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

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| **STUDENT,**<br>**By and through PARENT,**[1]<br><br>***Petitioner,***<br>**v.**<br><br>**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,**<br><br>***Respondent.*** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Case No.**<br><br>**Bruce Ryan, Hearing Officer**<br><br>**Issued: June 22, 2011** |

# 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 April 1, 2011, on behalf of an 11-year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends a DCPS elementary school (the "School") and resides in the District of Columbia with Petitioner, who is the Student's mother.

Petitioner claims that that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to (a) implement the Student's 06/23/2010 individualized education program ("IEP"); (b) develop an appropriate IEP on 02/14/2011; (c) evaluate in all areas of suspected disability; (d) provide an appropriate placement; and (e) include the parent in the decision making process.

DCPS filed its Response on April 12, 2011, which responds that the Student has not been denied a FAPE. DCPS asserts that: (a) DCPS appropriately implemented the 06/23/2010 IEP

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

"within the SAM inclusion model at the School"; (b) the "current draft IEP" (dated 02/14/2011, but not yet signed by the parent) provides an appropriate program for the Student; (c) the Student does not require further evaluations; (d) DCPS has provided an appropriate placement; and (e) parent was present during the deliberation and development of the 02/14/2011 IEP.

A resolution session was also held on April 18 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of May 1, 2011. A Prehearing Conference ("PHC") was then held on May 10, 2011; the parties filed five-day disclosures on May 24, 2011; and the Due Process Hearing was scheduled for May 31, 2011. Petitioner elected for the hearing to be closed.

On May 31, 2011, the parties convened for the Due Process Hearing and heard the testimony of seven (7) witnesses. However, due to an unanticipated electrical utility outage affecting an area of downtown D.C. including the Student Hearing Office ("SHO"), the hearing was forced to conclude two hours earlier than scheduled. All parties agreed to reconvene the following day, June 1 to complete the hearing, but the SHO offices were again closed due to the same electrical power outage.

The parties then determined that they would next be available to finish the hearing on June 14, 2011, and agreed to extend the 45-day HOD timeline from June 15 to June 22, 2011 to accommodate the rescheduled hearing. The hearing was subsequently rescheduled to June 15, 2011, due to the illness of the remaining DCPS witness. Based on these circumstances, the Hearing Officer found good cause for and granted the requested extension of the HOD timeline in order to complete the hearing and render a decision.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

> **Petitioner's Exhibits:** P-1 through P-16 (without objection).
>
> **Respondent's Exhibits:** R-1; R-2; R-4 through R-7. (Exhibit R-3 was withdrawn at hearing; and Petitioner's objection to R-2 was overruled.)

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

> **Petitioner's Witnesses**: (1) Parent-Petitioner; (2) the Student's Educational Advocate ("EA"); (3) Occupational Therapist ("OT");

(4) Clinical Psychologist; and (5) Director of Education, Private School.

**Respondent's Witness**: (1) DCPS School Psychologist; (2) Special Education Coordinator ("SEC"); and (3) Teacher.

## 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 *SOP*. The statutory HOD deadline is June 22, 2011.

## III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

(1) **Failure to Implement June 2010 IEP.** — Did DCPS deny the Student a FAPE by failing to implement the Student's 06/23/2010 IEP, in that the Student allegedly did not receive all of his required 15 hours per week of specialized instruction in an Out of General Education setting and all of his required related services?

(2) **Failure to Evaluate.** — Did DCPS deny the Student a FAPE by failing to evaluate in all areas of suspected disability, specifically by conducting a neuropsychological evaluation?

(3) **Inappropriate IEP (Feb. 2011).** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP on 02/14/2011, in that the IEP prescribes (a) insufficient hours of specialized instruction, (b) an inappropriate setting for specialized instruction, (c) inappropriate goals and objectives, (d) no baselines, and (e) no OT services? *See* Complaint, p. 2, paragraph 13.

(4) **Inappropriate Placement (Feb. 2011).** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement on 02/14/2011, in that the Student needs small class sizes, in a full-time Out of General Education program for students with learning disabilities?

(5) **Parent Participation.** — Did DCPS deny the Student a FAPE by failing to include the parent in the decision making process regarding IEP and placement in February 2011?

Petitioner requests that the Hearing Officer order DCPS to: (a) immediately place and fund the Student at Private School; (b) fund an independent neuropsychological evaluation of the Student; (c) convene an MDT/IEP team meeting to review and revise the IEP; and (d) fund or provide appropriate compensatory education.

## IV. FINDINGS OF FACT

1. The Student is an 11-year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. Her primary disability is Specific Learning Disability ("SLD"). *P-5; R-5; Parent Test.*
2. During the 2009-10 school year, the Student attended a D.C. public charter school, for which DCPS serves as LEA.
3. On or about June 23, 2010, DCPS convened a meeting of the Student's MDT/IEP Team to develop an IEP. The 06/23/2010 IEP provided for (a) 15 hours of specialized instruction (Reading, Math, and Written Expression) in an Out of General Education setting; (b) 60 minutes per week of behavioral support services (counseling) in an Out of General Education setting; (c) 60 minutes per week of speech/language services in an Out of General Education setting; and (d) 60 minutes per month of additional behavioral support services (organization skills) in an Out of General Education setting. *P-3, p.9.*
4. The 06/23/2010 IEP services represented an increase in hours from the Student's previous IEPs. His 12/10/2009 IEP provided for 9 hours per week of specialized instruction outside general education, and the 03/04/2010 IEP provided for 12 hours per week of specialized instruction outside general education. *See P-1; P-2.*
5. Petitioner was informed that the charter school was not able to meet the Student's increased needs, and that the School could meet her needs and implement an IEP with greater hours of specialized instruction. *Parent Test.*; *EA Test.* Thus, DCPS issued a Prior Written Notice dated 06/24/2010 specifying the School as the "proposed educational placement for [the Student] for the 2010-2011 academic school year." *P-11.* The Student then began attending the School at the start of the 2010-11 school year. *Parent Test.*

6. On or about November 15, 2010, Petitioner obtained an independent comprehensive psychological evaluation, which found (*inter alia*) that the Student had "deficits with memory, picture naming, and also spatial integration [which] may point to neuropsychological impairment." *P-9, p. 12.* The evaluator recommended that the Student receive a neuropsychological evaluation to assess these deficits. *Id., pp. 12-13.*
7. On or about February 2, 2011, DCPS convened a meeting of the Student's MDT/IEP Team to review independent comprehensive psychological and OT evaluations, to review and revise the IEP, and to discuss compensatory education if necessary. *R-1.* At this meeting, Petitioner requested that the Student receive a neuropsychological evaluation. *Id.; EA Test.* To date, DCPS has not conducted such an evaluation.
8. Also at the February 2, 2011 MDT meeting, DCPS acknowledged that the Student had not been receiving all of her 15 hours per week of specialized instruction in an Out of General Education setting, as required under the 06/23/2010 IEP. *See R-1,* p. 2 (noting that the Student "is not getting pulled out for 15 hours as the IEP instructs"). **[ADD FACTS/TESTIMONY re specific services provided]**
9. On or about February 14, 2011, DCPS reconvened the MDT/IEP Team to complete its review of the Student's IEP. The 02/14/2011 IEP provides for (a) 10 hours of specialized instruction in a General Education (inclusion) setting; (b) 60 minutes per week of behavioral support services (counseling) in an Out of General Education setting; and (c) 60 minutes per week of speech/language services in an Out of General Education setting. *See R-5; P-5; P-6.* Petitioner disagreed with the reduction in hours of specialized instruction and the change in setting. *Parent Test.; EA Test.*
10. Also at the February 14, 2011, MDT meeting, DCPS agreed that the Student required direct, school-based OT services, as had been recommended by the independent OT evaluation dated December 3, 2010. *P-10; Parent Test.* But the 02/14/2011 IEP did not include any OT services. *P-5; R-5; EA Test.* However, subsequent to the February 2011 team meetings, Petitioner was also informed that the Student was supposed to be receiving OT services. *Parent Test.*
11. On or about April 18, 2011, DCPS convened a resolution meeting in this case. *R-2.* DCPS felt that the 02/14/2011 IEP is appropriate as written and that the School is an appropriate site location. Petitioner disagreed and proceeded to hearing. Petitioner asked

DCPS to issue a PNOP for the Student to attend Private School and to issue an IEE for a neurological assessment. *Id.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

### A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP. 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).

### B. Issues/Alleged Denials of FAPE

As noted above, Petitioner claims that DCPS denied the Student a FAPE by: (1) failing to implement the Student's 06/23/2010 IEP; (2) failing to evaluate in all areas of suspected disability, specifically by conducting a neuropsychological evaluation; (3) failing to develop an appropriate IEP and provide an appropriate placement on 02/14/2011; and (4) failing to include the parent in the decision making process.

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); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on Issues 1, 2, and 5 above, and has met her burden of proof in part on Issues 3 and 4 above.

#### 1. Failure to Implement June 2010 IEP

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. 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*, for example, 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, Petitioner claims that DCPS failed to implement the Student's 06/23/2010 IEP, in that the Student allegedly did not receive (a) all of his required 15 hours per week of specialized instruction in an Out of General Education setting, and (b) all of his required related services. The evidence adequately supports these claims. The Special Education Teacher estimated that she provided no more than 7.5 hours per week of pull-out instruction from the beginning of the 2010-11 school year until approximately mid-November, and then began to

provide services on an inclusion or small-group basis with general education students. *See Spec. Ed. Teacher Test.*

In closing argument, DCPS conceded that the School did not implement the full 15 hours of pull-out specialized instruction, but argued that Petitioner had not proved that the Student suffered any specific educational harm from this failure. However, Petitioner was not required to make such showing. The failure to implement an IEP is not a mere procedural violation. When an LEA ***materially*** deviates from IEP requirements (as DCPS did here), educational harm to the student is presumed, since the LEA has failed to provide a service that the IEP team determined was necessary to meet the student's unique educational needs. *Wilson, supra.*

Accordingly, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 1.

**2. Failure to Evaluate (Neuropsychological)**

As part of both an initial evaluation and any re-evaluation, DCPS must (*inter alia*) ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304 (c) (4), (6); *see also Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Parents also have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g.,* 34 C.F.R. 300.305 (d); *see also Herbin v. District of Columbia,* 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005). The failure to act on a request for independent evaluation may constitute a denial of FAPE. *Harris v. DC, supra,* 561 F. Supp. 2d at 68-69.

In this case, Petitioner claims that DCPS denied the Student a FAPE by failing to evaluate in all areas of suspected disability, specifically by failing to conduct a neuropsychological evaluation that had been recommended by an independent clinical psychologist. The psychologist testified regarding the reasons for recommending this evaluation, including the Student's weaknesses in working memory and executive functioning, and her low scores related to these areas on the Woodcock-Johnson III. *See Clinical Psychologist Test.; P-9, p. 16.* While the DCPS' School Psychologist indicated at the February 2011 MDT meeting that

no further assessments were warranted, in cross examination at hearing she agreed that the Student's Visual-Auditory Learning score was "definitely a red flag." *School Psychologist Test.* (cross examination). The Student's score on this particular subtest translated to a Grade Equivalency of ***below*** Kindergarten. *P-9, p. 16.*[2] She ultimately testified that she would want to at least speak with the OT evaluator to see where the problem lies.

The Hearing Officer concludes that Petitioner has shown sufficient evidence to justify her request for a neuropsychological assessment. A neuropsychological evaluation could provide information relevant to determining the Student's educational needs, such as information concerning executive functioning issues (including visual-spatial relationships, memory, and abstract reasoning) beyond what was tested in the previous evaluations. Accordingly, Petitioner has met her burden of proof on Issue 2.

### 3. Failure to Provide an Appropriate IEP and Placement (Issues 3 & 4)

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

[2] The Hearing Officer also notes that DCPS' informational manual for "Obtaining an Independent Evaluation For Your Child" (at page 6) includes evaluation of "processing of visual and auditory material" as a reason for conducting a neuropsychological evaluation. The Hearing Officer has taken judicial notice of this official D.C. government manual.

children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982).[3] 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.'"[4] Moreover, DCPS must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities."*Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6.; *see* 34 C.F.R. 300.324.

The issue of whether an IEP is appropriate is a question of fact for hearing. *See, e.g., S.H.* v. *State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 709 F. Supp. 2d 57 (D.D.C. 2010), slip op. at 20.

Petitioner claims that DCPS denied the Student a FAPE by failing to provide an appropriate IEP on 02/14/2011, in that the IEP prescribes: (a) insufficient hours of specialized instruction; (b) an inappropriate setting for specialized instruction; (c) inappropriate goals and objectives; (d) no baselines; and (e) no OT services. *See* Complaint, p. 2, paragraph 13. Petitioner also claims that DCPS failed to provide an appropriate educational placement on that same date, because the Student needs small class sizes, in a full-time Out of General Education program for students with learning disabilities. The "placement" claim substantially overlaps the "inappropriate setting" portion of the IEP claim in this particular case. In both instances,

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[3] *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. ").

[4] *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").

Petitioner alleges that the Student requires an IEP and placement in a setting wholly outside general education, with full-time specialized instruction and a small student-teacher ratio.

***(a) Hours and Setting of Specialized Instruction***

In closing argument, Petitioner stressed that her primary challenge to the IEP involved the hours and setting of the specialized instruction – *i.e.*, that 10 hours of inclusion services was inadequate to meet the Student's needs as of 02/14/2011. The Hearing Officer concludes that Petitioner proved this claim by a preponderance of the evidence. The evidence shows that the Student struggled academically during the first half of the 2010-11 school year when DCPS failed to implement all of the pull-out services on his earlier IEP. And there is little evidence to suggest that he would now do better without ***any*** pull-out instruction. The Special Education Teacher testified that she thought the Student would benefit from extra help with reading instruction, which may not be fully available in an inclusion setting. *See Spec. Ed Teacher Test.*(cross examination). In addition, the SEC's testimony that she "does not believe in" pull-out instruction within the School (*SEC Test.*) "suggests that the change away from pull-out services [may have been] driven by the school's needs rather than [the Student's]." *N.S. v. District of Columbia, supra,* slip op. at 24. The IEP must drive placement, not the other way around. *See* 34 C.F.R. 300.116 (b) (2).

Upon consideration of all the testimony and evidence presented, the Hearing Officer concludes that in order for the IEP to be reasonably calculated to confer educational benefits on the Student at this juncture, it must be revised to include ***at least 10 hours of pull-out specialized instruction*** until the Student is able to close some of the gap between her academic performance and grade-level standards. If the Student had not been making adequate progress under an IEP providing 15 hours of pull-out instruction, it simply is not reasonable to expect greater progress with a smaller volume of services in a larger setting. At least, DCPS has not adequately justified such a change on the present record.

***(b) Inappropriate Goals***

Petitioner presented expert testimony establishing that a number of the goals stated in the 02/14/2011 IEP were not appropriate to meet the Student's educational needs, so as to enable the Student to be involved in and make progress in the general education curriculum (34 C.F.R. 300.320(a) (2)). For example, Reading Goals 4 and 5 appear to be geared to a much higher level

than is realistically achievable by the Student during the present school year, given that the Student's Reading Comprehension scores were only at the 1.9 GE level in November 2010. *See EA Test.; P-12.* Similarly, his Written Language scores are too low for some of the goals (e.g., # 2 and #3) in the Written Expression area. *Id.* Petitioner's expert also pointed out that the 02/14/2011 IEP contains no math goal relating to word problems. *EA Test.*

***(c) Missing Baseline Data***

Petitioner alleged that the 02/14/2011 IEP contained no baseline information for any of the Reading, Math and Written Expression goals, *see P-5, pp. 2-4,* which would mean that the Student's progress could not be effectively measured in these critical areas. *See EA Test.* However, DCPS submitted what appears to be a more complete copy of the 02/14/2011 IEP containing baseline information. *See R-5, pp. 3-5.*

***(d) OT Services***

Finally, Petitioner claims that the 02/14/2011 IEP fails to provide OT services that the Team specifically found to be warranted based on the independent OT evaluation. However, this appears to be an oversight. DCPS agrees that OT services should have been included in the IEP, and the evidence indicates that OT services have in fact been provided to the Student after February 2011. Of course, "[o]ne of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary." *N.S. v. District of Columbia, supra,* slip op. at 26. DCPS therefore will be ordered to revise the IEP to expressly incorporate the direct OT services.

In sum, Petitioner has proved by a preponderance of the evidence that the 02/14/2011 IEP should have included the above program elements and information. Accordingly, to the extent discussed above, Petitioner has shown that the IEP was not "reasonably calculated" to confer educational benefits on the Student at the time it was created.

**4. Procedural – Parent Participation (Issue 5)**

The IDEA requires that parents have meaningful participation in the placement decisions involving their child. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically, each public agency must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.,* 1414(e);

300.327. The team does not have to agree with the parent's proposal or concerns,[5] but it is required to listen to the parent's concerns and consider them, rather than issuing unilateral decrees. DCPS also is permitted to conduct its own investigation and identification of possible placement sites (*i.e*, those that meet regulatory requirements and have available space and resources to accommodate a particular student), as long as the parent participates meaningfully in the placement process. Meaningful participation necessarily includes being part of the discussion of appropriate and available schools, as well as the ultimate team placement determination. [6]

In this case, Petitioner alleges that DCPS failed to ensure meaningful parent participation in the decision making process regarding the IEP and placement in February 2011. The evidence appears to confirm this contention. For example, the SEC testified that she never even read the detailed analysis of Woodcock-Johnson III results (*P-12*) that was submitted by the Student's educational advocate between the dates of the two February meetings to demonstrate the Student's relative lack of progress. *See SEC Test.* (cross examination). The SEC also testified that ...

### C. Requested Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, Petitioner requests the Hearing Officer to order DCPS to: (a) immediately place and fund the Student at Private School; (b) fund an independent neuropsychological evaluation of the Student; (c) convene an MDT/IEP team meeting to review and revise the IEP; and (d) fund or provide appropriate compensatory education.

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

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

For the reasons discussed above, the Hearing Officer grants requests (b) and (c), and incorporates appropriate directives in the Order. However, the Hearing Officer declines to grant request (a) because Petitioner has not shown that the Student's unique needs can be appropriately met only in a full-time, non-public, out-of-general-education school for learning disabled students. Nor has Petitioner shown that Private School even meets those requirements. *See Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005); *McKenzie v. Smith,* 771 F.2d 1527, 1531 (D.C. Cir. 1985). Petitioner thus has not shown that this setting would provide the least restrictive environment (LRE) for the Student at this time. *See* 34 C.F.R. 300.114, 300.116. Moreover, where an appropriate non-public special education school or program is available within the District of Columbia, that option must be given priority over facilities outside of the District. *See* D.C. Code 38-2561.02. Private School is located in suburban Virginia.

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted*)*. Accordingly, based on careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that **100 hours of independent tutoring** would be an appropriate equitable remedy under the circumstances. The independent tutoring would reasonably compensate the Student for the missed pull-out specialized instruction in Reading, Math, and Written Expression, and would likely get her to a point the Student would have been expected to reach by now had she received such services. The evidence showed that the Student is getting ready to enter the 6th grade, but is generally performing at no more than the 2d-3d grade level in most academic areas. Petitioner's expert estimated that she would have been expected to be working on at least 3d-4th grade material at this point, had she received all her required and appropriate services. *See EA Test.; P-12.* [7]

[7] It appears that the Student would benefit most from tutoring in the areas of Reading and Written Expression. The 02/02/2011 MDT's review of the Student's standardized test scores indicate that she dropped two points on Reading , but has improved somewhat on Math. *See R-1, p. 2. See also EA Test.* (conceding some progress in math as measured by the two sets of W-J III scores); *P-12, p.2; Spec Ed. Teacher Test.* (Student has been more successful in math than reading).

The award meets the *Reid* standard [8] because it has been shown to be (1) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time period (*i.e.*, approximately August 2010 to the present), and (2) reasonably tailored to the unique needs and deficits of the Student. The compensatory education award addresses the Student's specific deficiencies by enabling her to gain skills and other benefits she likely would have obtained had she not missed required pull-out services and had she not been placed in an inappropriate setting during the past school year.

## VI. ORDER

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

1. Petitioner shall be authorized to obtain an **independent neuropsychological evaluation,** at the expense of DCPS and consistent with DCPS publicly announced criteria for IEEs. Petitioner shall make reasonable efforts to have such evaluation completed within **45 calendar days** of this Order. Upon completion, Petitioner shall cause copies of the reports to be sent directly to DCPS' Compliance Case Manager.
2. Within **30 calendar days** of receiving the independent evaluation report, DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members (including Petitioner) to: (a) review the results of the evaluation; (b) review all other updated information regarding the child's performance, behavior, and disabilities; (c) review and revise the Student's IEP, as appropriate and consistent with this HOD and the updated information; and (d) discuss and determine an appropriate educational placement and/or location of services that can meet the Student's needs and implement an appropriate, revised IEP for the 2011-12 school year.
3. Petitioner is awarded compensatory education as follows: Unless the parties agree otherwise, DCPS shall pay for **100 hours of individual academic tutoring services** for the Student in Reading, Written Expression, and Math during the 2011 summer and the 2011-2012 school year, at a rate not to exceed the current

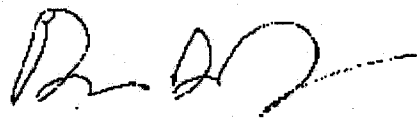
[8] *See Reid v. District of Columbia*, 401 F. 3d at 524 ("In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."); *see also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

established market rate in the District of Columbia for such services, beginning within **30 calendar days** of this Order.

4. Petitioner's other requests for relief in her Due Process Complaint filed April 1, 2011, are hereby **DENIED.**

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

***IT IS SO ORDERED.***



Dated: June 22, 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).