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

STUDENT,[1] **By and through PARENT,** ***Petitioner,*** **v.** **PUBLIC CHARTER SCHOOL,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: December 23, 2010**

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OSSE
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.*, against Respondent Public Charter School (' The Complaint was filed September 24, 2010, on behalf of a 17-year old student (the "Student") who resides in the District of Columbia, currently attends a non-public day school located in suburban Virginia (the "Private School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. He has an individualized education program ("IEP") that provides 5.5 hours per week of specialized instruction in a General Education setting, plus 1.5 hours per week of behavioral support services in a setting Outside General Education.

Petitioner alleges that denied the Student a free appropriate public education ("FAPE") by, *inter alia*: (a) failing to develop an appropriate IEP, and (b) failing to provide an appropriate educational placement for the 2010-11 School Year. Petitioner claims that the Student needs a full-time therapeutic placement. She seeks prospective placement and tuition

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

reimbursement relief effective September 24, 2010, along with compensatory education for the past two school years.

filed its Response on October 12, 2010. The Response admits that the Student attended for the 2008-09 and 2009-10 SYs, but denies that failed to provide a FAPE to the Student. The Response further asserts (*inter alia*) that because the Student did not re-enroll at for the 2010-11 SY, no longer had authority to make changes to his IEP or decisions about placement, and thus Petitioner is not entitled to any prospective relief.

The 30-day resolution period ended without agreement on October 24, 2010. Prehearing Conferences ("PHC") were then held on November 5 and 12, 2010, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order*, issued Nov. 16, 2010), ¶ 6. To accommodate the 45-day HOD timeline, the Hearing Officer scheduled the Due Process Hearing for November 29, 2010. However, the parties agreed to reschedule the hearing for December 14 to accommodate the availability of parties and witnesses, and a joint motion for continuance was granted for good cause. *Id.*, ¶¶ 2-3.

Disclosures were filed by both parties, as directed, on December 7, 2010, and the Due Process Hearing was held in Rooms 2008 and 2009 on December 14, 2010.[2] Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: AB-1 through AB-15.

Respondent's Exhibits: R-1 through R-28.

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

Petitioner's Witnesses: (1) Student; (2) Petitioner (Guardian); (3) Student's Aunt; (4) Educational Advocate; (5) Assistant Education Director, Private School; (6) Social Worker, Private School; and (7) Special Education Teacher, Private School.

Respondent's Witnesses: (1) Special Education Teacher, (2) Counselor, (3) Transition Specialist, (4) School Psychologist, (5) Director of Admissions, and (6) Placement Oversight Unit Manager, Office of State Superintendent of Education ("OSSE").

[2] Following a morning session, it was determined that the Student Hearing Office audio taping system in Room 2009 had malfunctioned, resulting in a failure to record a portion of the testimony of one witness (the Special Education Teacher at The hearing was resumed in Room 2008, and an agreed summary of the omitted testimony was read into the record.

Written closing statements were submitted by both parties on December 16, 2010.[3] 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 PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing: [4]

(1) **Inappropriate IEP — *Did deny the Student a FAPE by failing to develop an appropriate IEP?*** Specifically, Petitioner claims that the November 2008, March 2009, and/or July 2010 IEPs were inappropriate because they: (1) failed to provide sufficient amounts of specialized instruction to meet the Student's needs; (2) initially failed to provide sufficient amounts of behavioral support services (*i.e.*, at least 1.5 hours per week); (3) failed to appropriately revise the Student's annual academic goals based on his progress or lack thereof; and (4) failed to include any social-emotional goals prior to July 2010.

(2) **Failure to Provide Appropriate Placement — *Did deny the Student a FAPE by failing to provide an appropriate educational placement for the 2010-11 School Year?*** Petitioner claims that, at a 09/20/2010 MDT meeting, she requested that the Student be provided an appropriate, full-time, therapeutic setting to meet his needs, and that failed to do so. responds that as of that date, it no longer had authority to make changes to the IEP or decisions about placement once the Student did not re-enroll at for the 2010-11 SY.

As relief for the alleged denials of FAPE, Petitioner seeks (1) **prospective placement** and funding at Private School, with transportation, for the remainder of the 2010-11 SY; (2) **retroactive reimbursement** of tuition at Private School, back to the Student's date of enrollment, *i.e.,* 09/24/2010; and (3) **compensatory education**, for the period from 11/24/2008 to 09/24/2010. Petitioner's proposed compensatory education plan was included in her five-day disclosures.

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[3] Prior to the five-day disclosure date, both parties also submitted legal briefs on the applicability of the provisions of DCMR 5-E3019 (revised Dec. 2009), as agreed at the PHCs.

[4] The Complaint contained additional claims alleging that (i) failed to implement the Student's IEPs during the 2009-10 SY; and (ii) failed to conduct and review age appropriate transition assessments. However, the parties agreed at the beginning of the due process hearing that these issues were withdrawn. Petitioner did not submit a statement of missed services as required by the *Prehearing Order*, and evidence submitted in five-day disclosures showed that functional vocational evaluations were conducted in February and November 2009. *See R-6; R-12.*

III. FINDINGS OF FACT

1. The Student is a 17-year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with an Emotional Disturbance ("ED"). *See R-17* (7/8/2010 IEP). He was previously found eligible as a child with a Specific Learning Disability ("SLD"). *See R-4* (11/25/2008 IEP); *R-8* (3/19/2009 IEP).
2. During the 2007-08, 2008-09, and 2009-10 School Years, the Student attended PCS, an LEA Charter. The Student was repeatedly disciplined and suspended for in-school infractions. He also failed most of his classes, and he was retained in the 9th grade following the 2007-08 SY and the 10th grade following the 2009-10 SY. *See Complaint* ¶ 2; *Testimony of Student, Petitioner, and Spec. Ed. Teacher.*
3. At the beginning of the 2008-09 School Year, the Student had an IEP in effect dated May 7, 2008, which provided 10 hours per week of specialized instruction in a General Education (inclusion) setting. *AB-8; R-2,* p. 1; *see also R-1* (MDT meeting notes). Areas requiring specialized instruction included reading, math, and written expression. *R-2,* IEP page 4 of 4.
4. On or about November 14, 2008, the Student was administered a set of tests from the Woodcock-Johnson III Tests of Achievement, which included low performance in math calculation skills and math reasoning, and low average performance in written language. *R-3.*
5. On November 25, 2008, the Student's MDT/IEP Team developed an IEP based on his needs as a child with an SLD, which: (a) reduced his hours of specialized instruction in a General Education (inclusion) setting to 5.5 hours per week; and (b) added 45 minutes of the related service of Rehabilitation Counseling in a setting Outside General Education. *AB-7; R-4,* p. 3. The annual goals in academic areas were carried over essentially unchanged from the May 2008 IEP, and no goals were added in the area of Emotional, Social, and Behavioral Development against which progress in counseling services could be measured. *Id.,* p. 2. [5]

[5] Transition goals were included, however, with regard to growth and development of everyday life skills, which arguably related to the rehabilitation counseling services. *R-4,* p. 6 (annual goals for specialized services).

6. On or about February 6, 2009, the MDT/IEP Team met to develop a plan for the Student's re-evaluation. *R-5.* The Team agreed to complete a psycho/educational evaluation and a vocational assessment as part of the re-evaluation. *Id.,* p. 2.
7. On or about March 3, 2009, School Psychologist completed a Psychological Assessment Report. *R-7.* The Student's academic achievement scores showed him performing at approximately the 5th grade level in Broad Math (5.3) and approximately the 6th grade levels in Broad Reading (6.1) and Broad Written Language (6.5). *Id.,* p. 2. The Report also found, *inter alia*, that: (a) his performance on Broad Math, Math Calculation Skills, and Math Reasoning were areas of weakness, although still within the expected range compared to his cognitive functioning; (b) the Student continued to qualify for special education services as a child with a specific learning disability in math; and (c) "social and emotional concerns that have not yet been explored" may be another reason why the Student was not performing well in school. *Id.,* pp. 3-4. Among the report's recommendations were: "Continued participation in a math skills course to increase his basic math skills";[6] an FBA/BIP; and "continued behavior counseling at school to increase his problem solving skills and explore strategies for him to increase his school motivation." *Id.,* p. 4.
8. On March 19, 2009, the Student's MDT/IEP Team again met and developed an IEP based on his needs as a child with an SLD, which: (a) provided the same 5.5 hours per week of specialized instruction in a General Education (inclusion) setting; and (b) increased Behavioral Support Services to 1.5 hours per week in a setting Outside General Education. *AB-6; R-8,* p. 4. The increase in counseling services was justified by the Student's "numerous behavior concerns during the school year including disrespect, oppositional defiant behavior toward both instructors and his peers, theft, excessive absences and tardies, using profanity, singing in class, and outbursts." *R-8,* p. 5. However, no social-emotional goals were added to the IEP at this time. *Id.,* pp. 2-3.
9. In early October 2009, a Functional Behavioral Assessment ("FBA") of the Student was conducted based on September 2009 observations at The stated reasons for the referral were that the Student "consistently disregard[s] class rules and directives from authority, displays inappropriate outbursts during class instruction, and does not turn in class

[6] At the subsequent 03/19/2009 MDT meeting, the Student's math skills teacher reported that he "is on lesson 2 and his classmates are on lesson 40." *R-9.*

assignments or homework." *AB-9; R-10,* p. 1. On or about October 8, 2009, then developed a Behavior Intervention Plan for the Student based on the FBA. *R-11.* The Team agreed to review the BIP in early November 2010. *Id.*

10. On or about January 12, 2010, the MDT/IEP Team met to discuss the Student's failing grades and behavior interruptions in his academic classes. *R-13.* Specific concerns were noted regarding "his ability to demonstrate self-control" in the classroom environment. *Id.,* p. 2. The team decided that it would "reconvene in two weeks to discuss [Student's] progress, and determine if he will remain at this school, or at another location that will assist him with being successful." *Id.,* p. 3. The next team meeting appears to have taken place on or about March 12, 2010 (two months, not two weeks, later). *R-14.*
11. Around the middle of the 2009-10 SY, Petitioner and staff (including the Student's counselor) began to discuss whether other secondary school programs should be considered in order to meet the Student's needs, given his lack of academic and behavioral progress at Petitioner wanted to look at other public school options and requested that consider alternative placements for the 2010-11 SY. In response, assisted the Student and Petitioner in exploring other public school options and provided a list of schools for Petitioner to consider. *See Response,* ¶ 14; *Petitioner Testimony.* The Case Manager testified that she sent home the list of schools shortly after the December-January winter holiday break, and that the list included non-public therapeutic programs such as the Foundations School due to "the nature and severity of what was going on" with the Student. *Case Manager Testimony.*
12. On or about March 12, 2010, conducted an annual IEP meeting for the Student. *R-14.* At that time, his Case Manager reported that the Student was "still failing all academic courses" and "probably will not be promoted to the 11th grade, after failing 10th grade for the second year in a row." *Id.,* p. 2. Nevertheless, the team decided that the goals for the IEP would remain the same. *Id.*
13. In May 2010, School Psychologist conducted an updated psychological evaluation of the Student, and then prepared a written report dated June 1, 2010. *See AB-10; Psychologist Testimony.* The report found (*inter alia*) that: classroom observations of the Student "have revealed he is highly disruptive to the classroom environment"; the Student experienced emotional distress consistently throughout testing; and his responses to the Conners CBRS

suggested that he was experiencing depressive symptoms and feelings of anxiety. *AB-10,* 3, 7-8. The School Psychologist recommended that "[b]ased upon current test results, [Student] should be provided Special Education Services as a student with Multiple Disabilities (Specific learning Disability and Emotional Disturbance)". *Id.,* p. 9.

14. A June 15, 2010 End of Year 2009-2010 Clinical Progress Report similarly found that the Student "continues to struggle with exhibiting appropriate behaviors in the classroom and respecting certain adults," and that "his retentions [in grade] are due to negative behaviors impacting [his] ability to remain in the classroom." *R-20. See also R-21* (Progress Notes for Transition Services) (noting that "his behavior within the classroom has become more distracting to students learning environment'); *R-27* (Psychologist's Observations) (noting teacher comments that the Student "often makes attempts to leave class and avoid class work at any cost").

15. On or about July 7, 2010, prepared an Evaluation Summary Report for the Student's MDT/IEP Team, to accompany the School Psychologist's 6/1/2010 evaluation report. *AB-11.* In the area of Academics-Mathematics, described the following concerns: "[Student] is not able to follow instructions in an inclusive classroom" and "inconsistently completes his assignments in class." *Id,* p. 1. He also "does not follow instructions of the teacher and [is] easily distracted." *Id.* In the area of Emotional, Social, and Behavioral Development, noted that "data collected from [Student's] teachers indicate that he has shown no improvement since the beginning of the year, despite the check in check out procedures implemented." *Id.,* p. 3. Overall, concluded that "[Student's] emotional disability has a tremendous impact on his classroom performance and academic achievement." *Id.,* p. 4.

16. On or about July 8, 2010, the Student's MDT/IEP Team then met "to review reevaluation testing results and determine eligibility." *R-16* (meeting notes). Based on the results of the Student's 6/1/2010 psychological evaluation, the Team endorsed the School Psychologist's determination that "Emotional Disturbance is the most prevalent disability at this point," and changed his disability classification from SLD to ED. *Id.; Psychologist Testimony.* The Team also decided to continue the same level of IEP services, *i.e.*: (a) 5.5 hours per week of specialized instruction in a General Education (inclusion) setting; and (b) 1.5 hours of Behavioral Support Services in a setting Outside General Education. *AB-5; R-17,* p. 5. Social-emotional goals were added to the IEP, *R-17, p. 4,* but no other changes appeared to

have been made at this time. The team noted that the Student "needs to reenroll in a school soon." *R-16,* p. 4.

17. The Student did not re-enroll at at the beginning of the 2010-11 School Year. Petitioner testified that she informed that she was having trouble finding another school and unsuccessfully attempted to re-enroll the Student through the admissions office prior to the end of the 2009-10 SY. Petitioner stated that someone from was supposed to call her back, but never did, before she ultimately was informed in September that spaces were no longer available for the 2010-11 SY. *See Petitioner Testimony.*[7]
18. On September 20, 2010, the Student's MDT/IEP Team met to review Petitioner's concerns following a request for records, which included the fact that the Student was no longer attending school and wanted assistance from Petitioner stated that she did not re-enroll the Student because she was looking for alternative schools for him. *R-18* (9/20/2010 meeting notes), pp. 1-2; *Petitioner Testimony.* Director of Special Education told Petitioner that she would talk to admissions to see if there were any openings and respond back to Petitioner's attorney. *R-18,* p. 3; *AB-13.*
19. On September 21, 2010, emailed its response to Petitioner's counsel, stating that it "check[ed] ... to see if there were any spots available in the 10th grade. Unfortunately, the high school is full."). *AB-13.* Because the Student did not re-enroll at for the 2010-11 School Year, told Petitioner that it no longer had authority to make changes to his IEP or make decisions about placement. advised Petitioner that the Student needed to be enrolled in school and that whatever school he was enrolled in would have to make decisions about his IEP and placement. *See Response,* ¶ 15; *Complaint,* ¶ 15.
20. On September 24, 2010, the same date as the Complaint was filed, Petitioner's counsel wrote a letter to stating: "As a result of failure to provide [Student] with an appropriate placement, my client intends to enroll [Student] in an appropriate non-public school, at the expense of as soon as possible." *AB-12.* Shortly thereafter, in late September 2010, the Student enrolled at the Private School. *See, e.g., Father's Testimony; Petitioner's Testimony; Private School Asst. Educ. Director.*

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[7] witnesses disputed this testimony. *See, e.g., Testimony of Admissions Director.* Given the Hearing Officer's conclusions regarding legal obligations to provide a FAPE to the Student (discussed *infra*), it is not necessary to resolve this specific conflict.

21. On November 8, 2010, subsequent to the filing of the Complaint, convened a resolution meeting to discuss the due process hearing notice. stated that an independent vocational evaluation could be completed for the Student's transition plan, and it offered to fund 50 hours of independent tutoring to resolve the issue of compensatory education. However, was not willing to fund the placement at Private School. *See AB-1* (meeting notes); *AB-2.* As a result, the complaint was not resolved.
22. The evidence shows that the IEPs developed at the November 2008, March 2009 and July 2010 MDT/IEP Team meetings were not reasonably calculated to provide the Student with meaningful educational benefit, in that the IEPs (a) failed to provide sufficient hours of specialized instruction, including one-to-one instruction outside the General Education setting, (b) failed to revise the Student's annual academic goals appropriately based on his progress or lack thereof; and (c) failed to include any social-emotional goals prior to July 2010. The November 2008 IEP reduced his hours of specialized instruction, and the March 2009 and July 2010 IEPs maintained the same level of specialized instruction, despite demonstrated lack of academic progress. The Student's annual academic goals in his IEPs have remained substantially the same since May 2008; and no social/emotional goals were added to the March 2009 IEP despite significantly increased behavioral concerns at that time. However, Petitioner has not demonstrated that the Student requires full-time special education and related services in a setting outside General Education.
23. It is undisputed that did not initiate the OSSE's placement review process pursuant to DCMR 5-E3019.8, and did not otherwise contact the OSSE for assistance in securing an appropriate placement for the Student, at any time. Instead, continued to implement the IEP/placement process and take sole responsibility for all applicable IDEA requirements for the Student, at least through the end of the 2009-10 SY.
24. The evidence shows that, as of September 24, 2010, the Student has obtained meaningful educational benefit at the Private School. It appears to provide appropriate specialized instruction and related behavioral support services designed to meet his specific areas of need, including academic instruction and counseling in small groups with low student-teacher ratios. The Student testified that he is learning at Private School and that their counseling has been helpful. He has earned better grades in several courses, but his problem behaviors have continued. The Private School has addressed the Student's disruptive

classroom behaviors with a behavior management system that includes "point sheets" and brief "cool-down" periods averaging 10-30 minutes, which minimize the amounts of missed instruction as compared with the lengthier in-school suspensions employed at However, it is a full-time, out-of-general-education program, and the Student's current IEP does not provide for full-time services. Additionally, he has had eight (8) total absences in the first three months at the school. *See R-17* (7/8/2010 IEP); *R-26* (behavior log)*; Testimony of Student, Student's Aunt, Educational Advocate, Private School Asst. Educ. Director, Private School Social Worker, and Private School Sp. Ed. Teacher.*

25. Petitioner has not demonstrated that the Student necessarily requires placement in a full-time, special education private school program offering no interaction with any non-disabled peers. *Id.* Thus, the Hearing Officer finds that whether Private School and/or another public or private school program can offer an appropriate secondary school program that can implement the goals and services in the Student's IEP in the least restrictive environment, going forward, is an issue that remains to be determined by his MDT/IEP Team.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence.[8]

The Hearing Officer concludes that Petitioner has met her burden of proof on each of the designated issues, to the extent set forth below.

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[8] *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

1. Inappropriate IEPs

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

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." [9] 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.'" [10] 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 [any] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, Petitioner claims that that the November 2008, March 2009, and/or July 2010 IEPs were inappropriate because they: (a) failed to provide sufficient amounts of

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[9] *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); *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. ").

[10] *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").

specialized instruction to meet the Student's needs; (b) initially failed to provide sufficient amounts of behavioral support services (*i.e.*, at least 1.5 hours per week); (c) failed to appropriately revise the Student's annual academic goals based on his progress or lack thereof; and (d) failed to include any social-emotional goals prior to July 2010.

Petitioner has demonstrated that providing for only 5.5 hours per week of specialized instruction in a General Education setting was not reasonably calculated to confer educational benefits on the child and was not a sufficient level of services to meet the Student's academic needs during the period from November 2008 through June 2010. In particular, The Hearing Officer agrees with Petitioner that acted inappropriately in ***reducing*** the Student's specialized instruction from 10 to 5.5 hours per week in the November 2008 IEP, despite academic achievement several grade levels below and the fact that he had been retained following the 2007-08 SY. And the March 2009 and July 2010 IEPs maintained this same level of specialized instruction, despite continued lack of academic progress.

Petitioner has also shown that each of the IEPs inappropriately repeated the same annual academic goals. *Compare AB-5, AB-6, and AB-7.* "Because the IEP must be 'tailored to the unique needs' of each child, *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. *See* 20 U.S.C. 1414 (b)-(d)." *Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6; *see also* 34 C.F.R. 300.324 (b). The Case Manager conceded that the Student had not made academic progress during his time there. *See Case Manager Testimony.* Yet consistently failed to adjust the Student's annual academic goals appropriately based on this lack of progress.

In addition to his academic weaknesses, the Student experienced significant behavioral and social-emotional difficulties that impeded his academic success. Petitioner has shown that neither the November 2008 nor March 2009 IEPs included any social-emotional goals designed to meet the Student's needs in this area, against which his progress in counseling could be measured. concedes that "the IEPs prior to July 2010 do not contain specific social-emotional goals," but argues that this was merely "a procedural flaw at best" since the counselor testified that she employed certain goals in practice. *Closing Argument,* p. 3;

Counselor Testimony. However, "[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,* 110 LRP 26678 (D.D.C. May 4, 2010),

slip op. at 12. *See also Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006) ("A written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent to both monitor her child's progress and determine if any change to the program is necessary."). also appears to suggest that the Student's failure to make academic and behavioral progress under his IEPs was due simply to his choosing not to do the assigned work. *See Closing Argument,* p. 4. But own July 2010 evaluation report concluded that "[Student's] emotional disability has a tremendous impact on his classroom performance and academic achievement,"*AB-11,* p.4, thus underscoring the importance of clearly articulated social-emotional goals in counseling.

On the other hand, the Hearing Officer concludes that Petitioner has not demonstrated that the IEPs provided insufficient amounts of behavioral support services. Petitioner agrees that 1.5 hours per week is a sufficient level of counseling services, and the record indicates that appropriately increased services to that level (from 45 minutes per week) in March 2009, in light of (i) the School Psychologist's findings regarding "social and emotional concerns that have not yet been explored," and (ii) other information at that time indicating "numerous behavior concerns" at school. *Findings,* ¶¶ 7-8.

2. **Failure to Provide Appropriate Placement for 2010-11 SY**

has elected to serve as its own LEA (*i.e.*, it is an "LEA Charter") and thus is responsible for compliance with all requirements applicable to an LEA under the IDEA and its implementing regulations (34 C.F.R. Part 300), as well as local laws, regulations and policies. *See DCMR 5-E3019.3.* As noted above, under the IDEA, FAPE includes "an appropriate preschool, elementary school, or secondary school education ... provided in conformity with the [IEP]." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1. In determining the educational placement of a child with a disability, the LEA must ensure that the placement decision is made at least annually by a group of people that includes the parent, 34 C.F.R. 300.116; and it must ensure that a continuum of alternative placements is available to meet the needs of such child, *id.* at 300.115 (a). [11]

[11] *See also Branham v. District of Columbia,* 427 F. 3d 7, 12 (D.C. Cir. 2005) (affirming "placement based on **match between a student's needs and the services offered at a particular school**") (emphasis added); *Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988) (quoting *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 200, 207 (1982); D.C. Code 38-2561.02 (requiring

Additionally, the OSSE has promulgated specific rules governing the responsibilities of LEA Charters in determining placements, including in transfer situations and into non-public schools. Among other things, an LEA Charter is responsible for maintaining placements in the least restrictive environment (*DCMR 5-E3019.8*) and is required to contact OSSE for "technical assistance" if it "anticipates that it may be unable to meet its obligation to provide a FAPE to a child with a disability currently enrolled in its school."*DCMR 5-E3019.8(b).* Upon completion of the placement review process resulting from the OSSE contact, if the IEP team makes a placement decision that cannot be implemented within the LEA Charter, the OSSE shall then make a "location assignment" for the placement of the child. *DCMR 5-3019.8(b)(5). See also OSSE Testimony.* And if the child's placement is changed to a non-public school by the IEP team at the LEA Charter in order to ensure the provision of FAPE, the regulations provide that "a child enrolled in an LEA Charter shall remain enrolled in and is the responsibility of the LEA Charter, unless and until his or her parent re-enrolls the child into another LEA (whether another LEA Charter, a District Charter, or DCPS)." *DCMR 5-3019.9.* However, tuition payments for D.C. children with disabilities placed in non-public schools are treated as "state level costs and are not the responsibility of the LEA Charter." *DCMR 5-3019.9(e).*

In this case, the evidence is undisputed that did not determine placement at the July 2010 meeting, and it also did not contact the OSSE and/or initiate any placement review process within OSSE pursuant to DCMR 5-E3019.8. At the same time, assisted the Student in exploring other school options, both public and private. Thus, continued to assume responsibility for implementing all applicable IDEA requirements for the Student, including placement, at least through the end of the 2009-10 SY. The evidence also suggests that anticipated or should have "anticipate[d] that it ***may*** be unable to provide a FAPE to [the Student, who was] currently enrolled in its school." *DCMR 5-E3019.8(b)* (emphasis added). Accordingly, it appears that should have contacted the OSSE and triggered the placement review process outlined in the regulations. Its failure to do so effectively circumvented a procedure carefully designed to produce an appropriate prospective placement for every disabled student, and left Petitioner to navigate the Student's special education options on her own.

DCPS to place a student with a disability in "**an appropriate special education school or program** in accordance with this chapter and the IDEA") (emphasis added).

argues that "OSSE only gets involved when an LEA is considering placement into a more restrictive non-public placement" and that "[t]his was not the case." *Closing Argument,* p. 10 (citing OSSE testimony). However, the regulations appear to apply whenever the LEA Charter "anticipates that it may be unable to meet its obligation to provide a FAPE to a child currently enrolled in its school," and calls for notice to OSSE prior to any IEP meeting "at which a possible change in placement to a more restrictive environment will be discussed." DCMR 5-E3019.8 (b). Pursuant to 34 C.F.R. 300.114 -300.115, a more restrictive environment may include both special classes and separate special schools – either of which may have been potentially implicated in this case, given the Student's continued difficulties in the general education environment. *See, e.g., Case Manager Testimony* (testifying that had no self-contained classrooms, and that list of schools she provided to Petitioner included non-public choices due to "the nature and severity of what was going on" with the Student); *R-13* (recognizing need to monitor Student's progress to "determine if he will remain at this school, or at another location that will assist him with being successful.").

Accordingly, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 2. Petitioner has shown that denied the Student a FAPE by failing to provide an appropriate educational placement to the Student for the 2010-11 School Year by, among other things, failing to pursue the OSSE placement review process for LEA Charters under DCMR 5-E3019.8. Alternatively, Petitioner has shown that committed a significant procedural violation in carrying out its LEA placement responsibilities in this regard, and such procedural inadequacy (a) impeded the Student's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, and/or (c) caused a deprivation of educational benefit. 34 C.F.R. 300.513. Moreover, at the time these actions and/or inactions took place (during the 2009-10 SY), the Student was still "currently enrolled" at DCMR 5-E3019.8 (b). The denial of FAPE is not based on what did or didn't do in September 2010, but rather what occurred during the end of the 2009-10 SY, even though the effects of the actions would be felt in the 2010-11 SY.

C. <u>Appropriate Relief</u>

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. §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, 521-23 (D.C. Cir. 2005). Petitioner seeks (1) **retroactive reimbursement** of tuition at Private School, back to the Student's date of enrollment, *i.e.,* 09/24/2010; (2) **prospective placement** and funding at Private School, with transportation, for the remainder of the 2010-11 SY; and (3) **compensatory education**, for the period from 11/24/2008 to 09/24/2010. The Hearing Officer exercises his discretion to grant appropriate equitable relief as set forth below.

Retroactive Reimbursement

IDEA provides that "a court or a hearing officer ***may*** require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R. § 300.148 (c) (emphasis added). [12] However, "equitable considerations are relevant in fashioning relief," *Burlington,* 471 U.S. at 374, and courts and hearing officers have "broad discretion" in the matter. *Id.* at 369. The Hearing Officer therefore "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter,* 510 U.S. at 16; *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009), slip op. at 16-17 ("When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted").

Moreover, IDEA provides that the cost of reimbursement may be reduced or denied if: (1) "at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team ...[of] their intent to enroll their child in a private school at public expense"; or (2) at least 10 business days prior to removal, the

[12] *See also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006). The Hearing Officer concludes that the Private School placement chosen by the parents is "proper under the Act," which is a lesser standard than FAPE. *See Carter,* 510 U.S. at 15; *Burlington,* 471 U.S. at 370.

parents did not give written notice of their intent to the public agency; or (3) "upon a judicial finding of unreasonableness with respect to the actions taken by the parents." 34 C.F.R. §300.148 (d).

Considering all relevant factors based on the record in this case, including the conduct of Petitioner, the Hearing Officer concludes that reimbursement of past tuition should be denied. At the July 2010 IEP team meeting, Petitioner did not state her intent to enroll the Student in Private School at public expense. Nor did Petitioner provide written notice prior to the Student's removal from rather, she sent notice over a month into the new school year, well after the date that the Student had been effectively "removed" from by not re-enrolling him there. By that time, the "notice' to could no longer accomplish its purpose of allowing it to take corrective action, as argues. The Hearing Officer finds that this course of conduct was unreasonable under the circumstances.

Prospective Placement

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) (emphasis in original). With respect to prospective private placement awards, *Branham* makes clear that they "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 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). "Because placement decisions implicate equitable

considerations, moreover, courts [and hearing officers] may also consider the parties' conduct." *Id.; Reid,* 401 F.3d at 524.

The Hearing Officer concludes that Petitioner has not demonstrated in this hearing that a full-time, out of general education placement at the Private School, going forward, is necessary and appropriately tailored to meet the specific needs of the Student. The Student does not currently have a full-time IEP, and Petitioner has not demonstrated that full-time services are required to meet the Student's needs, although she has demonstrated that reducing his hours of specialized instruction from 10 to 5.5 per week was not appropriate. Petitioner also has not shown on the present record that the Private School represents the least restrictive environment (LRE) capable of meeting the Student's special education needs, where the Private School has only disabled students and cannot offer any interaction with non-disabled peers.

At present, however, the Student is attending Private School due to failure to pursue the required placement review process and identify an appropriate placement; he is entitled to special education services under the IDEA; he is receiving educational benefit at Private School; and no other educational placement has been or is being offered by any public agency. Accordingly, the Hearing Officer concludes that placement at Private School on at least an ***interim basis*** during the current 2010-11 School Year would constitute appropriate equitable relief under the circumstances. This is intended as a temporary placement pending completion of the process outlined in the Order below. *See, e.g., Verhoeven v. Brunswick Sch. Comm.,* 207 F. 3d 1 (1st Cir. 1999); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); *Green v. District of Columbia,* 45 IDELR 240 (D.D.C. 2006).

This temporary, non-public placement shall be at the expense of subject to whatever recourse may have to the OSSE pursuant to D.C. Code §38-2907 and DCMR 5-E3019.9 (e) (providing that tuition payments for D.C. students placed in non-public schools are state level costs not the responsibility of LEA Charters).

This limited form of prospective relief will allow an opportunity for the Student to become re-enrolled in an LEA (either DCPS or LEA Charter), and for the LEA to complete its normal IEP/placement review process. Should such further review demonstrate that an appropriate special education school or program is available within the D.C. public school system, that option would be given priority under D.C. Code 38-2561.02, even if a private school

might be ***more*** appropriate or better able to serve the Student. *See, e.g., Roark v. District of Columbia,* 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006).

Compensatory Education

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). "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." 401 F.3d at 524. *See also 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'").

In this case, Petitioners demonstrated that failure to provide the Student with an appropriate special education program and placement from November 2008 to the beginning of the 2010-11 School Year has resulted in harm to the Student. failure to provide the Student with the appropriate special education services that he needed harmed the Student as he fell further behind academically especially in math, and as his disruptive behaviors that impeded his learning increased in frequency and severity.

Based on careful consideration of Petitioner's proposed compensatory education plan, as well as the other testimony and evidence presented in this case, the Hearing Officer concludes that the Student should be awarded 50 hours of academic tutoring focused on mathematics (the same amount that offered to fund at resolution) and 25 hours of independent counseling and behavioral support services. The plan meets the *Reid* standard because it has been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from an appropriate program of special education that should have supplied in the first place during the relevant time period, and (b) reasonably tailored to the unique needs and deficits of the Student, which have been shown to relate primarily to these two areas (*i.e.,* math academics and behavioral issues). The compensatory education plan addresses the Student's

specific deficiencies by enabling him to gain skills and other benefits he likely would have obtained had he not been placed in an inappropriate learning environment during the past two school years. *See AB-14; Educational Advocate Testimony.*

V. ORDER

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

1. Within **five (5) school days** of this Order, Student shall be placed at **Private School,**[13] including tuition and transportation, at the expense of Public Charter School. The placement shall be on an **interim basis**, until such time as any change is effected in the Student's educational placement following completion of the MDT/IEP Team's IEP and placement review process set forth in this Order.
2. For purposes of the interim placement and further MDT/IEP review process ordered herein, the Student shall be deemed to remain enrolled in and be the responsibility of Public Charter School, unless and until his parent enrolls the Student into another LEA (whether another LEA Charter, a District Charter, or DCPS) pursuant to DCMR 5-E3019.9.
3. Within **45 calendar days** of this Order, (or the successor LEA) shall convene a meeting of the Student's MDT/IEP Team, with all necessary members including the parent participating. The purposes of the meeting shall include: (a) to review all updated information concerning the Student's performance and progress at Private School during the 2010-11 School Year; (b) to review and revise, as appropriate, the Student's Individualized Education Program (IEP) in light of all updated information, to correct the deficiencies identified in this HOD (including providing sufficient amounts of specialized instruction and appropriate annual measureable goals), and to otherwise meet the unique needs of the Student that result from his disability; and (c) to discuss and determine an appropriate educational placement that can meet the Student's needs and implement an appropriate revised IEP.
4. To the extent necessary and appropriate, should anticipate that it may be unable to meet its obligation to provide a FAPE to the Student in its school, shall contact the OSSE for technical assistance and to initiate the placement review process provided for in DCMR 5-E3019.8 (b). In that event, shall provide notice to the OSSE at least **30 days** prior to the scheduled IEP meeting in accordance with DCMR 5-E3019.8 (b) (2).
5. shall fund **50 hours** of independent academic tutoring focused in the area of mathematics and **25 hours** of independent counseling and behavioral support

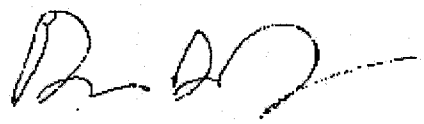
[13] *See* Appendix.

services, as compensatory education for the denials of FAPE found in this HOD. The services shall be compensated at standard reasonable rates, and shall be completed by December 23, 2011.

6. All other requests for relief in Petitioner's September 24, 2010 Due Process Complaint are **DENIED**.

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

IT IS SO ORDERED.



Dated: December 23, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).