were intended to remediate any educational harm to Student through March 21, 2012. With respect to location of service, the DCPS team members determined that the current DCPS senior high school can implement Student's IEP and that DCPS was, in fact, implementing the IEP. Parent and her advocate disagreed that the current high school is capable of implementing the IEP.[9]

8. Parent and/or her representatives did not raise ESY at Student's January 2012 meeting or her March 2012 meeting.[10]

9. On June 27, 2012, Petitioner's counsel sent an email to the SEC at Student's current school asking, *inter alia*, whether DCPS would agree to fund an independent auditory processing evaluation since it had not completed one for Student, and whether DCPS would provide Student with ESY, which was scheduled to begin the following week. Petitioner's counsel also stated her concern that Student did not appear to be receiving a full-time out of general education program at the current DCPS high school.

   The SEC responded the following day by indicating that Student's IEP did not call for ESY and she couldn't be enrolled in ESY without amending the IEP. The SEC noted that during his last conversation with Parent she was happy with Student's progress, but the SEC suggested convening a meeting to discuss Parent's concerns.

   On July 6, 2012, Petitioner's counsel suggested July 20, 2012 as the meeting date. On July 20, 2012, Petitioner's counsel noted that the meeting date had passed and requested that DCPS provide alternative dates with at least 10 days notice. On August 2 and 6, Petitioner's counsel sent additional emails to DCPS regarding the requested meeting. A response was provided by DCPS, but the requested meeting was not scheduled.[11]

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[8] Petitioner's Exhibit 28; Respondent's Exhibit 15.
[9] Respondent's Exhibit 21 and 22.
[10] Testimony of Parent.
[11] *See* Petitioner's Exhibits 1-10.

10. Student began receiving independent 1-on-1 tutoring services in April 2012 pursuant to the March 21, 2012 award of compensatory education. The tutor provided Student with tutorials and basic skills training in math, reading, writing, life skills, money skills, telling time, and speech and language communication. Student met with the tutor two times per week, with an additional session on the weekend sometimes, and each session was from 1.5 to 2.5 hours.

    Student's strength is that she's eager to learn. She asked a lot of questions with the tutor, because she was comfortable in that setting, but she's afraid to ask questions in front of a lot of people. Student thrives on repetition because it's difficult for her to retain information. Student's weaknesses include not being able to tell time, poor concentration at times, inability to articulate exactly what she wants to say, and being unsure of herself when trying to make decisions. Although Student can work independently to some extent, she has to be supervised and the work has to be checked.

    Student's independent tutoring sessions ended on August 31, 2012. Student made significant progress as a result of the tutoring and her progress in school improved as well, because she was more confident, attentive and interactive. She has become more articulate, her writing and punctuation skills have improved, and with the help of her parents, she has become more organized and structured. Student received 2-3 tutorials per week during Summer 2012, but her tutor recommended year-round schooling for Student with no lengthy breaks due to her retention problems and her need for as much academic support as possible.[12]

11. On November 22, 2011, Petitioner, through Petitioner's counsel, submitted to DCPS a written request for the audiological and auditory processing evaluations recommended in Student's independent speech and language evaluation.[13]

12. The requested audiological and auditory processing evaluations had not been completed as of the date of the due process hearing in this case.

13. In the past, Petitioner's independent audiologist/speech-language pathologist has billed and been paid by DCPS a total of $1200 for a combined audiological/auditory processing evaluation. DCPS's current approved rates for these assessments are $88.35 per hour, with a maximum of $353.40, for the audiological evaluation, and a maximum of $1,019.83 for the auditory processing evaluation.[14]

14. Student's February 24, 2012 Progress Report indicated that she was taking the following subjects and had earned the following grades for Term 3: Developmental Reading I -- A-; Advisory 1.0 -- A; Basic Skills A -- B; learning Lab 2 -- B-; Fluency

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[12] Testimony of compensatory education provider; testimony of Parent; *see* Petitioner's Exhibit 13.
[13] Petitioner's Exhibit 12.
[14] Testimony of independent audiologist/speech-language pathologist; testimony of DCPS Compliance Case Manager; Petitioner's Exhibit 17; DCPS Exhibit 31.

Skills A -- A; Application Skills A -- C+; English I – D; Art and Design Foundations – no grade listed; From Bach to Rap – C+.[15]

15. Student's September 27, 2012 Progress Report indicated that she was taking the following subjects and had earned the following grades for Term 1: Learning Lab 3 – A; Reading Comprehension – B+; Reading Resource I – A; Vocabulary Development – A; Fluency Skills B – A; Application Skills B – A; English I – B; and Extended Literacy 9 – no grade listed.[16]

16. Despite Student's full-time out of general education IEP and even though her schedule has been changed several times during the current school year, Student presently takes mostly general education classes and is receiving specialized instruction outside of general education in only 2-3 classes. In fact, Student has been receiving some of her instruction in general education classes ever since her IEP was revised to provide full-time services in January 2012, as her English and math classes continued to be general education classes from January 3, 2012 through the end of SY 11/12.[17]

17. The current DCPS senior high school is unable to provide Student with all classes outside general education because it does not have teachers with the dual certification in special education and the various content areas required to provide Student with Carnegie units for each course she takes while also providing her with special education services in those courses. As a result, DCPS is providing Student with inclusion services in general education classes so that she can receive the Carnegie units she needs to graduate, and Student will obtain elective credits for the special education courses she takes.[18]

18. DCPS asserted in its October 29, 2012 Disclosure Statement that Student's neighborhood DCPS senior high school can serve as Student's location of service. However, no evidence was presented at the due process hearing to establish that the neighborhood school can implement Student's IEP.[19]

19. In its compensatory education plan submitted in connection with this case, Petitioner has requested the following forms and amounts of compensatory education: 6 hours per week of specialized instruction to be provided for 52 weeks by Student's previous independent tutor, for a total of 312 hours of independent tutoring; a summer vocational program, such as the Adult Basic Education (Level 1 Course) offered by Seeds of Tomorrow; and 25 hours of mentoring services to be provided by someone Student can view as a peer and can establish a positive rapport with. The plan is designed to redress harm that began occurring as of November 15, 2011 (although the

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[15] Petitioner's Exhibit 36.
[16] Petitioner's Exhibit 47.
[17] Testimony of Parent; testimony of advocate.
[18] Testimony of advocate.
[19] See Respondent's Disclosure Statement, n. 1; *see also* Prehearing Order at 2 (which allowed DCPS "until October 19, 2012 to propose another DCPS school for Parent to consider and investigate in the event the hearing officer finds the current location is inappropriate.").

plan inadvertently says November 15, 2012), which is supposed to represent 15 school days after issuance of the HOD when DCPS was required to change Student's IEP to full-time out of general education services and begin implementing same.[20]

CONCLUSIONS OF LAW

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

1. Alleged Failure to Review December 2011 Psychological Evaluation at January 2012 Meeting

On October 23, 2011, an Independent Hearing Officer ("IHO") ordered DCPS to, *inter alia*, complete a comprehensive psychological assessment of Student and to convene a meeting to review the assessment and review and revise Student's IEP to reflect the recommendations in the assessment. *See* Finding of Fact ("FOF") 2; *see also* 34 C.F.R. § 300.324(b)(1)(ii)(B) (results of any reevaluation conducted must be considered in reviewing and revising a disabled child's IEP).

In the instant case, Petitioner asserts that DCPS failed to review Student's December 2011 psychological evaluation at Student's January 3, 2012 MDT meeting. In support of this assertion, Petitioner points to the fact that the present levels of performance in Student's 1/3/12 IEP are based on data from a 2010 evaluation instead of data from the December 2011 evaluation of Student.

A review of the evidence in this case reveals that the stated purpose of Student's 1/3/12 IEP/MDT meeting included "HOD review assessments." *See* FOF 5. The Meeting Notes also indicate that Student's school-based psychological evaluation was reviewed, but there is no indication of the date of the evaluation that was reviewed and there was no testimony presented at the hearing from anyone who was at the meeting regarding the date of the evaluation that was reviewed at the meeting. Therefore, it is unclear whether Student's December 2011 evaluation was reviewed at the meeting.

As Petitioner points out, the present levels of performance in Student's 1/3/12 IEP are based on data from a 2010 evaluation instead of data from the December 2011 evaluation of Student, which indicates that whether or not the December 2011 evaluation was reviewed at the meeting, the relevant data from the evaluation was not incorporated into Student's IEP. However, there is no complaint by Petitioner about the IEP goals, the number of hours of service, or any other substantive aspect of the IEP. Nor does Petitioner allege any educational harm as a result of the failure to include data from the 2011 evaluation in the IEP. As a result, the hearing officer concludes that to the extent that DCPS may not have reviewed Student's December 2011 psychological evaluation at the January 2012 meeting, the failure to do so was a procedural violation that does not rise to the level of a denial of FAPE under the circumstances of this case. *See, e.g.,* 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only where procedural inadequacies impeded child's right to FAPE, impeded Parent's opportunity to

[20] Petitioner's Exhibit 46; testimony of advocate.

participate in decision-making, or caused deprivation of educational benefit); *Lesesne v. D.C., 447 F.3d 828 (D.C. Cir. 2006)* (only procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable). Nevertheless, to ensure compliance with IDEA's procedural requirements, the hearing officer will Order DCPS to convene another MDT meeting for Student to review the December 2011 psychological evaluation and revise Student's present levels of performance on the 1/3/12 IEP to incorporate the results of that evaluation.

2. **Alleged Denial of FAPE by Failing to Conduct Audiological and Auditory Processing Evaluations**

Under IDEA, a public agency conducting an evaluation of a disabled child must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). The public agency must also ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4).

In the instant case, Petitioner contends that DCPS denied Student a FAPE by failing to conduct recommended audiological and auditory processing evaluations of Student. DCPS contends that it agreed only to an auditory processing evaluation at Student's 1/3/12, and that in any event, any failure to conduct the recommended evaluations is a procedural violation at best.

A review of the evidence in this case demonstrates that in recent and previous evaluations, Student required many repetitions of verbal material presented to her orally, and Student appeared to have a discrimination in noise problem, which taken together suggests that Student may have auditory processing deficits that affect her abilities to understand verbally presented material in academic settings. *See* FOF 3. Therefore, the most recent speech and language evaluator recommended an audiological evaluation to rule out hearing loss and an auditory processing evaluation to determine specific areas of difficult Student may be having when taking in verbal information and trying to making sense of that information, and how to accommodate and treat Student to reduce the impact of these difficulties in the classroom. Based on this recommendation, DCPS agreed to either conduct an auditory processing evaluation or fund an independent assessment for Student, but DCPS has failed to do so. Moreover, although DCPS did not agree to conduct or fund the recommended audiological evaluation, said evaluation is necessary to rule out hearing loss as the underlying reason for Student's problems processing verbal material that is presented to her orally. *Id.*

Under the circumstances of this case, where the evidence demonstrates that DCPS's failure to conduct the recommended audiological and auditory processing evaluations may have resulted in a deprivation of educational benefit to Student because it resulted in the failure to collect the data needed to determine the nature, if any, of Student's hearing and/or auditory processing problems and how best to accommodate them in the classroom, the hearing officer concludes that Petitioner has met its burden of proof on this claim. *See, e.g.,* 34 C.F.R. § 300.513(a)(2), *supra*; *Lesesne v. D.C., supra*, (IDEA claim viable where procedural violations affect student's

substantive rights); *Suggs v. District of Columbia,* 679 F.Supp.2d 43, 51-52 (D.D.C. 2010) (failure to conduct recommended assessments may be deemed a denial of FAPE where it appears that IEP is not reasonably calculated to provide educational benefit). Therefore, the hearing officer will order DCPS to provide funding for audiological and auditory processing assessments for Student.

3. **Alleged Failure to Provide Full-Time Services After the 10/23/11 HOD and/or Provide 26.5 Hours of Services During SY 11/12 and SY 12/13**

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program." Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d).

"[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis 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." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007) (*quoting Houston Independent School District v. Bobby R.,* 200 F.3d 341, 348-49 (5th cir. 2000). Hence, to prevail on this claim, Petitioner must prove that DCPS deviated from the IEP and that those deviations were "material." *See id.*

In the instant case, Petitioner alleges that DCPS failed to implement a revised IEP for Student following the 10/23/11 HOD and/or failed to provide 26.5 hours of specialized instruction outside general education during SY 11/12 and SY 12/13 to date. DCPS disagrees with the allegation, asserting instead that it has fully implemented Student's January 3, 2012 IEP.

A review of the evidence in this case reveals that the 10/23/11 HOD ordered DCPS to revise Student's IEP so as to provide her with 26.5 hours of specialized instruction outside general education per week within 15 school days, which would have been on or about November 14, 2011, but DCPS did not revise Student's IEP to provide 26.5 hours of specialized instruction until January 3, 2012. *See* FOFs 3, 5-6. Moreover, from the time the January 3, 2012 IEP was created through the end of SY 11/12, and from the beginning of SY 12/13 through the date of the November 5, 2012 due process hearing in this case, DCPS failed to provide Student with the 26.5 hours of specialized instruction outside of general education that the IEP requires. *See* FOFs 16-17. Indeed, Student continued to receive both English and math in general education classes from January 3, 2012 through the end of SY 11/12, and Student presently receives all instruction in general education classes, with the exception of 2-3 classes. *Id.* Hence, the evidence proves that DCPS's failures to implement the January 3, 2012 IEP were material, and the hearing officer concludes that Petitioner has met its burden of proof on this claim.

"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 by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994)

(quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). Although Petitioner initially requested relief in the form of a private school placement in this case, at the due process hearing Petitioner represented that it has failed to obtain an acceptance for Student at a private school, and therefore, it is requesting an award of the items of compensatory education plan in lieu of a private school placement.

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, 522 (D.C. 2005). In every case, 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. *Id.*, 401 F.3d at 524. Hence, the hearing officer has determined to award Petitioner compensatory education to compensate Student for DCPS's past failure to provide Student with 26.5 hours of specialized instruction outside general education as required by the 10/23/11 HOD and Student's 1/3/12 IEP. However, the hearing officer declines to award the requested items of compensatory education in lieu of the private school placement Petitioner initially requested and will instead order DCPS to promptly reconvene Student's IEP/MDT meeting and assign a school for Student to attend that can provide her with 26.5 hours of specialized instruction outside of general education while also providing her with the opportunity to earn the Carnegie units she needs to graduate.

As compensatory education, the hearing officer will award Petitioner 5 hours per week of independent 1-on-1 tutoring for Student for the 30-week period beginning the week of November 26, 2012 and ending with the week of June 17, 2012, which is the last week of SY 12/13, for a total of up to 150 hours of tutoring at rate not to exceed DCPS's current rate of pay for independent tutoring. In rendering this award, the hearing officer has taken into account that DCPS's previous award of compensatory education to Student was intended to remediate harm suffered through March 21, 2012, and that Student previously made significant progress in school when receiving 2-3 sessions per week of independent tutoring outside of school, with each session lasting between 1.5 and 2.5 hours. Hence, it is the hearing officer's intent to provide Student with additional academic support so that she will have the opportunity to make by the end of the current school year the academic progress she likely would have made had DCPS begun providing her with the proper form and amount of specialized services as of March 22, 2012.

4. **Alleged Failure to Provide a Location of Services Capable of Implementing the 1/3/12 IEP**

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Where, as here, there is no contention that the student's IEP is inappropriate, the determination of whether the current location of services is appropriate turns on whether the school can implement the student's IEP. *See Hinson v. Merritt Educational Ctr.,* 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).

In the instant case, Petitioner contends that DCPS has failed to provide Student with a location of services that can implement the 1/3/12 IEP. DCPS disagrees. However, the evidence in this case proves that the current DCPS high school has not implemented the 1/3/12 IEP and is, in fact, unable to do so because it does not have teachers with the dual certification in special education and the various content areas required to provide Student with Carnegie units for each course she takes while also providing her with special education services in those courses. *See* subsection 3, *supra*; FOF 17. Hence, Petitioner has met its burden of proof on this claim. As noted above in the preceding subsection, however, the hearing officer has already determined to order DCPS to assign Student to attend a school that can fully implement her IEP while providing her with the opportunity to earn necessary Carnegie units and to award Student compensatory education in the form of 1-on-1 tutoring to remediate the harm caused by DCPS's past failure to implement the IEP. Under these circumstances, the hearing officer has determined that no additional relief is required to remedy DCPS's denial of FAPE in connection with this claim.

5. <u>Alleged Denial of FAPE by Failing to Provide ESY During Summer 2012</u>

IDEA provides that each public agency must ensure that extended school year services are available as necessary to provide FAPE. 34 C.F.R. § 300.106(a)(1). However, extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.

In the instant case, Petitioner contends that DCPS denied Student a FAPE by failing to provide her with ESY during Summer 2012. However, a review of the evidence in this case reveals that Student's 1/3/12 IEP indicated that Student did not require ESY services. *See* FOF 6. Moreover, Petitioner did not begin asking DCPS to consider providing Student with ESY services until the week before those services were scheduled to begin, and DCPS responded by indicating that Student's IEP did not call for ESY services but DCPS would be willing to meet to discuss ESY and the other concerns Petitioner had raised. Unfortunately, the parties exchanged several scheduling emails but the meeting never took place.

Based on the evidence outlined above, the hearing officer concludes that DCPS did not deny Student a FAPE by failing to provide her with ESY during Summer 2012 because Student's then current IEP indicated that Student did not require ESY services. Nevertheless, in light of Petitioner's request for a meeting to consider Student's possible need for ESY, the hearing officer will order DCPS to determine whether Student requires ESY during Summer 2013 when it reconvenes Student's MDT/IEP meeting pursuant to this Decision and the accompanying Order.

ORDER

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

1. Within 15 school days of the issuance of this Order, DCPS shall convene another MDT/IEP meeting for Student to: (i) review Student's December 2011 psychological evaluation and revise Student's present levels of performance on the 1/3/12 IEP to incorporate the results of that evaluation; (ii) assign a school for Student to attend that can provide her with 26.5 hours of specialized instruction outside of general education while also providing her with the opportunity to earn the Carnegie units she needs to graduate; and (iii) discuss and determine whether Student requires ESY during Summer 2013.

2. DCPS shall fund independent audiological and auditory processing assessments for Student at a rate not to exceed DCPS's current approved rates of $88.35 per hour, with a maximum of $353.40, for the audiological evaluation, and a maximum of $1,019.83 for the auditory processing evaluation.

3. DCPS shall provide funding for Student to receive 5 hours per week of independent 1-on-1 tutoring for the 30-week period beginning the week of November 26, 2012 and ending with the week of June 17, 2012, for a total of up to 150 hours of tutoring at rate not to exceed DCPS's current rate for independent tutoring. Student shall be allowed holiday and other breaks from tutoring, if appropriate, with Parent's agreement, but any tutoring services missed as a result of said breaks shall not be made up subsequent to June 17, 2012.

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).

Date: 11/12/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer