

**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

Hearing: April 28, 2010

Decided: May 12, 2010

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STUDENT HEARING OFFICE

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 his 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.

Petitioner claims that DCPS has denied the Student a free appropriate public education (“FAPE”) by various actions over the past two school years, as described further below. Petitioner alleges that DCPS: (1) committed certain procedural violations in connection with a June 12,2009 meeting of the Student’s Multi-Disciplinary Team (“MDT”); (2) failed to implement the Student’s June 12, 2009 individualized education program (“IEP”); (3) failed to convene manifestation determination meetings several times for disciplinary suspensions totaling

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

more than 10 school days in a school year (including with respect to a March 8, 2010 incident); (4) developed an inappropriate IEP at a January 6, 2010 MDT/IEP meeting; and (5) failed to provide an appropriate placement.

DCPS filed a Response to the Complaint on March 31, 2010, which asserts (*inter alia*) that: (1) the allegations relating to the June 2009 MDT/IEP meeting are “purely procedural” and do not constitute a denial of FAPE; (2) DCPS has implemented the June 2009 IEP to the extent the Student has been available for services and/or any failure does not constitute a denial of FAPE; (3) the discipline claims are without merit; (4) the Student’s January 2010 IEP is appropriate; and (5) the School is appropriate because it can implement the IEP, is the school closest to his home, and is the school he would attend were he not disabled.

Upon filing, the Complaint was classified by the Student Hearing Office as an Expedited-Discipline case. Petitioner also filed a Motion for Expedited Hearing on April 6, 2010, to which DCPS filed an Opposition on April 8. On April 13, the Hearing Officer granted the motion and confirmed the expedited status of the due process hearing pursuant to 34 C.F.R. §300.532(c). The Hearing Officer stated that he was satisfied that the Complaint filed by the Parent includes (but is not limited to) disagreement regarding one or more placement decisions and/or manifestation determinations under §§300.530 and 300.532(a), regardless whether the Student is currently on suspension. Both parties agreed that a bifurcated hearing on the other claims would not be appropriate. *See Prehearing Order* (April 13, 2010), ¶ 2.

The expedited resolution period ended as of April 5, 2010, and the expedited due process hearing was required to be held by April 28, 2010 (20 school days from the date that the Complaint was filed). *See* 34 C.F.R. § 300.532 (c) (2). The parties reported that a resolution meeting occurred on April 5, 2010, and that the matter was not resolved to the satisfaction of both parties.

Prehearing Conferences were held on April 6 and 13, 2010, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order* (April 13, 2010), ¶ 5. Five-day disclosures were thereafter filed by both parties as directed, on or about April 21, 2010.

The Due Process Hearing was held on April 28, 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: P-1 through P-15.

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

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

Petitioner's Witnesses: Parent-Petitioner; and
Admissions Director, Schools of Washington, D.C.

DCPS' Witnesses: The Special Education Coordinator ("SEC")
and two Special Education Teachers at the School.

Pursuant to the IDEA, the Hearing Officer must make a determination within 10 school days after the hearing. See 34 C.F.R. § 300.532 (c) (2). This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUES AND REQUESTED RELIEF

A discussion at the Prehearing Conferences of the issues and requested relief raised by Petitioner, along with the pleadings filed by both parties, resulted in the following issues being presented for determination at hearing:

- (1) ***Procedural Violations with 6/12/09 MDT Meeting*** — Did DCPS fail to hold an MDT meeting with all necessary team members, specifically the Parent and Student; and did DCPS fail to invite Parent and Student to that meeting?
- (2) ***Implementation of 6/12/09 IEP*** — Did DCPS fail to provide special education and related services (*i.e.*, counseling) as called for in the 6/12/09 IEP, by (*inter alia*) placing the Student in the general education setting and not in a full-time ED cluster program as alleged in the Complaint?
- (3) ***Discipline/MDR*** — Did DCPS fail to convene manifestation determination review ("MDR") meetings for disciplinary suspensions totaling more than 10 school days in a school year?
- (4) ***Inappropriate 1/6/10 IEP*** — Did DCPS deny the Student a FAPE by reducing the Student's specialized instruction and behavioral support services to 7.5 hours per week and 30 minutes per week, respectively, in a general education setting?
- (5) ***Inappropriate Placement*** — Did DCPS fail to provide an appropriate educational placement for the Student for the 2009-2010 school year?

The relief Petitioner requests under these issues includes: (a) appropriate findings of FAPE denial; (b) an Order requiring DCPS to perform necessary evaluations and convene an MDT/IEP/placement meeting within 30 days; and (c) an immediate non-public placement at School. *See Prehearing Order* (April 13, 2010), ¶ 5; *see also DCPS-01* (Complaint), p. 5, Section III. The Complaint stated that “[a]ll issues with respect to compensatory services are reserved” (*DCPS-01*, p. 5 ¶ 16); this was confirmed at the PHC, and DCPS’ counsel did not object to that reservation.²

III. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia and currently attends his DCPS neighborhood high school (the “School”). The Student is currently repeating the grade and has had a history of behavioral and academic problems in school for a number of years. *See DCPS-01; P-10; Parent Test.*
2. As a result of prior HODs issued in November 2008 and February 2009, the Student was identified, comprehensively evaluated and determined to be eligible for special education and related services as a child with a disability under the IDEA. *See generally* HOD, Case No. (issued Feb. 2, 2009); *DCPS-01.*
3. An independent comprehensive psychological evaluation was completed on February 17, 2009. *P-10.* The report found that the Student was performing within the Average range of intellectual functioning, with a full-scale IQ of 93, which was consistent with the most recent testing performed by DCPS. *Id.*, p. 11. The report also found that on achievement measures, the Student was performing within the Average range in most areas, except for math where he performed in the Low Average range. *Id.*, p. 12. Because the Student displayed difficulty with achievement in mathematics, the report recommended that the Student may benefit from assistance in developing his skills in that area. *Id.*
4. On an emotional level, the 2/27/09 evaluation reported that the Student “is aware of a great deal of anger and some anxiety” and that “[b]ecause he tends to externalize his

² As confirmed at the April 13 PHC, all other issues and requested relief originally set forth in the March 22 Complaint were deemed withdrawn by Petitioner. *See Prehearing Order* (April 13, 2010) ¶ 5.

negative feelings, he is prone to behaving in disruptive ways.” *P-10*, p. 12. The evaluator diagnosed the Student as having “Major Depressive Disorder, Recurrent,” as well as Adolescent Antisocial Behavior,” and found that he “may meet the criteria for specialized education services under the classification Emotional Disabled.” *Id.*, p. 13. The report recommended that, if behavior plans previously developed in a December 2008 MDT meeting did not produce desirable results, the Student “should be considered for placement in an academic setting designed to attend to the emotional needs of their students.” *Id.* The report recommended that a functional behavioral analysis (“FBA”) be conducted to assist in developing a behavioral intervention plan (“BIP”), and further recommended a psychiatric consultation, individual therapy, classroom accommodations, increased activities using his artistic talents, and involvement in a mentoring program. *Id.*, pp. 13-14.

5. On or about June 1, 2009, the Student’s MDT met to determine eligibility, with the parent participating. Based on this 2/17/09 evaluation report and other relevant information, the MDT determined that the Student suffered from a serious emotional disturbance (“ED”), as defined in the IDEA, 34 C.F.R. 300.8(c)(8). *See P-9* (6/1/09 MDT meeting notes). The team found (*inter alia*) that he displayed an “inability to build/maintain satisfactory interpersonal relationships with peers and teachers,” and thereby met the defined ED criteria. *Id.*, p. 4. The team said it would reconvene on June 18, 2009, to develop the IEP. *Id.*
6. Despite the fact that the MDT/IEP Team meeting had been scheduled for June 18, on or about June 12, 2009, DCPS reconvened the MDT without the parent in attendance to develop an IEP. *DCPS-06; P-8; see also P-7* (6/18/09 advocate notes). DCPS also developed an FBA and BIP that same date, also without the Parent’s participation. *DCPS-07*. The Parent testified that she did not receive an invitation to the 6/12/09 MDT meeting, *see Parent Test.*, although DCPS claimed that it had faxed notice to the Student’s educational advocate, *see DCPS-14*.
7. At the 6/12/09 MDT meeting, DCPS determined that the Student would receive 27.5 hours of specialized instruction in a setting outside general education and one hour per week of behavioral support services (counseling) in a general education setting.

See P-8; P-9; DCPS-14. DCPS also determined that the Student's full-time IEP could be implemented at the School, within its full-time ED Cluster Program. P-8 (6/12/09 meeting notes). The Student's primary disability under the 6/12/09 IEP was stated to be ED, consistent with the June 1 eligibility determination. P-8.

8. On June 18, 2009, DCPS held another MDT meeting, this time with the parent present. See DCPS-14; P-7. The Parent and advocate were given a copy of the 6/12/09 MDT notes and IEP at that time. *Id.*
9. At the beginning of the 2009-2010 school year, DCPS placed the Student at the School, where he was to have received services within the full-time ED Cluster Program in accordance with the June 2009 IEP. The evidence shows that the required specialized instruction and related services (counseling) were not consistently provided in the correct setting within the School. See *Parent Test.*; *SEC Test.* When the Student was in the special education resource classroom, he often just sat and played on the computer without any services being provided. *Id.* Students assigned to the ED Cluster program earn resource class credits, but not Carnegie units. *Teacher #1 Test.*
10. Following that placement, the Student's behavior problems continued and, in some respects, may have escalated. The Student has been disciplined and suspended for various incidents occurring during the course of this school year, including: on 12/3/09 (suspended one day for "walking the hallways"); 1/12/10 (suspended 5 days for being "very belligerent and disrespectful" toward staff); 1/26/10 (suspended 3 days for "cursing out the administrator"); and 3/8/10 (proposing expulsion for "verbal threatening staff including intimidating posture"). P-14.³ In addition, the Parent testified that she receives frequent calls from School staff about behavioral concerns. *Parent Test.*

³ In the previous school year (2008-09), the Student was also disciplined and suspended numerous times, including incidents occurring on 4/27/09 (3 days for being in hallway without pass), 03/17/09 (25 days for threats to injure staff, failure to comply with directives, and causing a disruption), 3/16/09 (3 days for being in hallway without pass), 3/6/09 (3 days for being in hallway without pass), 3/5/09 (same), 1/8/09 (3 days for being in hallway and leaving school building without permission), 11/10/08 (2 days for walking the hallways), 9/26/08 (7 days for gross disrespect toward staff), 9/17/08 (2 days for refusing staff directive). See P-14.

11. On or about January 6, 2010, DCPS revised the Student's IEP to reduce the amount of specialized instruction to 7.5 hours per week and to reduce the amount of behavioral support services to 30 minutes per week. *DCPS-05*, p. 4. DCPS also changed the setting of the specialized instruction to General Education. *Id.* The evidence indicates that DCPS made these changes without formally convening a meeting of the Student's MDT/IEP Team. Instead, the Student's Special Education Teacher/Case Manager made the changes in concert with the Parent, and the Parent reviewed and signed the IEP consenting to its implementation. *Id.*, p. 1; *Parent Test; Teacher #1 Test.* The primary reason for the changes in the IEP was to enable the Student to access more of the general education curriculum, and thereby accommodate the Parent's desire to have the Student be in position to earn sufficient credits to graduate with a regular high school diploma. The Student wants to attend college, and is considered capable of doing so. *See Parent Test; SEC Test; Teacher #1 Test.*
12. Following the 1/6/10 changes to the IEP, the Student has been placed into a "partial inclusion" program in which special education teachers provide services within multiple general education classrooms. The Student's classroom includes 6-7 other students with current IEPs and 14 non-disabled students with whom he interacts. Since returning from spring break at the beginning of April, the Student's behavior appears to have improved somewhat, according to his teacher. *See Teacher #1 Test.*
13. On or about March 26, 2010, DCPS issued its latest Report to Parents on Student Progress, which reflects the Student's progress through the advisory ending 3/26/10. *DCPS-10.* The report indicates that the Student's grades have improved slightly over the course of the last advisory, since the revised IEP has been in place. However, the "improvement" appears to be due at least in part to downward adjustments in his academic class schedule (*e.g.*, the Student is now earning a C in Pre-Algebra Development vs. previously an F in Algebra I, and is now earning a D in Extended Literacy vs. previously an F in English I⁴).

⁴ If the Student can pass these two classes (Algebra and English), he will be able to advance to the _____ grade. *See Parent Test; SEC Test.* The Student can take Algebra I in summer school if he successfully completes the Pre-Algebra development course this spring. *Id.*

14. The March report also shows 20 unexcused absences in the latest advisory and 78 unexcused absences in the school year to date. *Id. See also DCPS-13* (Attendance Summary 8/17/09 to 4/21/10, indicating a total of 269 unexcused absences from classes). DCPS witnesses testified that the Student is not passing his courses because he often does not attend classes. *See, e.g., Teacher #2 Test; SEC Test.*
15. On or about April 5, 2010, DCPS held a resolution meeting with the Parent-Petitioner, but no agreement was reached. *See DCPS-04; P-2.* DCPS offered to settle all claims by agreeing to: (a) authorize an independent vocational assessment and comprehensive psychological evaluation at the expense of the District of Columbia; (b) convene an MDT/IEP Team meeting, within 20 school days of receipt of the independent evaluations, “to review the evaluation[s], revise the IEP, and discuss and determine the location of services”; and (c) fund compensatory education consisting of five hours per month of mentoring for nine months (to be completed by 12/31/10), one hour per week of individual or family counseling for 10 months (to be completed by 3/1/11), and two hours per week of tutoring for six months (to be completed by 12/1/10). *P-3; DCPS-03.*⁵
16. On or about April 21, 2010, the Student was accepted into the ED program at the _____ Grade Center, which is part of the _____ of _____ Washington, D.C. *See P-1.* _____ is a non-public school which offers a full-time, self-contained, special education program serving students in middle school and high school grades. Many of the students enrolled at _____ are DCPS students who are placed there pursuant to either DCPS placement or HODs. The Student can earn Carnegie units and be on diploma track at _____. *See Clarke Test.*

⁵ According to the advocate’s notes, the SEC reported at the resolution meeting that the School was “not appropriate for the Student,” *P-2*, but no other placement was proposed at that time. The matter was unresolved and proceeded to due process hearing. *Id.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. 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 provide an appropriate IEP and/or placement, as well as failures to implement an IEP.

2. 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

3. The Hearing Officer concludes that, to the limited extent set forth herein, Petitioner has met her burden of proof on the specified issues. However, Petitioner has not met her burden of proof as to the remainder of the issues and requested relief, as discussed below.

Issue (1): Procedural Violations with 6/12/09 MDT Meeting

4. Petitioner proved that DCPS failed to invite and hold a meeting on June 12, 2009, with all necessary team members, including the Parent. *See* 34 C.F.R. 300.321, 300.322. However, the Hearing Officer agrees with DCPS that any possible harm resulting from the Parent's lack of participation was effectively cured when Parent and her advocate attended a further MDT meeting on June 18, 2009, at which the Parent was provided a copy of the proposed IEP and was offered an opportunity to discuss and consent to the IEP and proposed placement. As a result, the procedural violation did not significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student. *See* 34 C.F.R. 300.513 (a) (2).⁶

⁶ *See also Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 193 (2d Cir. 2005) (holding no denial of FAPE where parent had attended and participated in at least two other meeting during the same school year, but did not attend an IEP meeting); *Anderson v. District of Columbia*, 2009 U.S. Dist. LEXIS 26436, at *10-11 (D.D.C. Mar. 30, 2009) (absence of regular and special education teachers was not a denial of FAPE because there was sufficient information before the MDT); *E.P. v. San Ramon Valley Unif. Sch. Dist.*, 2007 U.S. Dist. LEXIS 47533, at * (June

5. Accordingly, the Hearing Officer concludes that while a procedural violation occurred in connection with the 6/12/09 MDT meeting, such procedural inadequacy did not result in a denial of FAPE to the Student. *See* 34 CFR 300.513; *Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006).

Issue (2): Implementation of 6/12/09 IEP

6. The evidence shows that DCPS failed fully to implement the June 12, 2009 IEP by failing consistently to provide the Student with 27.5 hours per week of specialized instruction and one hour per week of counseling services in the prescribed settings during the period September through December 2009. Accordingly, Petitioner has carried her burden of proof on this issue.

7. The Hearing Officer concludes that the aspects of the IEP not followed in this case were “more than a *de minimus* failure”; they were “substantial or significant,” or in other words the deviation from the IEP’s stated requirements was “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). As a result, the deviation caused a deprivation of educational benefit to the Student. *See id.*; 34 C.F.R. §300.513(a)(2). This failure to fully implement the IEP constitutes a denial of FAPE to that extent. *See* 34 C.F.R. 300.17(d).

Issue (3): Discipline/MDR

8. 34 C.F.R. §300.530(b) provides that school personnel “may remove a child with a disability who violates a code of student conduct from his or her current placement ...***for not more than 10 consecutive school days***...as long as those removals do not constitute a change of placement under §300.536.” Section 300.536, in turn, provides that a “change of placement” occurs if either (1) the removal is for more than 10 consecutive school days, or (2) the child is subject to a series of removals totaling more than 10 school days in a school year that constitute a “pattern,” determined on a case-by-case basis consistent with the factors spelled out in the rule. 34

21, 2007) (school district did not deny the Student a FAPE by moving forward with an IEP meeting the day before the school year began when parents were notified in advance, had participated in prior IEP meetings and school district had a statutory obligation to hold meeting before the beginning of the school year).

C.F.R. §300.536. If such a “change of placement” occurs, the LEA must then convene a meeting of the IEP team to make a “manifestation determination” as provided in Section 300.530 (e).⁷

9. Over the current school year, the available evidence shows that the Student was not subjected to any suspension or removal of more than 10 consecutive school days, or to any series of removals totaling more than 10 school days, until at least the date of the March 8, 2010 threatened expulsion. As of the filing of the current complaint, DCPS was not yet obligated to conduct a manifestation determination review with respect to the March 8 incident, and that issue thus was not ripe for presentation in this hearing. *See* 34 CFR 300.511(d). While the Student appears to have been suspended for more than 10 school days during the prior (2008-09) school year, he was not determined eligible for special education until June 1, 2009, and Petitioner’s complaint does not assert the protections of 34 CFR 300.534 for any prior disciplinary infractions.

10. Accordingly, Petitioner has failed to prove that DCPS erred in not timely convening a manifestation determination review meeting. Moreover, even if DCPS had failed in this regard, an FBA was conducted and a BIP was developed in connection with the June 2009 meetings. *Cf.* 34 CFR 300.530 (f).

Issue (4): Inappropriate 1/6/10 IEP

11. 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).⁸ An appropriate IEP also does not guarantee results. “Judicial review of IEPs under the IDEA 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

⁷ The IEP team is to determine whether the conduct in question either (1) was “caused by, or had a direct and substantial relationship to, the child’s disability,” or (2) was the “direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. §300.530(e); *see* 20 U.S.C. §1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child’s disability, then the IEP team generally must (1) conduct a functional behavior assessment (“FBA”) and implement a behavioral intervention plan (“BIP”) for the child, and (2) return the child to the placement from which the child was removed. 34 C.F.R. §300.530(f); *see* 20 U.S.C. §1415(k)(1)(F).

⁸ *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.”).

‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207).⁹

12. Whether an IEP is appropriate, moreover, “can only be determined as of the time it is offered for the student, and not at some later date.” *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). Thus, an IEP generally should not be found to be inappropriate based on subsequent information and events that the IEP Team has not yet had an opportunity to review. On the other hand, a “child’s educational needs at the time of trial may be relevant in determining the child’s needs at the time of disputed events,” *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71,82-83 (D.D.C. 2004). Finally, 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).

13. In this case, Petitioner primarily claims that the 1/6/10 IEP is inappropriate because it reduced the prior full-time IEP to only 7.5 hours per week of specialized instruction and 30 minutes per week of behavioral support services per week in a general education setting. Petitioner alleges that the Student continues to require a full-time IEP outside general education, within a “small, structured, therapeutic placement.” *DCPS-01*, pp. 3-4. The evidence does not appear to support that contention. The Student is capable of succeeding academically in the general education curriculum, with appropriate supports, provided that his behavior and poor class attendance do not interfere with his school work. Moreover, the change in IEP/placement made in January was in direct response to Petitioner’s request that he be given an opportunity to progress toward a regular high school diploma given his measured cognitive abilities. *See generally Parent Test.; SEC Test; Teacher Test.*

14. Accordingly, the Hearing Officer concludes that Petitioner has not carried her burden of proof on this issue. Of course, the results of the further evaluations ordered herein and the extent of the Student’s progress under the revised IEP may well dictate future adjustments.

⁹ *See also Town of Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (affirming the district court decision not to “Monday morning quarterback the school system” by finding evidence created two years after an administrative hearing dispositive of the appropriateness of the IEP at issue in the administrative hearing).

Issue (5): Inappropriate Placement

15. “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 also must be based upon the child’s IEP and be in conformity with the least restrictive environment (“LRE”) provisions of the IDEA. See 34 C.F.R. §§ 300.114 -300.116; DCMR §§ 5-3011, 5-3013; *Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006).

16. Similar to her inappropriate IEP claim, Petitioner alleges that the current placement at the School is not appropriate because (*inter alia*) the Student is “failing in the general education setting” and requires a “full-time small structured therapeutic placement based on the student’s needs.” *DCPS-01*, pp. 3-4.

17. On the basis of the present record, the Hearing Officer concludes that Petitioner has failed to carry her burden of proving that the School selected by DCPS cannot offer an appropriate placement that can fulfill the requirements of the 1/6/10 IEP. However, in light of the relief provided herein for the other denials of FAPE, DCPS will be directed to have the MDT/IEP team review its determination of an appropriate school placement based on all updated information at the next team meeting.

C. Appropriate Equitable Relief

18. 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*, 510 U.S. 7, 16 (1993); *Reid v. District of 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.

19. In this case, Petitioner primarily argues that the Student requires a full-time IEP and placement at the _____ School in Washington, D.C. _____ Alternatively, Petitioner requests that the Hearing Officer order DCPS to (a) perform necessary further

evaluations, and (b) convene an MDT/IEP/Placement meeting with all relevant and necessary team members, within 30 days, to review all evaluations and other information and to revise the IEP as necessary.

20. As the U.S. Court of Appeals for the District of Columbia Circuit has explained, “an award of private-school placement is not...retroactive relief designed to compensate for *yesterday’s* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.” *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Thus, placement awards “must be tailored to meet the child’s specific needs” through a fact-intensive inquiry. *Id.* at 11-12. “To inform this individualized assessment, [c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.” *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“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*, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

21. Applying these factors here, 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. The Admissions Director testified that he had not met the Student for over a year (since March 2009, prior to his eligibility determination), had not seen either of the Student’s IEPs, and had no idea of his current educational program. *Clarke Test.* Thus, his conclusion that the Student was an appropriate candidate for enrollment in the ED program at the Grade Center did not appear grounded in any specific assessment of the Student’s current strengths, weaknesses, needs or progress. Moreover, _____ testified that there currently were no other _____ year olds at the _____ Grade Center, which is part of the _____ School covered by the acceptance letter submitted by Petitioner (*P-1*). _____ Upper School provides services only for students in grades 10-12, plus a _____ grade LD center – neither of which

thought would be appropriate for the Student if he is academically in grade and is not learning disabled. *See Clarke Test*. Finally, Petitioner has not shown that the placement, in a self-contained setting with disabled students only 100% of the time, would represent the least restrictive educational environment capable of meeting this Student's unique special education needs.

22. With respect to compensatory education, as noted above, Petitioner sought to reserve on that issue and did not make a fact-specific showing necessary to craft an award under *Reid v. District of Columbia*, 401 F. 3d at 521. Thus, despite DCPS' counsel's suggestion of such remedy in closing argument, the Hearing Officer has not included any specific compensatory education plan as part of the equitable relief ordered. A hearing officer also may not determine that a student is entitled to compensatory education services, and then delegate to the IEP team the authority to reduce or terminate the award. *Reid*, 401 F. 3d at 526; *see Board of Education of Fayette County v. L.M.*, 478 F.3d 307, 317-18 (6th Cir. 2007). However, courts have found it appropriate for a settlement agreement and/or HOD to require that an MDT/IEP Team meet to "discuss and determine the amount of compensatory education the student is due," and to "develop a compensatory education plan" if it determines such is due, without initially finding entitlement to an award. *Gregory-Rivas v. District of Columbia*, 108 LRP 51949 (D.D.C. Sept. 8, 2008).¹⁰ This may be particularly appropriate where the IEP team is already directed to meet for other purposes – such as to review independent evaluations and/or review and revise the IEP, as here – since "insight about the precise types of educational services [the child] needs to progress" is a critical part of the record on which a compensatory education award should be based. *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 124-25 (D.D.C. 2008), *quoting Branham*, 427 F. 3d at 12. *See also Friendship Edison*, 583 F. Supp. 2d 169 (D.D.C. 2008) (ordering new psycho-educational and vocational evaluations so that a specific compensatory education plan can be crafted).

23. Based on the analysis above and the evidence presented at the due process hearing, the Hearing Officer will grant a form of Petitioner's alternative requested relief, as set forth in the accompanying Order below.

¹⁰ In this regard, the team may wish to consider the appropriateness of the specific types and amounts of mentoring, counseling, and tutoring services proposed by DCPS at the resolution meeting. *See Findings*, ¶ 15; *DCPS-03*.

V. ORDER

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

1. Parent is authorized to obtain an independent vocational assessment, independent comprehensive psychological evaluation, and independent functional behavior assessment (FBA) of the Student, at the expense of the District of Columbia, to be completed within 45 calendar days of the date of this Order. The rates for the independent evaluations shall be in accordance with the Chancellor's Directive dated July 18, 2008.
2. Within **20 school days** of receipt of the foregoing independent evaluations, DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including the Parent. At that meeting, DCPS shall: (a) review the independent evaluations; (b) review all other updated information concerning the Student's unique needs that result from his disability, including recent emotional and/or behavioral issues, his progress and performance in various settings during the 2009-10 school year, and the extent to which his behavior may impede his class attendance and learning; (c) review and revise, as appropriate, the IEP to meet the Student's unique needs; (d) discuss and determine an appropriate school placement and location of services for the 2010-2011 school year; and (e) discuss and determine the amount of additional services, if any, that may be appropriate to compensate the Student for previous missed services and/or denials of FAPE during the 2009-10 school year.
3. Petitioner's other requests for relief shall be, and hereby are, **DENIED**.
4. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: May 12, 2010

/s/ Bruce D. Ryan
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).