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

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STUDENT,[1] **By and through PARENT,**	)	
Petitioner,	)	**Case No.**
v.	)	**Bruce Ryan, Hearing Officer**
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	**Hearing: May 18, 2010** [2] **Decided: May 31, 2010**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND AND RECORD

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.*, and its implementing regulations. The Complaint was filed March 22, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a -year old student (the "Student") who resides in the District of Columbia, currently attends her DCPS neighborhood high 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. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f) and 34 C.F.R. §300.513.

Petitioner's Complaint claims that DCPS denied the Student a free appropriate public education ("FAPE") during the 2009-2010 school year in the following respects: (1) DCPS allegedly failed to provide the occupational therapy ("OT") services listed on the Student's November 11, 2009 individualized education program ("IEP"); (2) DCPS allegedly failed to

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

[2] A continuance was granted to permit written closing statements to be submitted on May 21, 2010.

conduct an OT re-evaluation in a timely manner; (3) the IEP developed on March 5, 2010, is not appropriate; and (4) the educational placement at the School is not appropriate. In addition, the Complaint alleged that (5) DCPS had failed to determine compensatory education as suggested by a prior HOD issued March 27, 2009.

DCPS filed a Response to the Complaint on or about March 23, 2010, which asserts that it has not failed to provide the Student a FAPE. However, DCPS noted that it was "still investigating whether the student was provided OT services," and that DCPS was willing to amend the current IEP to correct the disability classification and "to adjust the amount of time specialized instruction will be provided outside the classroom." *DCPS Response,* p. 1. [3]

A Prehearing Conference ("PHC") was held on April 19, 2010, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order* (April 27, 2010), ¶¶ 6-7. Following the PHC, a rescheduled resolution meeting was held on or about April 30, 2010, which resolved Petitioner's concerns regarding the OT services, OT re-evaluation, and compensatory education (claims 1, 2 and 5 above). However, the claims and issues relating to the appropriateness of the March 5, 2010 IEP and placement remained unresolved. Five-day disclosures were thereafter filed by both parties as directed, on or about May 11, 2010.

On May 14, 2010, DCPS filed a motion for summary judgment, requesting that Petitioner's complaint be dismissed with prejudice because it asserts that "none of the claims noted in the prehearing order have any genuine issues of material fact." Motion, p. 10. On May 17, the Hearing Officer found that DCPS' motion was not filed in a timely manner under Section 401 (C) (4) of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*, and that good cause was not shown for the late filing.[4] However, in the interest of streamlining the issues and/or evidence for hearing, Petitioner's counsel was requested to review the list of 41 numbered items set forth in DCPS' statement of material facts (contained at pages 2 through 6 of the motion) and to inform the Hearing Officer at

[3] DCPS also sought to file an unauthorized "Amended Response" on May 13, 2010, three business days prior to the scheduled hearing and over a month after the April 21 prehearing conference. DCPS cited no authority for this 11th-hour amendment to its March 23 pleading, and the Hearing Officer is aware of none. The Hearing Officer ruled at the outset of the hearing that this so-called "Amended Response" would, without objection, instead be treated as a written opening statement by DCPS. *See* Hearing Officer Exhibit HO-2.

[4] *See* email correspondence dated May 17, 2010, from Hearing Officer to counsel for both parties.

the outset of the hearing which items were or were not genuinely disputed. This resulted in a number of stipulations of fact, which were admitted into the record at hearing and to the extent material are reflected in the Findings of Fact set forth below. Specifically, the parties stipulated and agreed to Paragraphs 1 through 12; Paragraph 22 (first two sentences); and Paragraphs 23-24, 29-31, 34-36, and 38-39 of DCPS' statement of material facts. *See HO-1,* pp. 2-5.

The Due Process Hearing was held on May 18, 2010. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: -01 through -15; -17; -19 through -23. [5]

DCPS' Exhibits: R-01 through R-14.

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

Petitioner's Witnesses: Student; Parent-Petitioner; Educational Advocate; Psychologist; and official.

DCPS' Witnesses: Special Education Teacher; and General Education Teacher.

II. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

(1) ***Inappropriate IEP*** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP at the March 5, 2010 team meeting? Petitioner alleges that the IEP is not appropriate for the Student because it "does not provide for a sufficient level of services outside the general education setting [and] does not provide the full-time placement in a program geared for students with her limited cognitive abilities and academic functioning... *-01,* ¶ 28; *see Prehearing Order,* ¶¶ 6-7.

(2) ***Inappropriate Placement*** — Did DCPS deny the Student a FAPE by failing to provide her an appropriate placement based on the March 5, 2010 IEP? Petitioner alleges that the School "does not have a program geared for students who are MR and at level of functioning," and "that can meet these needs including vocational services." *-01,* ¶ 29; *see Prehearing Order,* ¶¶ 6-7.

[5] Petitioner withdrew Exhibits -16 and -18.

The relief Petitioner requests under these issues includes: (a) appropriate findings of FAPE denial; (b) development of an appropriate IEP; and (c) funding an appropriate non-public placement at . *See -01,* pp. 8-9; *Prehearing Order,* ¶¶ 6-7. Other relief originally requested in the Complaint (*e.g.,* independent OT evaluation and compensatory OT services) has been withdrawn because it has been obtained through the resolution process.

III. FINDINGS OF FACT [6]

1. The Student is a -year old student who resides in the District of Columbia and has attended her DCPS neighborhood high school (the "School") since the beginning of the 2009-2010 school year. The Student is currently in the grade for the first time. Prior to that, the Student attended another DCPS school for the 2008-2009 school year. *HO-1, Stipulations* ¶¶ 1-3.

2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. *-04; Prehearing Order.*

3. The Student's current IEP dated March 5, 2010, calls for 7.1 hours of specialized instruction in the general education setting and 3.58 hours of specialized instruction outside of general education, for a total of 10.68 hours of specialized instruction. *HO-1, Stipulations* ¶ 11.

4. A prior HOD issued March 28, 2009, held that DCPS had inappropriately reduced the Student's specialized instruction from 15 hours per week to 10 hours per week in a setting outside general education, without adequate explanation or justification and without conducting a required triennial re-evaluation. *See -13* (HOD, Case No. 2009-0206, issued March 28, 2009); *-09* (1/16/08 IEP). The HOD ordered DCPS to fund independent psychological, Vineland adaptive, and occupational therapy ("OT") evaluations and convene an MDT meeting to review the evaluations and revise the IEP. *13,* p. 8.

[6] The Findings of Fact are based in part on the facts stipulated by the parties at hearing, as noted herein. *See HO-1* (DCPS' Motion for Summary Judgment, Statement of Material Facts as to Which There is No Genuine Issue), pp. 2-5, ¶¶ 1-12, 22-24, 29-31, 34-36, and 38-39; *DCPS' Closing Argument,* May 21, 2010, pp. 1-3.

5. On or about April 9, 2009, an independent comprehensive psychological evaluation of the Student was completed. *See -14.* The report found that the Student was performing within the Extremely Low range of intellectual functioning, with a full-scale IQ score of 59, consistent with previous testing. *-14,* p. 14. This meant that her overall thinking and reasoning abilities fell below approximately 97% of children her age. *Id.,* p. 15. On achievement measures, the Student was generally performing at 3d grade levels in Math, at 4th grade levels in Reading, at grade levels in Spelling, and at 6th grade levels in Reading Comprehension. *Id.,* p. 15, Addendum. The examiner diagnosed a learning disorder, ADHD-predominately inattentive type, and adjustment disorder with anxiety. She also recommended that an updated Vineland adaptive assessment be administered in order to confirm or rule out functional mental retardation. *Id.,* p. 16. The report further recommended that the Student "would benefit from small-class instruction with more intensive services directed at her mathematics reasoning skills," as well as counseling services. *Id. See also Psychologist Test.*

6. On or about May 15, 2009, an independent Vineland Adaptive Assessment of the Student was completed, which found her overall adaptive functioning to be low. *15.* The Student's Vineland results and her reported IQ score suggested a classification of Mild Mental Retardation. *Id.*, p. 5. The examiner also recommended that the Student "needs extensive support in the area of adaptive functioning, especially in the domain of Communication." *Id.* [7]

7. An IEP document dated October 5, 2009, continued to classify the Student with a specific learning disability and stated that she would be provided 215 minutes (3.58 hours) per week of specialized instruction in the general education setting. *08.*

8. An IEP document dated November 11, 2009, also classified the Student with a specific learning disability and stated that she would be provided 15 hours per week of specialized instruction in the general education setting and 30 minutes per day of OT services outside general education. *-07.*

[7] An independent OT evaluation was also completed on or about May 8, 2009.

9. As of January 22, 2010, the Student received the following final grades (*HO-1, Stipulations* ¶ 29; *see also* *-11*):

Algebra 1: D+

English 1: C

World History and Geography 1: C

Intro to Computer Programming 1: D

French 1: D

Biology: D

US History: C

Learning Lab (special education): B+

10. On March 5, 2010, DCPS convened a meeting of the Student's MDT/IEP Team to review the independent evaluations, review the Student's disability category, and review the IEP. Petitioner participated in the meeting along with other members of the Team, including a DCPS school psychologist, special education teacher, general education teacher, and DCPS' case manager and project coordinator. *See* *-06* (3/5/10 MDT meeting notes); *DCPS-4* (3/5/10 signed IEP); *-05* (same). The MDT/IEP Team decided on March 5, 2010 that the Student met the criteria for Intellectual Deficiency; and the IEP was changed to reflect this. *HO-1, Stipulations* ¶¶ 22-23; *see also* *-04* (Final Eligibility Determination Report); *R-9; R-14.*

11. The 3/5/10 IEP Team reviewed the Student's present levels of performance and academic goals in Reading, Math, and Written Expression; and it discussed her need for special education services.[8] DCPS then revised the IEP to provide specialized instruction in the amount of 430 minutes (7.17 hours) per week within general education and 215 minutes (3.58 hours) per week outside general education. *-06,* p. 2; *DCPS-4;* *-05*, pp. 2-7. The parent agreed with the implementation of services, but disagreed with the amount of services. *-05*, p. 1; *DCPS-4,* p. R-000025.

[8] The Student's March 5, 2010 IEP indicates that the Student was administered a Gates-MacGinitie Reading Test (4th Ed—Level 7/9) in September 2009 and January 2010. In September 2009, the Student achieved a grade level equivalent score of 3.8. *HO-1, Stipulations* ¶ 22. Petitioner has disclosed no Woodcock-Johnson III educational assessment for 2009 or 2010. *Id.,* ¶ 30.

12. With respect to the Least Restrictive Environment ("LRE") justification for the 215 minutes per week portion of specialized instruction, the 3/5/10 IEP Team found that the Student was "performing 3 or more grade levels below expected, which signals that she needs to be removed from the general education setting for remediation in reading, mathematics, and written expression." *-05,* p. 8; *DCPS-4,* p. R-000032. Her classroom setting accommodations include "location with minimal distractions" and "small group testing." *-05,* p. 9; *DCPS-4,* p. R-000033.

13. At the March 5, 2010 IEP meeting, Petitioner's advocate requested a "full-time IEP." *HO-1, Stipulations* ¶ 12.

14. As part of the resolution process in this case, DCPS has given the Student 15 hours of independent OT tutoring at DCPS expense, and has agreed to conduct an OT re-evaluation. The parent signed a consent form authorizing DCPS to conduct the OT re-evaluation on or about April 20, 2010. *HO-1, Stipulations* ¶¶ 31, 34-35; *see also R-7* (consent to evaluation). [9]

15. The Student has no history of behavioral problems at school. *HO-1, Stipulations* ¶36.

16. Per independent evaluation reports, the Student aspires to become a teacher and has never been retained. *HO-1, Stipulations* ¶¶ 38-39; *see also DCPS-4,* p. R-000036.

17. As of March 5, 2010, the Student has been placed into a "partial inclusion" program at the School, in which special education teachers provide services within multiple general education classrooms.[10] The Student also participates in a self-contained "Learning Lab" classroom consisting of no more than 10 children, all of whom

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[9] At the 4/30/10 resolution meeting, DCPS offered to complete the OT re-evaluation, and the parties agreed that OT services had been missed. *See -02,* pp 3-4 (resolution meeting notes). DCPS ultimately agreed to fund 15 hours of independent OT services in a compensatory education plan dated May 10, 2010, with services to be completed by September 1, 2010. *See -17.* In addition, the resolution meeting notes state that "DCPS will offer alternative placement within DCPS." *-02,* meeting notes at p. 2.

[10] The record is not clear regarding the extent to which the Student actually receives these inclusion services in each class, as no claim of failure to implement the IEP has been presented in this case. However, the Student's English teacher testified that while there is a special education instructor from the in her classroom as part of a program established at the School this year, that teacher has not provided the Student with any specialized instruction or support. *See Gen. Ed. Teacher Test.* Both DCPS witnesses testified that the Kennedy Institute services are only made available to students who have such supporting services included in their IEPs. *Id.; Special Ed. Teacher Test.*

receive special education and related services under an IEP. The is directed by a special education teacher, and students work on their respective IEP goals and objectives, as well as vocational and life skills. *Spec. Ed. Teacher Test.* The Student currently spends approximately 45 minutes per day in this setting. *Id.*

18. The evidence does not reveal significant academic progress by the Student overall during the 2009-2010 school year. *See, e.g., TB-11* (Jan., 2010 progress report); *R-2* (Feb. and March, 2010 progress reports); *Parent Test.; Spec. Ed. Teacher Test.* [11]

19. The evidence shows that the Student has made significant progress within the classroom, especially during the first semester. The special education teacher who directed the during that period testified that the Student is very motivated to learn in this setting and that, with appropriate supports in place, she can successfully access the general education curriculum. *Spec. Ed. Teacher Test.* For example, the special education teacher worked with the Student on strategies for completing multi-step Algebra equations, and she was then able to transfer what she learned in the to access the curriculum in her Algebra class. *Id.; see DCPS' Closing Argument,* p. 2.

20. The Student has been accepted into which is a non-public school located in the District of Columbia offering full-time special education programs for disabled students only. The evidence shows that the school can provide an educational benefit to the Student. The school has programs geared toward students with mild and moderate intellectual disabilities; the classes are generally small and taught by certified special education teachers; and the school provides opportunities to earn credits toward a regular high school diploma, as well as extensive vocational/transitional services. *See Rock Creek Test.*

[11] DCPS primarily relies on two informal assessments, the Gates-MacGintie and Brigance, to argue that the Student has improved academically. However, other evidence is in conflict. Moreover, neither of these assessments is typically used to assess and determine special education needs, as opposed to the more formal and validated WIAT-II used in the April 2009 comprehensive psychological testing. *See Petitioner's Closing Argument,* pp. 4-5.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including alleged failures to provide an appropriate IEP and/or educational placement. 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 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., NG.* 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).

B. Issues/Alleged Denials of FAPE

As discussed further below, the Hearing Officer concludes that Petitioner has met her burden of proof on the two specified issues, but only in part.

Issue (1): Inappropriate IEP

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), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982); *see Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988). Moreover, judicial and hearing officer review of IEPs under the IDEA is "meant to be largely prospective and to focus on a child's needs looking forward... at the time an IEP was created.'" *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"). [12] Finally, the

[12] For this reason, DCPS' argument that "it will be difficult for petitioner to prove that this IEP has not effectively allowed the student to make educational progress because it has only been in effect for approximately two months" (*HO-2,* p. 4) misses the mark. *See also N.S. v. District of Columbia,* Civ. Action No. 09-621 CKK (D.D.C. May 4, 2010 ("parents are not required to wait and see a proposed IEP in action before concluding that it is inadequate").

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).

In this case, Petitioner claims that the IEP developed on March 5, 2010 is not appropriate primarily because it (a) "does not provide a sufficient level of services outside the general education setting", and (b) "does not provide for full-time placement in a program geared for students with her limited cognitive abilities and academic functioning." *01,* p. 7, ¶ 28.[13] The Hearing Officer concludes that a preponderance of evidence supports the first claim, but not the second claim.

As noted above, the 3/5/10 IEP Team determined that the Student needed to be removed from the general education setting for appropriate "remediation in reading, mathematics, and written expression." *-05,* p. 8; *DCPS-4,* p. R-000032. The Student was also found to require locations with "minimal distractions" in order to access the general education curriculum. *-05,* p. 9; *DCPS-4,* p. R-000033. However, the evidence shows that the volume of specialized instruction to be provided outside of general education (3.58 hours per week) is not reasonably calculated to confer these educational benefits. Sufficient remediation and effective specialized instruction in the academic areas identified in the 3/5/10 IEP (*i.e.,* reading, mathematics, and written expression) would appear to require at least as much instruction in the Learning Lab as is presently provided on an inclusion basis (7.17 hours per week), in order to meet this Student's unique needs at this time.

The evidence shows that the Student would benefit from a greater volume of specialized instruction in the Learning Lab setting because (1) she appears to have continuing difficulty with concentration and focus in larger classroom settings due to her disability; (2) her general education classes at the School are often noisy or chaotic, with other students acting in a disruptive manner; (3) more intensive specialized instruction is made available to her in the setting; and (4) she has performed well in that setting, including development of strategies for accessing the general education curriculum. *See Student Test.; Parent Test;*

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[13] Petitioner originally claimed that the IEP also was inappropriate because it did not properly classify the Student's disability as Intellectual Disability(or MR) and did not provide for OT services. *TB-01,* p. 7, ¶ 28. However, the parties stipulated that the disability classification has been corrected, and Petitioner withdrew all claims related to OT services after DCPS agreed to fund a compensatory education plan for OT services and complete an OT re-evaluation. *See* discussion, *supra.*

Educational Advocate Test.; Spec. Ed. Teacher Test.; Psychologist Test.; -11 (1/22/10 student progress report). Even DCPS appeared to concede this point in its Response when it stated that "DCPS is willing to adjust the amount of time specialized instruction will be provided outside the [general education] classroom." *-03,* p. 1.

Finally, the Hearing Officer notes the recent history of DCPS' acting to reduce or otherwise fluctuate the hours of specialized instruction in the Student's IEP, without apparent explanation or consistency. *See -13,* p. 6, n. 4. If the most recently dated November, 2009 IEP document is deemed valid, [14] then DCPS again would have reduced the Student's specialized instruction hours (this time from 15 to 10.68 per week), without any clear explanation. Given the Student's continuing academic struggles in the general education curriculum, and DCPS' new determination that she suffers from an intellectual disability, such an abrupt change would not appear to meet the Student's unique needs. Providing specialized instruction in the amount of approximately 430 minutes in *each* setting (*i.e.,* inclusion and would better meet her documented needs as of 3/5/10, and would roughly maintain the overall level of services (15 hours) specified in the immediately preceding IEP document dated less than 4 months earlier. DCPS may then choose to review the Student's progress and make any appropriate further adjustments at the next annual IEP review during the 2010-2011 school year.

In sum, the Hearing Officer concludes that the March 5, 2010 IEP is not appropriate for this Student in that it fails to provide a sufficient level of services outside the general education setting. The Hearing Officer also concludes that DCPS' failure to develop an appropriate IEP that includes more specialized instruction outside the general education setting has caused and is causing educational detriment to the Student. The inappropriate IEP constitutes a denial of FAPE to the Student. *See* 34 C.F.R. 300.17. However, the record evidence does ***not*** support a finding that the Student requires a full-time special education program designed entirely for disabled students with her limited cognitive abilities and academic functioning.

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[14] There appears to be some confusion in the record regarding which previous IEP was effective as of the March 5, 2010 meeting, with both 10/5/09 and 11/11/09 documents in evidence. *See -07; -08.* DCPS did not present any witness to explain this apparent discrepancy, and DCPS did not raise questions regarding the validity of the November 2009 IEP until it attempted to file an "Amended Response" three business days prior to the scheduled hearing. Moreover, both the Complaint and the Prehearing Order summarizing PHC discussions clearly specified that the original implementation issue (involving failure to provide OT services) related to the 11/11/09 IEP. The 10/5/09 IEP does not provide for OT services, which DCPS appears to have agreed were missed this school year. *See -02; TB-17.*

Issue (2): Inappropriate Placement

"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). Like the IEP, a child's educational placement must be "reasonably calculated" to confer educational benefit. *Board of Education* v. *Rowley,* 458 U.S. 176 (1982). The placement must be based upon the child's IEP and also must be in conformity with the least restrictive environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114 -300.116; DCMR §§ 5-E3011, 5-E3013; *Roark* v. *District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006).

With respect to placement, Petitioner primarily claims that the School "does not have a program geared for students who are MR and at [the Student's] level of functioning." *TB-01,* p. 7, ¶ 29. "Accordingly, she requires a school that can meet these needs including vocational services." *Id.* The Hearing Officer concludes that Petitioner has not carried her burden of proof on this claim, other than to the limited extent discussed below.

Petitioner has ***not*** proved that the School selected by DCPS is unable to offer an appropriate program that can fulfill the requirements of an appropriately modified March 5, 2010 IEP. The School does have a special education program geared for students with intellectual disabilities, including at the Student's level of functioning, which provides services both within and outside the general education setting.[15] As discussed above, however, the 3/5/10 IEP has been found to be inappropriate for this Student to the extent it provides too few hours of specialized instruction in the School's Learning Lab (outside the general education setting), a finding which also impacts appropriate placement. The Hearing Officer finds that a greater emphasis on such instruction, while continuing with essentially the same level of inclusion services, would be appropriate to meet the unique special education needs of the Student. This also would be generally consistent with the Team's existing LRE determination.

[15] To the extent that Petitioner argues that "the IEP as written is not even being implemented," based on evidence suggesting that specialized instruction may not have been provided to the Student in certain general education classrooms (*e.g.*, English) during the second semester, *Petitioner's Closing Argument,* p. 6, that issue is outside the scope of this hearing because it was not raised in the Complaint. *See* 34 C.F.R. 300.511(d).

Additionally, the evidence suggests that there may be an appropriate partial-inclusion program available at the School for students with intellectual disabilities and part-time IEPs that DCPS is not offering to the Student. The School currently collaborates with the which provides specialized instruction and other services within the general education classrooms at the School, as well as some learning lab support.[16] This program appears to have been brought to Petitioner's attention for the first time at the hearing in this case. DCPS witnesses testified that the staff does not work with the Student at this time because such services are not specified on her IEP. *See Findings,* ¶ 15 & n. 8, *supra.* While DCPS' witness believed the program is geared toward "more moderate" than "mild" intellectual disabilities, *Spec. Ed. Teacher Test.,* the eligibility criteria is not established in the record. Moreover, the Student's tested FSIQ score of 59 is near the bottom of the "mild" MR classification (normally 55-70). Thus, the Team should meet to review and, to the extent appropriate revise, the IEP in this respect as well.

C. Appropriate Equitable Relief

Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §141S(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* S10 U.S. 7, IS-16 (1993); *Reid v. District o/Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the record developed at hearing, the Hearing Officer has exercised his discretion to order appropriate equitable relief as described below.

In this case, Petitioner requests (*inter alia*) that (1) the Hearing Officer "either develop an IEP for the Student that is consistent with the claims made here or that DCPS be ordered to do so"; and that (2) DCPS be ordered to fund placement at or, alternatively, convene an MDT meeting to revise the IEP for full-time placement or at least "considerably more hours on the IEP outside of the general education setting." *Petitioner's Closing Statement,* pp. 7-8. Petitioner also requests that any consideration of alternative placements include consideration of the program at the School. *Id.,* p. 8.

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[16] *See Spec. Ed. Teacher Test.;* http://www.dcase.org/

The Hearing Officer concludes that Petitioner has ***not*** shown on the basis of the present hearing record that a full-time, out-of-general education placement at would be appropriate and warranted for the Student at this time. Petitioner has not shown that a full-time IEP is appropriate, nor that the proposed private-school placement is justified considering all relevant factors -- including "the nature and severity of the student's disability, the student's specialized educational needs, the link between these needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005), *citing Board of Education v. Rowley*, 458 U.S. 176, 202 (1982). Most significantly, Petitioner has not shown that the placement -- in which the Student would have very little, if any, opportunity to interact with non-disabled students -- would represent the least restrictive educational environment capable of meeting this Student's unique special education needs at this time. *See* 20 U.S.C. 1412(a)(5); 34 C.F.R. §§ 300.114 -300.116; DCMR 5-E3011.

However, as discussed above, Petitioner has shown that the Student would benefit from more hours of specialized instruction in the environment where she has been particularly successful, together with inclusion services in the general education setting. Accordingly, the Hearing Officer will grant a form of Petitioner's alternative requested relief, as set forth in the accompanying Order below. The Order requires DCPS to convene an MDT/IEP Team meeting to revise the IEP to include more hours in the as well as to discuss and determine placement in an appropriate school program that can implement the revised IEP. On the latter issue, DCPS must also consider the extent to which the Student should be included within the program in order for any continued placement at the School to be appropriate and to fulfill all the requirements set forth in the revised IEP. The parent has also indicated a willingness to consider other appropriate placements within DCPS, which could be addressed in such meeting as well.

V. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.,* **by June 30, 2010**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including the Parent, to (a) review and revise the Student's IEP dated March 5, 2010; and (b) discuss and determine a proposed placement in an appropriate school program that can fulfill the requirements of the revised IEP.

2. At the IEP meeting convened pursuant to Paragraph 1, DCPS shall revise the Student's IEP to include at least 430 minutes per week of specialized instruction in a setting Outside General Education, without reducing the 430 minutes of specialized instruction currently provided within a General Education setting. The IEP Team may consider changing the amount of specialized instruction below these levels only as part of the Student's next annual IEP review, based on all updated information, including demonstrated academic improvement and progress toward IEP goals in the general education curriculum. The IEP Team also may make any other changes found to be appropriate in order to meet the Student's unique needs that result from her disability. The IEP Team shall discuss and determine whether additional services, if any, may be appropriate to compensate for any missed services since 3/5/10.

3. In the event DCPS determines that continued placement at the School would be appropriate to fulfill the requirements of the revised IEP, such placement determination shall include consideration of whether the Student would benefit from the School's program for students with intellectual disabilities that is currently supported by the If that program is determined appropriate to meet the Student's unique needs, DCPS shall ensure that the Student receives the benefit of these additional specialized instruction resources when she receives services within the General Education setting. DCPS may also offer alternative placements within DCPS, as it indicated it would do at the resolution meeting held in this case. DCPS shall issue any notice of proposed placement within **10 days** of the MDT/IEP meeting.

4. Petitioner's other requests for relief shall be, and hereby are, **DENIED**.

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

IT IS SO ORDERED.

Dated: May 31, 2010

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).