

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

STUDENT,¹)
By and through PARENT,)
)
 Petitioner,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
 Respondent.)

Case No.
Bruce Ryan, Hearing Officer
Issued: April 9, 2011

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND 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 January 24, 2011, on behalf of a -year old student (the "Student") who resides in the District of Columbia, attends her neighborhood DCPS middle school (the "School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioner is the Student's aunt/guardian, who has custody of the Student. She claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (a) failing to develop an appropriate individualized education program ("IEP") for the Student; (b) failing to reconvene a meeting of the Student's IEP team meeting as agreed by the team; and (c) failing to implement the Student's earlier IEP.

DCPS filed its Response on or about February 2, 2011, which denies that the Student was not provided with a FAPE. DCPS asserts, *inter alia*, that an IEP team meeting was held for the

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

Student on August 25, 2010, in compliance with a May 9, 2010 settlement agreement; and that another IEP team meeting was held following the Complaint on January 26, 2011.

A Prehearing Conference (“PHC”) was held on February 22, 2011, at which the parties discussed and clarified the issues and requested relief. The 30-day resolution period then ended without resolution on February 23, 2011. Five-day disclosures were filed by both parties, as directed, by March 9, 2011; and the Due Process Hearing (“DPH”) was held in Room 2006 on March 16, 2011. Petitioner elected for the hearing to be closed. During the DPH, the following Documentary Exhibits were admitted into evidence:

Petitioner’s Exhibits: P-1 through P-15.

Respondent’s Exhibits: R-1 through R-5.

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

Petitioner’s Witnesses: (1) Parent; (2) Educational Advocate (“EA”); (3) Dr. Sharon Lennon, Newlen Educational Consultants, LLC; and (4) Private School Representative.

Respondent’s Witnesses: None. DCPS presented no witnesses and rested on the record following Petitioner’s case.

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 April 9, 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 (*see also Prehearing Order*, ¶¶ 5-6):

- (1) **Failure to Implement IEP (June 2010)** — Did DCPS deny the Student a FAPE by failing to implement the Student’s February 23, 2010 IEP by unilaterally moving her into a general education setting near the end of the 2009-10 school year, *i.e.*, during the month of June 2010)?

- (2) **Inappropriate IEP (August 2010)** — 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) on or about August 25, 2010, in that the IEP (a) failed to provide sufficient hours of specialized instruction, and/or (b) failed to provide for full-time placement in a therapeutic, out-of-general-education setting?
- (3) **Procedural/Failure to Hold Timely IEP Team Meeting** — Did DCPS fail to reconvene an IEP team meeting within a reasonable period of time (*i.e.*, approximately 60 days) following the 08/25/2010 meeting, as allegedly decided by the IEP team? If so, did such procedural violation result in a denial of FAPE in accordance with 34 C.F.R. 300.513 (a) (2)?

Petitioner requested that DCPS be ordered to: (a) revise the Student's IEP to provide for placement in a full-time therapeutic, out-of-general-education day program;² (b) identify a suitable location for services with parent participation or fund a private school selected by parent (the "Private School"), with transportation; and (c) provide compensatory education in the form of independent counseling and tutoring services.

IV. FINDINGS OF FACT

1. The Student is a year old student who resides in the District of Columbia. She has been determined to be eligible for special education and related services under the IDEA as a child with an Emotional Disturbance ("ED"). *See P-1* (02/23/2010 IEP); *P-2* (08/25/2010 IEP); *see also R1; R-4*. The Student currently attends her neighborhood DCPS middle school (the "School") where she is now in the grade.
2. On or about February 23, 2010, DCPS convened a meeting of the Student's MDT/IEP team, which developed an IEP that provided for 25.5 hours per week of specialized instruction and two (2) hours per week of behavioral support services in a setting outside general education. *See P-1*, p. 6. The IEP further stated that the Student's behavior required that she be placed in a therapeutic setting. *Id.*, p. 7.
3. On or about May 9, 2010, Petitioner and DCPS entered into a settlement agreement ("SA") of an earlier due process complaint, wherein the parties agreed that: (a) DCPS would fund an independent comprehensive psychological evaluation (as well as an occupational therapy evaluation); and (b) within 20 school days of receiving the final evaluation, DCPS would

² Petitioner contended at hearing that this first item of requested relief is now effectively moot in light of the January 26, 2011 IEP.

convene an MDT/IEP team meeting to review the evaluations and, if warranted, review and revise the IEP, discuss and determine an appropriate location of services, and discuss compensatory education. *See P-9.*

4. Sometime during June 2010, without benefit of an IEP team meeting, the Student was removed from her self-contained special education classroom and placed in an inclusion setting for the remainder of the 2009-10 school year ending in late June.
5. On or about June 20, 2010, a report of a comprehensive psychological evaluation of the Student was completed by Diagnostics Consultants, LLC. *P-8.* The evaluation included cognitive, educational, and clinical components, as required by the May 2010 SA. *Id.*, pp. 1-2. The Student's overall cognitive ability was found to be in the Borderline range, as measured by the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”). *Id.*, pp. 5-6, 12. The evaluators found that her cognitive profile suggested significant deficits that may interfere with her academic performance, which “coupled with her current emotional discomfort suggest she is in need of continued academic support/specialized educational services.” *Id.*, p. 12.³ They recommended that she continue to receive special education services as an ED student, in a “highly therapeutic academic environment.” *Id.*, p. 14.
6. The required independent evaluations of the Student were thereafter submitted to DCPS. *See, e.g., P-8; R-3.*
7. On or about August 25, 2010, DCPS convened a meeting of the Student's MDT/IEP team to review the evaluations and discuss the other matters required by the May 2010 SA. *See R-3.* At that time, the team decided to change the IEP to provide for 15 hours per week of specialized instruction in a general education (inclusion) setting, to remove occupational therapy (“OT”) services, and to decrease behavioral support services to one hour per week. The team further agreed that the School continued to be an appropriate educational placement for the Student. *Id.*, p. DCPS000018. *See also R-4 & P-2 (08/25/2010 IEP).* Pursuant to the May 2010 SA, the IEP team also discussed and agreed to provide an

³ Consistent with the Student's presentation and personal history, the results of the evaluation were found to support a clinical diagnosis of Mood Disorder Not Otherwise Specified, as well as Post-traumatic Stress Disorder as she was exposed to extremely traumatic stressors (including sexual abuse) prior to residing with her aunt. *P-8*, p. 13. According to the report, the Student also appeared to be “acting out in a highly disruptive manner consistent with the diagnostic criteria of Disruptive Behavior Disorder Not Otherwise Specified.” *Id.*

additional 20 hours of independent counseling services and 10 hours of independent mentoring services as compensatory education for missed services during the first semester of the 2009-10 school year,. *See R-3*, pp. DCPS000017-19; *P-3* (advocate notes), p. 7.

8. In deciding to change the hours and setting of specialized instruction in the August 25, 2010 IEP, the MDT/IEP team felt that Student had made educational progress that would allow her to transition to a less restrictive environment. *See R-3; P-3*. The Student had shown improved grades and test scores over the past year. *See, e.g., R-2* (06/18/2010 progress report). The team also noted improvements in behavior, with a decreased need for de-escalation, when the Student was in the inclusionary setting during June. *P-3*, pp. 5-6; *see also EA Testimony*. In addition, the Special Education Coordinator (“SEC”) noted that the Student wanted to feel more included and was familiar with the special education teacher who was providing inclusion services. *P-3*, p. 5. *See also Petitioner Testimony* (stating that Student was “happy to be included” and not to be in a “special setting”).
9. While Petitioner was “hesitant” to have the service hours changed heading into the 2010-11 school year, she specifically agreed to the reduction of services at the time of the 08/25/2010 meeting, according to the advocate’s own notes. *P-3*, p. 6. However, given Petitioner’s concerns, she asked – and the IEP team agreed – to meet in 60 days to review the Student’s progress in the inclusionary services setting, in order “to make sure that all services are being provided and are sufficient for [the Student].” *Id.* DCPS ensured Petitioner that if any problems arose, her program could be changed back to a full-time, out of general education setting for the remainder of the school year “w/o the process starting over.” *Id.*, p. 5. *See also EA Testimony* (Peticioner made decision to try and see if the new program worked, and she agreed with changes, subject to follow-up review of progress); *Peticioner Testimony* (testifying that she agreed to the change, but only on an “exploratory” or “trial” basis).
10. A further meeting for this purpose was scheduled for October 19, 2010. *P-3*, p. 6. However, the meeting did not take place on that date. Petitioner and the educational advocate were available, but DCPS cancelled the meeting because other members of the team were not available to participate. *See EA Testimony*. DCPS attempted to reschedule the meeting for October 21, but it was unable to do so because some team members were involved in school testing that day. *Id.* Subsequent attempts to reschedule prior to year-end were also unsuccessful.

11. During November and December 2010, the Student's disruptive behaviors increased, with more aggressiveness toward peers and staff. *See EA Testimony; P-6*, pp. 3-4 ("change was all of a sudden between Nov-Dec," noting "foul lang./profanity", "aggressive toward students," and "verbal altercations"). Petitioner began to have concerns that the inclusionary setting was not working sometime in December. *Petitioner Testimony. See also P-11*, p. 1 ("Following winter break, there was deterioration in [Student's] behavior.").
12. On or about January 4, 2011 (the first school day after winter break), and upon Petitioner's request or consent, the Student was moved back into a self-contained classroom to receive her special education services. *Petitioner Testimony; P-11*, p. 1.
13. On January 26, 2011, subsequent to the filing of the Complaint, DCPS convened another IEP team meeting. The team reviewed and revised the IEP so as to reinstate a full-time, out of general education program of special education services. Specifically, the 01/26/2011 IEP now provides for 25 hours of specialized instruction and 1.5 hours of behavioral support services in a setting Outside General Education. *P-5*, p. 6. The LRE section of the IEP provides that the Student "was in an Inclusion setting and Self-Contained, but the team agreed that she would be better served in a Specialized School." *Id.*, p. 5. "Outbursts [and] explosiveness [were] reported by all teachers," and the Student had made no progress on her emotional/behavioral goals. *P-6*, pp. 3, 7. Teachers and the social worker reported that she was being removed from class for de-escalation or crisis intervention about three times per week on average. *See EA Testimony.*
14. At the January 26, 2011 meeting, Petitioner agreed with an "interim placement" at the School pending further review and determination of an appropriate school placement going forward. *P-5* (01/26/2011 IEP), p. 1. *See also P-6* (01/26/2011 advocate meeting notes); *P-7* (SEC meeting notes); *Petitioner Testimony.* The frequency of the Student's behavioral crises has decreased in recent weeks, following her return to a self-contained setting at the School. *See Petitioner Testimony.*
15. The Student has been accepted into Private School based on the January 26, 2011 IEP. The Private School can implement the services provided on the current IEP. *See Private School Testimony.*

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner did not meet her burden of proving that DCPS denied the Student a FAPE by failing (a) to implement the Student's February 23, 2010 IEP during the month of June 2010, (b) to develop an appropriate IEP at the August 25, 2010 team meeting, or (c) to reconvene an IEP team meeting within a reasonable period of time (i.e., 60 days) thereafter. The evidence shows (*inter alia*) that DCPS did not deviate materially from the 02/23/2010 IEP; that the 08/25/2010 IEP was reasonably calculated to confer educational benefits on the Student at the time it was developed; and that DCPS did not violate IDEA's procedural requirements in a manner that caused educational harm to the Student or impeded her right to a FAPE. No relief is awarded to Petitioner on the present complaint.

B. 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 develop an appropriate educational program 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 (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).

C. Issue/Alleged Denial of FAPE

1. **Claim That DCPS Failed to Implement February 2010 IEP**

Petitioner claims that DCPS denied the Student a FAPE by failing to implement the Student's February 23, 2010 IEP, in that DCPS allegedly moved her unilaterally into a general education setting near the end of the 2009-10 school year, *i.e.*, during the month of June 2010. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to present sufficient evidence to prevail on this issue in accordance with applicable legal standards.

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 (emphasis added).

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). In order to constitute a denial of FAPE, however, courts have held that the 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.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. March 18, 2011) (“Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*”); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

As was recently confirmed by the District Court in *Wilson*, “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.” 111 LRP 19583, slip op. at 5 (*quoting Bobby R.*). 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.” *Id.*, *quoting Howard Road Academy*, 585 F. Supp. 2d at 68. In *Wilson*, DCPS failed to transport a student to three of the four weeks of an ESY program, and thus “almost entirely failed to provide a service that [student’s] IEP team determined was necessary

for his educational development.” Hence, the deviation was found to be material, and not a “minor discrepancy.” *Id.*, slip op. at 6-7.

In this case, the evidence indicates that the Student continued to be provided special education services, although in a general education classroom, for less than a month at the end of the 2009-10 school year. While the educational setting is a significant provision of the IEP, Petitioner did not prove that this brief departure caused any educational harm to the Student. To the contrary, Petitioner testified that the impact of such change may not have been very pronounced due to the relatively short time remaining in the school year at that point (*Pet. Test.*); and the Educational Advocate similarly testified that her compensatory education proposal did not attribute any harm to this June 2010 period (*EA Test.*). Moreover, the Student’s grades actually appear to have improved during the last advisory period ending June 18, 2010. *See R-2.*

2. Claim That August 2010 IEP is Inappropriate

Petitioner next claims that the August 25, 2010 IEP was inappropriate (*i.e.*, was not reasonably calculated to provide meaningful educational benefit to the Student) because it allegedly failed to provide sufficient hours of specialized instruction, and/or failed to provide for full-time placement in a therapeutic, out-of-general-education setting. The Hearing Officer concludes that Petitioner has also failed to meet 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).

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).⁴ 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.’”⁵ 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, the evidence shows that that the Student’s August 2010 IEP was reasonably calculated to confer educational benefits on the Student at the time it was created. In deciding to change the hours and setting of specialized instruction in the August 25, 2010 IEP, the MDT/IEP team felt that the Student had made educational progress that might allow her to transition to a less restrictive environment. See *R-3; P-3*. The Student had shown improved grades and test scores over the past year. See, e.g., *R-2* (06/18/2010 progress report). The team also noted improvements in behavior, with a decreased need for de-escalation, when the Student was in the inclusionary setting during June. *P-3*, pp. 5-6; see also *EA Testimony*. In addition, the SEC noted that the Student wanted to feel more included and was familiar with the special education teacher who was providing inclusion services. *P-3*, p. 5. See also *Petitioner Testimony* (stating that Student was “happy to be included” and not to be in a “special setting”).

⁴ 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.”).

⁵ *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”).

DCPS acts appropriately when it updates and revises 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. Moreover, in this instance, Petitioner specifically agreed to the reduction of services at the time of the 08/25/2010 meeting, subject to a 60-day review of the Student’s progress. *See P-3; see also EA Testimony* (Petitioner made decision to try and see if the new program worked, and agreed with changes, subject to follow-up review of progress); *Petitioner Testimony* (testifying that she agreed to the change, but only on an “exploratory” or “trial” basis).

3. **Alleged Procedural Violation – Timing of IEP Team Meeting**

Petitioner next claims that DCPS failed to reconvene an IEP team meeting within a reasonable period of time following the 08/25/2010 meeting, as had been agreed to by the IEP team; and that such procedural violation resulted in a denial of FAPE to the Student. The Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue.

Assuming *arguendo* that DCPS’ delay in convening a 60-day follow-up meeting violated required procedures under the IDEA, Petitioner has not shown that such procedural inadequacy caused a deprivation of educational benefit, or otherwise resulted in a substantive denial of FAPE, in accordance with 34 C.F.R. 300.513 (a) (2). *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). Petitioner did not prove that the Student suffered any significant educational harm during the approximately seven weeks of school between October 25, 2010, and January 4, 2011, in which she continued to be placed in an inclusionary setting. Petitioner’s evidence largely showed that the Student’s behavior did not worsen until it did so quite abruptly sometime in December; and that DCPS then acted to reinstitute the full-time, out-of-general-education setting immediately upon return from winter break at the beginning of January. Moreover, the Student’s January 21, 2011 academic progress report shows A’s and B’s in all subjects (R-5), comparable to the grades she earned in June 2010 (R-2).

D. Requested Relief

Because Petitioner has not established a denial of FAPE to the Student as of the filing of the instant Complaint, there is no basis on which to grant the Student compensatory education, prospective private placement, or any other form of relief. *See* 20 U.S.C. §1415(i)(2)(C)(iii);

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

Even assuming *arguendo* that DCPS' failure to return the Student more promptly to a full-time, out of general education setting constituted a denial of FAPE, Petitioner has not established that compensatory education relief is warranted in this case. Petitioner did not prove that the brief period of delay⁶ caused any specific educational deficit. Much less has she shown how her proposed award would 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." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Accordingly, the Hearing Officer would conclude that Petitioner failed to meet her burden of "proposing a well-articulated plan" for compensatory education, in accordance with *Reid*. See, e.g., *Gill v. District of Columbia*, Civ. Action No. 09-1608 (D.D.C. March 16, 2011); *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. Sept. 13, 2010).

Petitioner's request for prospective private placement appears to be somewhat premature. As discussed above, Petitioner has not demonstrated that DCPS denied the Student a FAPE *as of the date the Complaint was filed*. The evidence does show that the IEP team has since decided to revise the Student's IEP to provide for full-time specialized instruction in a special education setting, and that in doing so the team "agreed that she would be better served in a Specialized School." P-5, p. 5. But DCPS has not yet had the opportunity to consider alternative placements consistent with LRE requirements and in the proper context of the IEP process. At the same time, Petitioner expressly agreed to an "interim placement" at the School while an appropriate future placement could be determined. *Id.*, p. 1. The Hearing Officer believes that it would unfairly preempt this IDEA-sanctioned process to order such relief now when such issues have only recently been presented during the pendency of the due process complaint proceeding.⁷

⁶ The Educational Advocate testified that the time period covered by Petitioner's compensatory education proposal begins November 2010, and thus would appear to include at most a two-month loss of FAPE. See *EA Testimony (cross examination)*; P-11.

⁷ See D.C. Code 38-2561.02 ("DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA"); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (emphasis in original) ("if there is an 'appropriate' public school program available, i.e., one 'reasonably calculated to enable the child to receive educational benefits,' the District need not consider private placement, even though a private school might be *more appropriate* or *better able* to serve the child.")

Moreover, given that the Student is less than three months away from completing her middle school career at the School, it would appear to be less disruptive to her education for the IEP team to decide on an appropriate high school-level placement (which may well turn out to be the Private School selected by Petitioner) beginning with the 2011-12 school year. This conclusion is further supported by the fact that 40 of the 43 students presently attending Private School are in the high school grades. *Private School Testimony*. For all these reasons, the Hearing Officer concludes that the requested placement at Private School has not been shown to be necessary and appropriate to meet the specific needs of the Student at this time. *See Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005).

It is expected that DCPS will now act reasonably promptly to complete the IEP/placement process begun on January 26 when the team noted that the Student would be better served in a "Specialized School," rather than in her current interim placement. DCPS should complete this process as soon as possible, before the end of the current school year. Petitioner is entitled to participate in that process and, if not satisfied with the result, may file a new due process complaint challenging DCPS' action.

VI. ORDER

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

1. Petitioner's requests for relief in her Due Process Complaint filed January 24, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: April 9, 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).