

the 2011-12 and 2012-13 school years and that, as a result, she “has not availed herself of appropriate programming and academic supports in her IEP and school.” *Response, p. 1.*

On December 3, 2012, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the resolution period early. Accordingly, the 30-day resolution period ended on December 16, 2012.

On January 4, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for January 29, 2013. A Prehearing Order (“PHO”) was issued on January 10, 2013. The parties then filed their five-day disclosures, as required, by January 22, 2013. ²

The Due Process Hearing was held in Hearing Room 2004 on January 29, 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-6.

Respondent’s Exhibits: R-1 through R-10.

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

Petitioner’s Witnesses: (1) Student; (2) [REDACTED] (Case Worker, [REDACTED] WDC); (3) [REDACTED] (Community Support [REDACTED] WDC); (4) [REDACTED] (accepted as expert on educational placement for special education students); and (5) [REDACTED] (Admissions Director, [REDACTED]).

Respondent’s Witnesses: (1) Teacher/Case Manager, High School B; and (2) Special Education Coordinator (“SEC”), High School B.

The parties then agreed that (a) Petitioner would present an oral closing argument; (b) DCPS would submit a written closing argument on the same date (January 29); and (c) Petitioner would be allowed to comment by email as necessary on DCPS’ written closing. The parties complied with these agreed procedures.

² The 45-day timeline for issuance of the Hearing Officer Determination (“HOD”) was originally due to expire on January 30, 2013. However, Petitioner filed a consent motion to continue and extend the HOD timeline to February 7, 2013, in order to allow the due process hearing to be scheduled on the mutually agreeable date of January 29, 2013. The continuance motion was granted on January 10, 2013. *See Interim Order on Continuance Motion* (Jan. 10, 2013).

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 February 7, 2013.

III. ISSUES AND REQUESTED RELIEF

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

(1) Failure to Develop Appropriate IEPs — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) on or about **October 24, 2011**, and **October 18, 2012**, in that both IEPs:

- (a) provide only five (5) hours of specialized instruction in a general education setting, whereas the Student required a full-time, outside general education IEP to address her significant academic deficits;
- (b) fail to include any goals to address the Student’s significant attendance concerns; and
- (c) fail to include any behavioral support services to address the Student’s significant behavioral concerns.³

(2) Failure to Provide Appropriate Placement — Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate school/program placement for the 2011-12 and 2012-13 school years, in that (*inter alia*) the Student requires a small structured placement that can provide her with the intensive academic supports she requires?

Petitioner requests that DCPS be ordered to: (a) place and fund Student in an appropriate school/program; (b) reconvene the MDT/IEP team to develop an appropriate full-time IEP; and (c) complete a comprehensive psychological re-evaluation of the Student.⁴ Petitioner also originally sought compensatory education relief, but failed to include a proposal in her five-day disclosures and withdrew such request for relief at hearing.

³ At the PHC, Petitioner’s counsel confirmed that both IEPs were being challenged on the same grounds, and that no other aspects of the IEPs were being challenged in this case.

⁴ At the PHC, it was reported that, subsequent to the resolution meeting, DCPS has offered to authorize an independent comprehensive psychological evaluation as part of a proposed settlement.

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 [REDACTED] student who is a resident of the District of Columbia.
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Her primary disability is Specific Learning Disability (“SLD”). *See P-1; P-2.*
3. On or about July 15, 2011, DCPS tested the Student’s academic performance levels by administering the Woodcock-Johnson III Tests of Achievement when she was entering 9th grade. The test results showed that, when compared to others at her grade level, the Student’s academic skills were within the very low range. *P-3.* Her Broad Reading tested at the 3.5 Grade Equivalency (“GE”); and her Broad Written Expression tested at the 4.0 GE. Reading comprehension was a particular weakness at 2.6. Broad Math was a relative strength at 6.2 GE, with math calculation skills at 6.0 but math fluency at 4.3 GE. *P3-2.*
4. On or about July 28, 2011, a DCPS School Psychologist completed a psychological re-evaluation of the Student and issued a report. *P-4.*⁵ The report found that the Student continued to present with concerns in reading and writing. *P4-1.* The report also found that “interventions and strategies implemented to address [Student’s] reading and writing concerns did not make expected gains and learning difficulties continue to be a concern.” *Id.*⁶ The evaluator concluded that a learning disability adversely impacted her learning in these areas, and that she continued to meet the criteria for special education services as a student with an SLD. *P4-8.*
5. With respect to the Student’s cognitive functioning, the 7/28/2011 DCPS psychological re-evaluation found that her general intelligence score was 97, within the average range of scores for same-aged peers. *P4-4.* In her academic functioning, however, the Student’s performance on Reading and Written Expression tasks was found to be below

⁵ DCPS’ Response stated that “DCPS attempted to evaluate the Student with a psychological assessment in July 2011 but was unsuccessful because of absences.” *Response*, p. 1. The basis for this statement is unclear and appears to be contrary to the evidence adduced at hearing.

⁶ The report noted that her then-current IEP prescribed five (5) hours of specialized instruction per week inside a general education setting. *P4-1.*

- age and grade level expectancy. *P4-6*. Her academic performance was found to be “significantly below what is expected, and suggests difficulties with reading comprehension that will require intervention through specialized support.” *Id.* The report also found that her reading fluency was slow, which “will be a detriment to her in the classroom, as she will lag behind on timed activities, and may not complete tests.” *Id.*
6. The 7/28/2011 DCPS psychological re-evaluation further found that the Student “makes attempts to exert effort in the classroom; however, she faces difficulty with comprehension and fluency, and faces a challenge when making complex inferences.” *P4-2*. It was reported that “when [Student] is provided one-on-one assistance, she completes her work.” *Id.*
 7. Overall, the DCPS Psychologist concluded that “her progress continues to be inadequate and slower than her same aged and grade peers, and her performance is inconsistent. She will likely experience great difficulty in keeping up with her peers in a wide variety of reading and writing academic situations.” *P4-3*. *See also P4-8* (“When examining multiple sources of confirming data relating to [Student’s] academic proficiency (DC-CAS and DC-BAS Testing results, Report Card, Teacher report, Student report, IEP Progress Report), she continues to function below her age and grade level expectancy and is making limited academic progress in the areas of Reading and Written Expression.”).
 8. During the 2011-12 school year, the Student was enrolled at and attended High School A. The Student experienced excessive absences during that school year and received failing grades in her core academic courses. *See R-1, p. DCPS-00007; R-4;*
 9. On or about October 24, 2011, DCPS convened an annual IEP review meeting of the Student’s MDT/IEP Team at High School A. Participants included Petitioner, Special Education Teacher, General Education Teacher, and Special Education Coordinator. DCPS school psychologist, and LEA representative. *P-1*. At the time, the team noted that the Student “struggles with reading fluency and is functioning on a ^{2nd} grade level. She is able to recognize words that are on her grade level, but lacks speed and accuracy in the reading process.” *P1-2* (Present Level of Educational Performance (“PLOP”) – Reading). The team also found that the Student was “within the mid-third grade level in regards to writing.” *P1-3* (PLOP – Written Expression).

10. The Student's IEP developed October 24, 2011 continued to provide five (5) hours per week of specialized instruction in a General Education setting. It provided no other services and no services in a setting outside of general education. *P-1, pp. 6-7.*
11. During the 2012-13 school year, the Student has been enrolled at and attended High School B, which is her neighborhood DCPS school. The Student has experienced excessive absences during that school year and is receiving failing grades. *See R-2; R-3; Case Mgr. Test.* Her grades include in-class assignments and participation, which have been impacted by her truancy. *Case Mgr. Test.* However, when the Student attends school, she can be "very focused" and "takes notes when she comes to class," according to her Special Education Teacher in English. *Case Mgr. Test.*
12. On or about July 19, 2012, the SEC of High School B met with Petitioner to discuss the Student's academic and behavioral concerns. Petitioner requested that the Student receive in-school counseling to address certain behaviors of concern. *R-1, p. DCPS 0005.*
13. On or about October 18, 2012, DCPS convened another annual review meeting of the Student's MDT/IEP Team at High School B. Participants included Petitioner, Student, Special Education Teacher, General Education Teacher, Special Education Coordinator, and the Student's advocates. *P-2.* Petitioner and the Student's advocates requested that DCPS increase Student's specialized instruction hours, address her behaviors in school, and discuss placement. *See Foshee Test.; [REDACTED] Test.*
14. At the October 18, 2012 meeting, the MDT/IEP Team decided that the Student's IEP goals would not change because she had not attended school enough to be assessed for current academic levels. *P2-2.* The Student had missed so much school that her Case Manager reported that he was unable to test her levels. As of October 11, 2012, the Student had missed 30 days of school during the first six weeks of the 2012-13 school year. *Id. See also R-2 (39 homeroom absences YTD as of 11/02/2012 progress report).*
15. The Student's IEP developed October 18, 2012 continues to provide five (5) hours per week of specialized instruction in a General Education setting. It provides no other services and no services in a setting outside of general education. *P2-6.*⁷ The IEP notes

⁷ The 10/18/2012 IEP also repeats the same PLOPs and goals as the 10/24/2011 IEP. *See [REDACTED] Test.; P-1; P-2.* Further, compensatory education was discussed at this IEP meeting and found not warranted. *P2-8.* The Student's projected exit category is a regular high school diploma by June 2016. *P2-15. See also R-10.*

that “Student is enrolled [in] Inclusion classes, but due to poor attendance she has not been able to access the supports.” *Id.* However, the Case Manager testified that he did not recall any team discussion of the Student’s least restrictive environment (“LRE”). *See Case Mgr. Test.*

16. At the 10/18/2012 meeting, the MDT “brainstormed” various approaches to address and increase Student’s school attendance, but did not develop or offer any written plan or put specific interventions in place at that time. ██████████ *Test.*; *see also* ██████████ *Test.*
17. Following the 10/18/2012 MDT meeting, Petitioner and the Student’s in-home therapist worked with the attendance officer at High School B to develop and implement a plan to improve the Student’s school attendance. ██████████ drove the Student to school on some days, and Petitioner “checked in” regularly with the attendance officer. The Student’s attendance has improved in January 2013 after winter break. ██████████ *Test.*; *Case Mgr. Test.*
18. The Student testified that she is not getting the support she needs within the classroom, and that she needs more help and support with reading. *Student Test.* *See also* ██████████ *Test.* (Student has “significant delays in reading and comprehension” and requires “intensive services and supports to catch up and get on grade level”). There are approximately 30 students enrolled in her English class, including eight (8) special education students. The special education teacher “walks around” the classroom checking on students with respect to the content and delivery of the curriculum. He testified that he did not know the Student’s current academic levels. *Case Mgr Test.* (cross examination).
19. High School B has a “reading resource” classroom, but the Student does not attend this class. *SEC test.*; *Case Mgr. Test.*; R-7 (class schedule). Since High School B is on an “A/B” schedule, it is possible for the Student to take the reading resource class as a credit-bearing elective in combination with the regular English course. *SEC Test.* For example, the reading resource class could be substituted for her current Journalism elective. *See R-7.*
20. The SEC testified that updated Woodcock-Johnson III and Brigance assessments would be needed to determine appropriate adjustments to the Student’s program. *SEC Test.* These tests are typically part of a comprehensive psychological evaluation. *Id.*

21. Petitioner and the Student also testified that she has problems with her peers at High School B and does not want to attend the school. *Student Test.*; *Pet. Test.* See also P2-2 (“Student states that she does not want to attend [High School B] any longer due to students talking about her.”); *Case Mgr. Test.*
22. On or about December 7, 2012, the Student was accepted as an appropriate candidate for enrollment into the learning disabled (“LD”) program at [REDACTED] for the remainder of the 2012-13 school year, dependent upon proper documentation and authorization from DCPS. P-5. The [REDACTED] Admissions Director testified that the Student would benefit from pull-out services with a reading specialist outside of the classroom, as well as in-class instruction with the English teacher. See [REDACTED] *Test.* [REDACTED] has been approved by the OSSE and can provide educational benefit to the Student. *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

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.

A. Relevant 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). The "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).

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). "[A]n individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted). See also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (same); *Adams v. State of Oregon*, 195 F. 3d 1141, 1149 (9th Cir. 1999) (same).

"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). 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. 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").

B. Issues/Alleged Denials of FAPE

Petitioner claims that DCPS denied the Student a FAPE by (1) failing to develop an appropriate IEP on October 24, 2011, and again on October 18, 2012; and (2) failing to provide an appropriate educational placement, as set forth more specifically under the Issues Presented. For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 1 and failed to meet her burden of proof on Issue 2.

Issue 1: Inappropriate IEPs

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child when it was created. Based on the evidence presented at hearing, neither the October 2011 nor October 2012 IEP were objectively reasonable at the time they were developed, in terms of the hours and setting of specialized instruction given the Student's significant academic deficits and assessed learning disorder.

The Woodcock-Johnson III Tests of Achievement conducted by DCPS in July 2011 found that, when compared to others at her grade level, the Student's academic skills were within the very low range (*e.g.*, Broad Reading = 3.5 GE; Broad Written Expression = 4.0 GE; and reading comprehension was a particular weakness at 2.6 GE). *See P3-2; Findings, ¶ 3.* DCPS' 7/28/2011 psychological re-evaluation further found the Student's academic performance to be "significantly below what is expected, and suggests difficulties with reading comprehension that will require intervention through specialized support." *P4-6.* The re-evaluation also found (*inter alia*) that the Student's reading fluency was slow, which "will be a detriment to her in the classroom"; that she faced difficulties with comprehension and fluency despite "attempts to exert effort in the classroom"; and that she "will likely experience great difficulty in keeping up with her peers in a wide variety of reading and writing academic situations." *P4-1 – P4-6.* Perhaps most important, DCPS found that the Student "did not make expected gains" in reading and writing under a five-hour inclusion IEP the previous school year. *P4-8. See Findings, ¶¶ 4-7.*

Despite these findings, DCPS decided to continue to provide only five (5) hours of specialized instruction in a general education (inclusion) setting as of 10/24/2011. At the same time, the team noted that the Student "struggles with reading fluency and is functioning on a 2nd grade level. She is able to recognize words that are on her grade level, but lacks speed and accuracy in the reading process." *P1-2* (Present Level of Educational Performance ("PLOP")) –

Reading). The team also found that the Student was “within the mid-third grade level in regards to writing.” *PI-3* (PLOP – Written Expression). *See Findings*, ¶ 3. The Hearing Officer concludes that this program of instruction was not reasonably calculated to confer meaningful educational benefits on the Student. Moreover, no new data supported the appropriateness of such limited interventions as of October 18, 2012. As of both IEP dates, the Student required more intensive services and supports to catch up and get on grade level for reading and writing in order to access the curriculum. At a minimum, this meant some pull-out or resource assistance to improve her reading comprehension and fluency. *See Findings*, ¶¶ 9-19.

In addition, by October 2012, the evidence shows that DCPS was aware that the Student needed behavioral support services. The SEC of High School B had met with Petitioner to discuss certain in-school behavioral concerns; Petitioner had specifically requested that the Student receive counseling to address those behaviors; and the behaviors appeared to be impeding her learning. *See R-1, p. DCPS 0005; Student Test.; Pet. Test.; Case Mgr Test.; Findings*, ¶¶ 12-13, 21. Thus, the Hearing Officer concludes that the 10/18/2012 IEP should have included at least 30 minutes per week of one-on-one behavioral support services (counseling) outside the general education setting. .

In its written closing, DCPS suggests that the Student should not be expected to function or perform at grade level due to her SLD condition. DCPS argues “that this is expected of students with this disability. In other words, it in fact is commensurate with their disability that those students will be behind grade level.” *DCPS’ Written Closing*, p. 2. This remarkable assertion appears to be at odds with the whole concept of special education. Under IDEA, agencies must first identify a child who does not make sufficient progress toward age- or grade-level standards due to learning difficulties – as DCPS’ evaluators and the MDT did here (*P4-9 – 10; see 34 C.F.R. §300.309*) – and must then develop and provide the necessary supports and services to enable such progress to occur. The severe discrepancy between the Student’s solidly average intellectual ability (Composite Intelligence Index of 97) and her low academic achievement levels only serves to underscore the importance of such measures here.⁸

⁸ DCPS’ other arguments regarding SLD definitional limitations (*DCPS’ Written Closing*, pp. 1-2) are inapposite since DCPS has already determined that the Student is eligible as a child with SLD.

DCPS correctly observes that the Student's serious attendance problems have often prevented her from being available for services and may have contributed to her poor academic performance over the past two school years.⁹ But while this may affect whether the Student has been harmed by DCPS' actions or can recover compensation for such harm in equity (*see* discussion in Part C, *infra*), it is largely irrelevant to the question whether her IEPs were objectively reasonable at the time they were drafted.

In fact, the Student's attendance problems are another area that should be addressed in her IEP, along with her reported behavior problems in school. Both types of behaviors appear to impede her learning, and the IEP team must therefore consider the use of positive behavioral interventions, supports, and strategies to address those behaviors. 34 C.F.R. §300.324 (a) (2) (i). At a minimum, DCPS should attempt to address the truancy question in its weekly counseling sessions and should develop and implement a written attendance plan for the Student.

Issue 2: Inappropriate Placement

As noted above, DCPS must offer placement in a school that can fulfill the requirements set forth in an appropriate IEP, and must ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. In this case, the evidence shows that High School B can fulfill the requirements of the October 2012 IEP, as modified by the terms of this HOD. Specifically, High School B can provide the Student with more intensive reading instruction outside the general education setting either in a "reading resource" classroom or through other "pull-put" instruction. It also appears that High School B can do so consistent with the Student's diploma-track IEP. *SEC Test.; R-7; Findings*, ¶19.

Petitioner has also failed to prove that the Student's learning disability warrants her full-time removal from the general education setting, such that her LRE is a separate, non-public special education school, at least at this time. *See* 20 U.S.C. §1412 (a) (5); 34 C.F.R. §§ 300.114-300.116; *DCPS' Written Closing*, p. 3. Accordingly, the Hearing Officer concludes that Petitioner failed to meet her burden of proof under Issue 2. DCPS has met its IDEA obligation

⁹ *See DCPS' Written Closing*, pp. 2, 4. *Cf. Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008) (discussing effect of student's severe truancy); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 103 (D.D.C. 2008) (student "was not 'availing himself of educational benefit' due to extended absences").

to offer placement in an appropriate school or program that can fulfill the requirements set forth in the IEP, as modified herein. *See* D.C. Code 38-2561.02 (b); *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).

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). As noted above, Petitioner requests that DCPS be ordered to: (a) place and fund Student in an appropriate school/program; (b) reconvene the MDT/IEP team to develop an appropriate IEP; and (c) complete a comprehensive psychological re-evaluation of the Student. Petitioner also originally sought compensatory education relief, but failed to include a proposal in her five-day disclosures and withdrew such request for relief at hearing.¹⁰

¹⁰ 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 she wants and the reasoning why her request would ameliorate the denial of FAPE, although a court or hearing officer ultimately must determine what is equitable. *Gill, supra*.

In this case, the Hearing Officer provided Petitioner an opportunity to present evidence on this question. The Prehearing Order directed Petitioner to include a written plan for compensatory education in her five-day disclosures, but she did not do so. Then at hearing, Petitioner ***expressly withdrew*** her request for compensatory education relief on the record. Further, the MDT/IEP team discussed compensatory education at the 10/18/2012 meeting and found that it was not warranted (P2-8), and Petitioner has not challenged that decision. Accordingly, sufficient facts to justify an award were not adduced at hearing, and the question of compensatory education was not presented for decision. Assuming *arguendo* that it was presented, the Hearing Officer concludes that DCPS’ inadequate IEP did not cause the Student educational harm or deprive her of educational benefit in light of the Student’s severe truancy. For that reason, the Hearing Officer further concludes that an award of compensatory education would not be equitable under all the circumstances of this case. *Cf. Garcia, supra; Gill, supra*, at 110, 114 (student’s truancy may factor into possible award of compensatory education).

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 the denials of FAPE found herein. No private placement relief is ordered since Petitioner did not prevail under Issue 2 and such relief was not found to be appropriate at this time.

VI. ORDER

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

1. By no later than **February 25, 2013**, DCPS shall amend and implement the Student's individualized education program ("IEP") dated October 18, 2012, as follows:
 - (a) Provide an additional five (5) hours per week of **Specialized Instruction** in an Outside General Education setting to address the Reading and Written Expression goals in the IEP, and to include intensive reading remediation with opportunity for one-on-one instruction, consistent with this HOD; and
 - (b) Provide at least thirty (30) minutes per week of **Behavioral Support Services** (*i.e.*, counseling) in an Outside General Education setting, consistent with this HOD.
2. Petitioner shall be authorized to obtain a **comprehensive psychological assessment** of the Student independently, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). The assessment shall be completed within the next **sixty (60) calendar days**. Upon completion of the assessment, Petitioner shall promptly submit a copy of the written report(s) of evaluation to DCPS.
3. Within **30 calendar days** of the submission of the report(s) of assessment specified in Paragraph 2 above, DCPS shall convene a meeting of the Student's MDT/IEP Team to (a) review the assessment report(s); (b) review all other updated information concerning the Student's academic and behavioral progress, including her progress under the revised IEP; (c) review and revise, as appropriate, the goals and services in the IEP, including development of annual goals in the area of Social, Emotional, and Behavioral Development to address both in-school behaviors and attendance concerns; (d) develop a written plan for improving the Student's school attendance; and (e) discuss and determine an appropriate school/program in which to place the Student for the 2013-14 school year.
4. To the extent DCPS proposes to conduct any further assessments or evaluations of the Student to determine the appropriate content of her IEP or her appropriate educational placement, DCPS shall provide prior written notice a reasonable time in advance pursuant to 34 C.F.R. §300.503, so that Petitioner can ensure that the Student is present and participating.

5. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
6. Petitioner's other requests for relief in her Due Process Complaint filed November 16, 2012, are hereby **DENIED**; and
7. The case is hereby **CLOSED**.



Dated: February 7, 2013

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).