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

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA** **PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: September 23, 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 July 11, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's mother.

Petitioner claims that that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to conduct a neuropsychological evaluation; (2) failing to conduct an auditory processing triennial reevaluation; and (3) attempting to "shoehorn" the Student into an inappropriate educational placement for the 2011-12 school year by (*inter alia*) erroneously reducing the amount of specialized instruction on his June 27, 2011 individualized education program.

A resolution meeting was also held on July 25, 2011, which did not resolve the Complaint. DCPS then filed its Response on July 26, 2011, denying the allegations. DCPS

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

asserts (*inter alia*) that it appropriately reduced the hours of programming and services on the Student's IEP based on his most recent academic data; that it has provided the Student with an appropriate amount and type of special education services for the past two years; and that it can currently implement the Student's IEP at his currently identified location of services, *i.e.*, his neighborhood DCPS high school ("DCPS High School").

The statutory 30-day resolution period ended August 10, 2011, and a Prehearing Conference ("PHC") was held on August 31, 2011. (The Hearing Officer's attempts to schedule an earlier PHC between August 15 and 26, 2011 were unsuccessful.) A Prehearing Order was then issued, and the parties filed five-day disclosures as agreed, on September 7, 2011. The Due Process Hearing was held on September 12, 2011. Petitioner elected for the hearing to be closed.

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

> **Petitioner's Exhibits:** P-1 through P-29; P-31; and P-33 through P-38.[2]
>
> **Respondent's Exhibits:** R-1 through R-9; R-11; and R-12.[3]

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

> **Petitioner's Witnesses**: (1) Parent-Petitioner; (2) Psychologist; and (3) Special Education Teacher, Private Middle School.
>
> **Respondent's Witnesses**: Special Education Coordinator ("SEC"), DCPS High School.

At the conclusion of Petitioner's case, DCPS moved for a directed finding, generally on the grounds that Petitioner failed to meet her burden of proof measured against the applicable legal standards on each issue. The Hearing Officer declined to grant the motion, taking the grounds for the motion under advisement to be resolved herein based on the entire record.

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[2] Petitioner withdrew Exhibits 30 and 32. Exhibits P-28, P-31, P-33, and P-34 were admitted over DCPS' objections for the reasons stated on the record. All other Petitioner Exhibits were admitted without objection.

[3] DCPS withdrew Exhibit R-10. Exhibit R-11 was admitted over Petitioner's objection for the reasons stated on the record. All other Respondent Exhibits were admitted without objection.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is September 24, 2011.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

(1) Failure to Evaluate (Neuropsychological). — Did DCPS deny the Student a FAPE by failing to conduct a neuropsychological evaluation of the Student, as recommended in his auditory processing evaluation?

(2) Triennial Reevaluation (Auditory Processing). — Did DCPS deny the Student a FAPE by failing to complete a triennial reevaluation in the area of auditory processing)?

(3) Failure to Develop an Appropriate IEP. — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.,* one that was reasonably calculated to provide educational benefit), as of June 27, 2011?

Petitioner alleges (*inter alia*) that DCPS erroneously reduced the Student's specialized instruction from 26 hours to 15 hours (outside general education) without supporting new evidence or information; that DCPS relied on invalid Woodcock-Johnson test results; and that the Student never mastered all of his goals from the previous IEP dated 02/03/2011.

(4) Failure to Provide an Appropriate Educational Placement. — Did DCPS deny the Student a FAPE by failing to determine an appropriate educational placement for the 2011-12 school year?

Petitioner alleges (*inter alia*) that the Student's academic and social/emotional needs cannot be met at DCPS High School because the Student needs a small student- teacher ratio and a structured school; that DCPS has "attempted to shoehorn" the Student into an inappropriate placement (or to predetermine placement) by deciding placement prior to determining annual goals and special education services; and that he should remain in his current placement in a self-contained special education class/school.[4] *See Complaint,* pp. 9-17; *Prehearing Order* ¶ 5.

[4] Petitioner also filed a "Motion for Stay Put Protection" requesting that DCPS be ordered to allow the Student to attend Private High School as his claimed then-current educational placement during the pendency of this proceeding, but shortly thereafter Petitioner enrolled the Student into a new public charter school, which he was attending at the time of the due process hearing. Accordingly, the stay-put motion has been dismissed as moot.

As relief, Petitioner initially requested that the Hearing Officer order DCPS: (a) to fund a full-time therapeutic placement at Private High School; (b) to fund an independent auditory processing evaluation and independent neuropsychological evaluation; and (c) fund the parent's compensatory education plan (or that the Hearing Officer fashion an appropriate compensatory education award). *Complaint,* p. 18; *Prehearing Order* ¶ 6. However, at the Due Process Hearing, Petitioner appeared to abandon her request for prospective private placement relief since the Student was now enrolled in a new D.C. public charter school (the "Public Charter School"), which began operation for the 2011-12 school year. Petitioner also withdrew her request for compensatory education. Petitioner now requests that DCPS be ordered to fund the independent evaluations and convene an MDT/IEP team meeting to review the evaluations and determine prospective placement (assuming that DCPS continues as the Student's LEA).[5]

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

1. The Student is a -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. His primary disability is Specific Learning Disability ("SLD"). *P-1; P-5; P-14; Parent Test.* He is a resident of the District of Columbia who resides with Petitioner, who is the Student's mother. *P-1; Parent Test.*

[5] The parties were unable to stipulate whether the Public Charter School that the Student now attends is an "LEA Charter" (*i.e.,* acting as its own LEA) or a "District Charter" (*i.e.,* DCPS' acting as the LEA), and neither party presented any direct evidence on this point at hearing. Subsequent to the hearing, Petitioner provided a copy of a 09/15/2011 letter from the Public Charter School stating that it "is its own LEA for the purposes of General Education Services," but that DCPS is the LEA "for Special Education Services." DCPS' counsel did not respond to this post-hearing submission, and current information on LEA status does not appear to be available on the websites of either the OSSE or the D.C. Public Charter School Board. *See* http://osse.dc.gov; www.dcpubliccharter.com. While the Hearing Officer therefore cannot confirm the status, it appears likely that DCPS will continue to function as the LEA for purposes of providing a FAPE to the Student.

2. During the 2010-11 school year, the Student attended a non-public, special-education day school located in the District of Columbia (the "Private Middle School"), where he was in the grade. The Student had been placed there by DCPS and attended the school since 2d grade. *See P-1; Parent Test.* In January-February 2011, DCPS conducted a re-evaluation of the Student to see if he still qualified for special education services as a child with an SLD. *See P-1; P-7; P-8.* In conducting the reevaluation, DCPS reviewed the results of a June 2010 independent comprehensive psychological evaluation, teacher input, observations, a report from DCPS' psychologist, report cards, and progress reports. *See P-8; P-20.*
3. The June 2010 independent psychological (conducted as part of his triennial reevaluation) concluded that the Student continued to have a Learning Disorder, Not Otherwise Specified, based on his cognitive and academic performance, and would benefit from continued special education services.[6]
4. On or about February 3, 2011, the Student's MDT/IEP team met and agreed that the Student continued to meet criteria for special education services under the SLD classification based on his cognitive and academic performance and that he needed special education and related services as a result thereof. *See P-8; P-9; P-11; P-12; P-27.* The team also developed a revised IEP, which provided 26 hours per week of specialized instruction and 1.5 hours per week of behavioral support services, both in an Outside General Education setting. *P-10, p. 6.* The IEP discontinued speech/language services. The Least Restrictive Environment ("LRE") section of the IEP stated that the Student "needs one on one individualized instruction to progress academically with the general education curriculum." *Id., p. 7.*
5. During the 02/03/2011 meeting, the IEP team agreed to consider a less restrictive environment for the 2011-12 school year (when the Student was scheduled to begin high school) at a subsequent meeting. *See P-11, p. 6; P-12, p. 2.*

[6] The evaluator found the Student to have Borderline intellectual ability with a Full Scale IQ score of 78. She also stated: "Scores on the WJ-III indicated that [Student] is functioning to his full potential and above in the current academic assessment, which is surprising given his cognitive delays. [Student's] reading, math, and writing skills were all in the Average range. Although his overall academic skills were Average, [Student's] general success is likely due to the specialized instruction he receives currently. He will likely have difficulty learning new information in a general education setting, given reported receptive and expressive language deficits, as well as his auditory processing deficits, and low processing speed." *P-20, p. 8.*

6. On or about April 29, 2011, DCPS convened a meeting of the Student's MDT/IEP team "to discuss change in location of services for next school year as [Student] is in the grade." *P-13.* Petitioner indicated that she still wanted the Student to be in a full-time, out-of-general-education setting. *Id., p. 1.* Following discussion, the IEP team agreed that the Student's LRE was "a combination of general education and special education." *Id., p. 2.* The meeting notes further indicate that Petitioner refused to consider a regular DCPS public school as an option for the Student, although she agreed to visit and consider an identified public charter school before the next meeting. *Id.*

7. On or about June 27, 2011, DCPS convened another meeting of the Student's MDT/IEP team. The stated purpose of the meeting was again "to discuss change in location of services for [Student] as he is in the grade." *P-15.* However, the team also reviewed the Student's progress and agreed to reduce the specialized instruction hours on his IEP from 26 to 15 hours in an Outside General Education setting. *Id.; P-14, p. 6.* DCPS indicated that the reduction in service hours and change to a combination setting was "due to [Student's] academic progress and mastery of his goals on is IEP." *P-33* (06/29/2011 clarification letter from DCPS Progress Monitor). *See also P-2* (DCPS Response). However, the goals in the 06/27/2011 IEP are virtually identical to the goals in the 02/03/2011 IEP, which carry forward most of the same goals from the May 2010 IEP. *Compare P-14* (06/27/11 IEP) *with P-10* (02/03/11 IEP) and *P-5* (05/08/2010 IEP).

8. DCPS then issued a Prior Written Notice dated 06/27/2011 stating that the IEP team proposed to change the Student's "location of services" from Private Middle School to DCPS High School "because he is aging out of the current school program." *P-29; see also P-15, p. 3.* Petitioner and educational advocate disagreed with the reduction of hours and with the proposed change in placement/location of services. *See Parent Test.; P-15; P-32.*

9. On or about July 8, 2011, Petitioner requested another comprehensive re-evaluation of the Student, to include psycho-educational, auditory processing, and neuropsychological evaluations. *P-34.*

10. At the time of the due process hearing, Petitioner had enrolled the Student at Public Charter School, and the Student was attending that school for the 2011-12 school year. *See Parent Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Issues/Alleged Denials of FAPE

Under the IDEA, 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 failed to prove by a preponderance of the evidence that DCPS has denied the Student a FAPE under Issues 1, 2, and 4 above. However, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 3, ***in part***, to the extent set forth herein.

1. 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.

Petitioner's claim under Issue 1 is based primarily on findings made in a July 2008 auditory processing evaluation, which recommended that the Student "be seen for a comprehensive clinical psychological ***or*** neuropsychological assessment to rule out executive functioning and/or attention deficits. The evaluator of such a psychological assessment would

then be able to provide specific recommendations for the individualized intervention needs for [Student]." *P-17, p. 5* (emphasis added); *see P-1, p. 4 ¶ 6.* DCPS funded an independent comprehensive psychological evaluation, which Petitioner obtained in June 2010. This comprehensive psychological evaluation by a licensed clinical psychologist assessed the Student in a number of different areas, including areas relating to attention and concentration, and did not find executive functioning or attention deficits. *See P-20.*[7] The evaluator also did not recommend any further assessment, such as a neuropsychological, to rule out these concerns. She went on to provide a number of specific recommendations for individualized learning interventions. The results of this evaluation were then considered by the IEP team at its February and June 2011 meetings. The team also did not determine that a further neuropsychological assessment was warranted in order to provide appropriate programming and services for the Student.

Accordingly, Petitioner has not shown that DCPS unlawfully refused to conduct a neuropsychological assessment. The Hearing Officer therefore concludes that Petitioner has failed to meet her burden of proof on Issue 1.

2. Triennial Reevaluation (Auditory Processing)

The IDEA and its implementing regulations provide that a public agency "must ensure that a reevaluation of each child with a disability is conducted" if either (1) the public agency determines that the educational or related services needs … of the child warrant a reevaluation" or (2) "the child's parent or teacher requests a reevaluation." 34 C.F.R. §300.303 (a). The regulations further provide (as a "Limitation") that such a reevaluation: "(1) ***may occur*** not more than once a year, unless the parent and the public agency agree otherwise; and (2) ***must occur*** at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary." *Id.* §300.303 (b). Moreover, the reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be "sufficiently comprehensive to identify all of the child's special education and related services

[7] For example, the evaluator found that the Student's "performance on the Working Memory Index (WMI) fell at the higher end of the Low Average range and represented a relative strength….On a task measuring rote memory, attention and concentration, [Student]'s score fell in the Average range." *P-20, p. 5.* The evaluator also found that the Student's "performance on the Processing Speed Index (PSI) fell in the Low Average range and his skills were evenly developed. Tasks on this Index require the ability to sustain attention and to demonstrate back and forth visual screening." *Id.*

needs...." §300.304(c) (6); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions); *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation "must be a complete evaluation of the child in all areas of the child's suspected disability....").

Also, "IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent." *Smith v. District of Columbia,* Civ. Action No. 08-2216 (RWR) (D.D.C. Nov. 30, 2010), slip op. at 6. In light of the lack of statutory guidance, *Herbin* concluded that "[r]e-evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." 362 F. Supp. 2d at 259 (quoting *Saperstone,* 21 IDELR 1127, 1129 (OSEP 1995)).

In this case, Petitioner claims that DCPS denied the Student a FAPE by failing to conduct an "auditory processing triannual" evaluation within three years. *P-1, p. 7.* Petitioner alleges that the last auditory processing evaluation was conducted on July 11, 2008, which found that the Student at that time had problems and deficits in the area of auditory information processing. *See P-1; P-17.* As with the neuropsychological evaluation, Petitioner further alleges that the Student was harmed when DCPS terminated speech and language services in February 2011 without first conducting a new auditory processing evaluation. *See P-1, pp. 8-9; P-11.*

The Hearing Officer concludes that Petitioner has not established this claim by a preponderance of the evidence. Petitioner actually did not request an updated auditory processing evaluation until July 8, 2011, over five months *after* the date the IEP was revised to discontinue speech/language services. *See P-34.* Petitioner then filed this Complaint only three days later, before DCPS even had an opportunity to respond to the request. Moreover, Petitioner apparently did not make such request during the time she was aware that DCPS was engaged in the re-evaluation process in January-February 2011. DCPS had only a reasonable period of time to complete this re-evaluation, before meeting to consider the results and revise the Student's IEP as appropriate. A triennial reevaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs," but there is no requirement in the IDEA that each and every individual assessment ever conducted must be repeated every three years. *See generally* 34 C.F.R. §300.303; *Herbin, supra; Letter to Tinsley; supra.*

Even assuming *arguendo* that DCPS had failed to conduct a required updated auditory processing evaluation, this would not entitle Petitioner to relief. "A failure to timely reevaluate is at base a procedural violation of IDEA." *Smith v. District of Columbia,* slip op. at 8. *Id.* (citing *Lesesne v. D.C.,* 2005 WL 3276205 (D.D.C. 2005), and distinguishing *Harris v. DC,* 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008)). Procedural delays generally give rise to viable IDEA claims only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006); 34 C.F.R. 300.513 (a) (2). In this case, Petitioner has not carried her burden of proof because she has not shown that the Student's educational program would be different but for the failure to update the auditory processing evaluation within three years. Nor has she shown that DCPS denied her the right to participate meaningfully in the development of the Student's IEPs in either February or June 2011, when the auditory processing evaluation was not yet three years old and prior to the date Petitioner made a written request for such evaluation. Thus, Petitioner has not proved substantive harm or a denial of FAPE. *See Smith, supra,* slip op. at 10-12.

3. Inappropriate IEP Claim

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i) (emphasis added). *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); *see also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988). Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207). An LEA also 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. And 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).

In this case, Petitioner claims that DCPS erroneously reduced the Student's specialized instruction on his June 27, 2011 IEP, primarily because many of the goals in the 02/03/2011 IEP (providing full-time services) had not yet been mastered. *See P-1, pp. 9-11.* However, the evidence shows that the IEP team carefully reviewed the Student's most recent academic data and appropriately determined that the Student needed fewer hours of specialized instruction (in a pull-out setting) in order to make progress in the general education curriculum and address his unique needs. The IEP team included the Parent, the Educational Advocate, the Student's Special Education Teacher and Social Worker at Private Middle School, the Director of Private Middle School, and two DCPS Progress Monitors. *P-15.* The Special Education Teacher reported in detail to the team regarding the Student's progress to date in reading, writing, and math; and she recommended that the Student no longer required a full-time special education setting, although he also wasn't ready for a full-time general education setting either. *Id. See also P-24; P-25.*

Indeed, when called as a witness by Petitioner at the hearing, the Special Education Teacher reiterated this same view, testifying that she had recommended only that the Student continue to receive appropriate amounts of pull-out specialized instruction in reading, writing, and math. *See Special Ed. Teacher Test.* On cross examination, she specifically stated that she agreed with the 15 hours of pull-out instruction and 1.5 hours of behavioral support services

provided in the 06/27/2011 IEP – with the remainder of the Student's time to be spent in general education, where "we thought he would thrive" by gaining more exposure to his non-disabled peers. *Id.* [8] After further discussion, the team (except Parent and Advocate) then agreed with the reduction of hours on the Student's IEP to 15 hours per week of specialized instruction in a pull-out setting. *P-15, p. 2.*

The change in services and setting also appears to be consistent with what the IEP team envisioned at its February 2011 meeting. Essentially, the team decided at that time to allow the Student to complete his 8th grade school year at Private Middle School, with the expectation that with continued progress he would be able to move to a less restrictive environment for high school in the 2011-12 school year. When the team returned to the table in June (as specifically contemplated at the end of the February meeting), these prospective needs were confirmed. While the particular sequencing of events over the course of these meetings appears to be less than ideal, the Hearing Officer cannot conclude that it resulted in a denial of FAPE or improper "shoehorning" of an IEP into a predetermined placement.

Nevertheless, the Hearing Officer does agree with Petitioner that an IEP that merely repeats word-for-word the same statements of measurable annual goals – while providing substantially reduced hours of specialized instruction, based on reported academic progress – is not "reasonably calculated" to confer educational benefit on the Student at the time it was created. "[T]he IDEA requires that as school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disable student." *N.S. v. District of Columbia,* 709 F. Supp. 2d 57, 70 (D.D.C. 2010). The goals articulated in the 06/27/2011 IEP were not sufficiently individualized to meet the Student's needs as of that date. The Hearing Officer therefore concludes that the IEP was inadequate in this respect, and that the defects are so significant that DCPS failed to offer the Student a FAPE. *See* 709 F. Supp. 2d at 69-73.

[8] In contrast, Petitioner's Psychologist presented credible expert testimony regarding her June 2010 evaluation of the Student, but she conceded on cross examination that she had no knowledge of the Student's progress after that date and that she would need such information to assess the appropriateness of the 06/27/2011 IEP. *See Psychologist Test.* She also was not a participant in either the February or June 2011 IEP meetings.

Accordingly, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 3, but only to the limited extent discussed above. The Hearing Officer will order DCPS to hold a prompt IEP team meeting to review and revise the goals section of the IEP to comply with IDEA requirements. This meeting may be combined with a 30-day review meeting to see how the 06/27/2011 IEP is operating at the new Public Charter School location, including whether the combination setting and services provided under that IEP are meeting the educational needs of the Student in such environment. The IEP team will also need to decide whether any additional or different services are needed in light of the revised goals. To the extent Petitioner is not satisfied with any DCPS change or refusal to change the IEP at such meeting, Petitioner retains the right to file a separate due process complaint regarding such actions. *See* 34 C.F.R. 300.513 (c).

4. Failure to Provide Appropriate Educational 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). In determining educational placement, DCPS must place a student with a disability in "an ***appropriate special education school or program***" in accordance with the IDEA. D.C. Code 38-2561.02 (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services ***offered at a particular school***") (emphasis added); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) ("If no ***suitable public school*** is available, the District must pay the costs of sending the child to an appropriate private school."). Among other things, DCPS must ensure (*inter alia*) that the placement decision is "based on the child's IEP," and that it is in conformity with Least Restrictive Environment ("LRE") provisions. 34 C.F.R. § 300.116.

In this case, Petitioner failed to demonstrate that DCPS High School could not implement the services and setting provided in the 06/27/2011 IEP, or that it could not provide an appropriate educational environment reasonably calculated to provide educational benefit to the Student. The uncontroverted testimony of the SEC showed that DCPS High School was capable of implementing the 15 hours of specialized instruction and 1.5 hours of behavioral support

services provided in the 06/27/2011 IEP. *See SEC Test.* While Petitioner's witnesses were skeptical that the DCPS High School could provide small enough classes to meet the Student's needs (which they defined as less than 17-20 students), they conceded that they had not visited the school or sought out any information on its special education services. *See, e.g., Special Ed. Teacher Test.; Parent Test.* Moreover, when Petitioner probed the SEC's testimony on cross examination, she learned that DCPS High School had a special education classroom of no more than 16 students; that a special education teacher is also present in many general education classrooms; and that SLD students are generally placed in different classes from OHI and ID students at the school. *SEC Test. (cross examination).* DCPS High School also employs two social workers who provide counseling to grade students. *Id.* In short, the cross examination did not establish any inability to implement the combination-setting IEP at DCPS High School.

Nevertheless, since (a) the goals in the 06/27/2011 IEP need to be reviewed and revised, (b) any decision on educational placement and/or location of services must be "based on the IEP," and (c) Petitioner's choice of Public Charter School essentially moots the school location previously specified by DCPS for the 2011-12 school year, DCPS necessarily will need to revisit the placement/location decision reflected in its 06/27/2011 Prior Written Notice ("PWN").[9] This shall be reflected in the Order.

B. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, the Hearing Officer will order DCPS to convene an MDT/IEP team meeting (a) to review and revise the IEP goals, consistent with this HOD, (b) to discuss and determine the appropriate hours and setting of specialized instruction based on the revised goals, and (c) to discuss and determine an appropriate educational placement and/or location of services based on the revised IEP and all

[9] The Hearing Officer notes that, even under the cramped definition of "placement" advanced by DCPS counsel under 34 C.F.R. 300.114-300.115 (*see P-2*), a change from a special non-public school to either regular or special classes in a DCPS school would qualify as a change along the continuum of alternative placements . Thus, it is hard to see the 06/27/2011 PWN as anything other than a prior notice of a ***change in educational placement*** under 34 C.F.R. 300.503 (a), which is exactly what the introductory language to the form says it is. *P-29.*

other relevant and updated information including the Student's progress at Public Charter School.

The Hearing Officer declines to order DCPS to fund the independent evaluations requested by Petitioner, since Petitioner failed to prevail on Issues 1 and 2, and such relief is not appropriate at this time. The Hearing Officer also declines to order DCPS to restore the previous full-time hours of specialized instruction, consistent with the findings and conclusions under Issue 3. No other relief was requested by Petitioner at the conclusion of the hearing, and none is found to be appropriate at this time. As noted above, Petitioner abandoned her requests for prospective placement and compensatory education at hearing. And no compensatory education relief would be appropriate in any event for the inadequate goals section of the 06/27/2011 IEP, which was not in effect last school year and has not been shown to have caused any educational harm to the Student in the first few weeks of the 2011-12 school year at her new school.

VI. 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 on or about **October 24, 2011**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members including Petitioner.
2. The purposes of the MDT/IEP team meeting convened under paragraph 1 shall include: (a) to review and revise the Annual Goals provided in the Student's IEP dated June 27, 2011, consistent with this HOD; (b) to discuss and determine the appropriate hours and setting of specialized instruction based on the revised goals; and (c) to discuss and determine an appropriate educational placement and/or location of services based on the revised IEP and all other relevant and updated information including the Student's progress at Public Charter School.
3. Petitioner's other requests for relief in her Due Process Complaint filed July 11, 2011, are hereby **DENIED.**
4. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: September 23, 2011

Impartial Hearing Officer