DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

[redacted], on behalf of
[redacted]

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0755

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2013 JAN 28 AM 10: 15

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is an [redacted] girl, who presently attends a nonpublic special education school located in the District of Columbia at Parent's expense. On November 1, 2012, Petitioner filed a Complaint against DCPS, inquiring whether (1) Student's 11/2/10 IEP provided a free appropriate public education ("FAPE") for school year ("SY") 2010/11; (2) DCPS failed to identify the full extent of Student's special needs during SY 2010/11; (3) Student's 9/13/11 IEP offered FAPE; (4) and to what extent Student should receive compensatory education for the absence of FAPE during SY 2010/11; (5) the nonpublic school provided educational benefit to Student during SY 2011/12; and (6) the nonpublic school should be deemed Student's "current educational placement."

On November 20, 2012, DCPS filed its Response, which asserted the following defenses: (1) DCPS used appropriate evaluation data and, along with Parent, developed an IEP on 11/2/10 reasonably calculated to provide educational benefit; (2) Parent agreed with all deliberations and with the 11/2/10 IEP; (3) DCPS used appropriate evaluation data and, along with Parent, developed an IEP on 9/13/11 reasonably calculated to provide educational benefit; (4) compensatory education is a claim and not a legal remedy, so the claim regarding same fails to present a claim upon which relief can be granted, and in any event no compensatory education is owed; (5) the nonpublic school is not proper; (6) the nonpublic should not be deemed Student's placement because Student unilaterally and voluntarily withdrew from DCPS and enrolled in the private school at a time when FAPE had been made available and was not at issue; and (7) any

parental request for reimbursement of the private school tuition should be denied because Parent failed to provide the required notice.

The parties concluded the Resolution Meeting process by participating in a resolution session on November 9, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline initially was set to begin on December 2, 2012 and end on January 15, 2013. However, on December 19, 2012, Petitioner filed a Motion for a Continuance on the ground that the LEA was closed for Winter Break through January 7, 2013, which the chief hearing officer granted on December 19, 2012, with the result that the 75-day timeline for this case was extended to January 25, 2013, which is now the HOD deadline.

On December 10, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on December 13, 2012.

By their respective letters dated January 7, 2013, DCPS disclosed 16 documents (Respondent's Exhibits 1-16), and Petitioner disclosed fifty-four documents (Petitioner's Exhibits 1-54).

The hearing officer convened the due process hearing on January 14, 2013.[1] DCPS declined to submit its disclosures for inclusion in the administrative record until the start of its case. Petitioner's Exhibits 1, 8-16, and 20-22 were admitted into the record without objection. DCPS objected to the admission of Petitioner's remaining Exhibits on relevance, hearsay and authentication grounds. Petitioner's Exhibits 2-4. 6-7, 17-19, and 23-54 were admitted over objection. Petitioner's Exhibit 5 was conditionally excluded as facially irrelevant. Petitioner also offered, and the hearing officer accepted for admission into the record, a set of administrative emails that were sent during the course of this matter. Thereafter, the hearing officer received Petitioner's opening statement, DCPS reserved its opening to the start of its case, and the hearing officer received the majority of Petitioner's testimonial evidence prior to adjourning the hearing.

The hearing officer reconvened the hearing on January 16, 2013. Petitioner presented its final witness and rested. DCPS offered its disclosed documents for admission into the record, and DCPS Exhibits 2 and 6-15 were admitted into the record without objection. Respondent's Exhibit 1 was excluded on Petitioner's relevance objection, and Respondent's Exhibits 3, 4 and 16 were excluded for Respondent's failure to provide them to Petitioner prior to the 5-day disclosure date pursuant to Petitioner's requests for records, and Respondent's Exhibit 5 was excluded as irrelevant. Petitioner objected to DCPS's proposed testimonial evidence on the ground that the descriptions of the testimony provided in the 5-day disclosure were too broad and vague. The hearing officer overruled the objection but determined that DCPS would not be allowed to present any expert testimony due to its failure to provide resumes of designated experts with its 5-Day disclosures.

Thereafter, the hearing officer received DCPS's testimonial evidence and ruled that the parties would be allowed until 9:30 am on January 22, 2013 to provide written closing statements that did not exceed 7 pages in length. Petitioner timely filed a brief of the appropriate length; DCPS

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

missed the deadline by several hours but offered the very cold weather and vehicle problems as an excuse, and the brief DCPS ultimately filed was 19 double-spaced pages. Although the hearing officer will excuse DCPS's lack of timeliness, DCPS will be held to the page-limit, with the result that the hearing officer will only consider pages 1-14 (counting each double-spaced page as ½ page) of DCPS's written closing statement.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did the 11/2/10 IEP fail to provide FAPE for SY 2010/11 by failing to provide sufficient specialized instruction?

2. Did DCPS fail to identify the full extent of Student's special needs during SY 2010/11 after additional evaluation data was provided by Parent?

3. Did the 9/13/11 IEP fail to provide FAPE by failing to provide sufficient special education services?

4. Did the nonpublic school provide educational benefit to Student during SY 2011/12?

5. Should the nonpublic school should be deemed Student's "current educational placement"?

FINDINGS OF FACT[2]

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an [redacted] who presently attends second grade at a nonpublic special education school located in the District of Columbia.[3]

2. Student is Parent's adopted child. Student was born in [redacted] prematurely at 7 months, she had non pre-academic exposure, and she was malnourished from infancy to 2008 (age 4) with a "failure to thrive" diagnosis. At age [redacted] Student could not hold

[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] *See* testimony of Parent.

a pencil, ate with her hands and could not use a fork or spoon, did not know what to do with a book, could not dress herself, and used language that was unintelligible; however, Student could walk, run, was toilet trained and appeared to understand basic English.[4]

3. Student came to the United States in September 2009, which is when Parent enrolled Student in a DCPS elementary school. Parent advised the school's principal and Student's teacher that Student had not had any prior schooling and had language issues, so Parent was unsure of what Student's needs were. The principal advised Parent that the school staff would observe and work with Student to see how she performed.[5]

4. From the start, Student's teacher had many concerns about Student during SY 2009/10. In October to November of 2009, the teacher asked the then SEC to observe Student, and after an informal meeting between Parent, the teacher and the then SEC, the SEC determined that the MDT would observe Student and take the necessary action. The team ultimately recommended a speech/language evaluation for Student, and in December 2009, Student received an IEP that provided 30 minutes per week of specialized instruction in general education, 30 minutes per week of speech/language services in general education and identified Student's disability as speech/language impairment ("SLI").[6]

5. Although Parent did not receive the procedural safeguards at Student's December 2009 meeting, she signed the documentation saying she did because she did not realize the safeguards were a separate document, and she believed she had to sign to receive implementation of the IEP.[7]

6. Student received speech/language services pursuant to her December 2009 IEP, and those services helped with Student's speech difficulties. However, Student continued to struggle with her school work. She could not understand the concept of money and the homework in special classes other than kindergarten homeroom was way above Student's level, so Parent focused on the basics of learning letters, learning to count and similar concepts.[8]

7. At the end of the kindergarten year (SY 2009/10), Student's teacher was concerned that Student had not learned as much as she needed to know and was of the opinion that retention might be best. However, at a meeting between the teacher, Parent and the SEC, Parent was advised that DCPS rules did not allow retention before the third grade and that Student would go to a first grade class with an additional aide besides the classroom aide to work with Student and a couple of other students. Parent asked

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[4] Testimony of Parent.
[5] Testimony of Parent; *see* testimony of DCPS principal.
[6] Testimony of Parent; Respondent's Exhibit 3.
[7] Testimony of Parent.
[8] Testimony of Parent; testimony of DCPS speech/language pathologist.

whether a new IEP would be developed for Student, but she was told that the IEPs were developed every calendar year and not at the end of every academic year.[9]

8. From the start of SY 2010/11, it was clear that Student was completely overwhelmed in the classroom, and she could not do any of the homework. Parent spoke with Student's teacher and the new SEC, the teacher had already starting raising concerns, and Student was becoming more reluctant to go to school. By this time, some of the other students had begun teasing Student. Moreover, the classroom aide who had been dividing her time between the two first grade classrooms began spending all of her time in the other classroom. Parent asked the new SEC for assessments and a determination of Student's needs, but the SEC said DCPS would continue to observe Student and move her IEP meeting up to November instead of holding it in December.[10]

9. DCPS convened an IEP meeting for Student on November 2, 2010. Student's November 2010 IEP provided her with no specialized instruction at all and 2 hours per month of speech-language services. Parent did not think the IEP was sufficient and, once again, she did not receive a separate document concerning procedural safeguards, but she signed because she thought she had to sign so that Student could continue receiving services. At the time, Parent's understanding was that further evaluations would be conducted to determine whether Student required more services.[11]

10. The November 2, 2010 IEP was insufficient to meet Student's needs because it did not address all of Student's deficits, which included deficits across all subject areas.[12] Indeed, the IEP provided only speech-language services and did not attempt to provide any specialized instruction to address Student's significant academic delays.

11. In January 2011, Student was not making progress and appeared to actually be losing ground, so Parent sought an independent psychological assessment. She received the independent evaluation report in April and discussed it with the previous SEC because the new SEC was out on maternity leave. Although Parent and the previous SEC were both shocked that Student's deficits were so much greater than they knew, the previous SEC said nothing could be done at that point because the school year was drawing to a close so they would deal with it at the beginning of the following school year and Student would be the first one on the IEP list.[13]

12. Student's psychological evaluation recommended a number of other evaluations, so over the course of the summer, Parent obtained the recommended evaluations, which included a developmental vision evaluation, an occupational therapy ("OT")

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[9] Testimony of Parent.
[10] Testimony of Parent.
[11] Testimony of Parent; Respondent's Exhibit 2.
[12] *See* testimony of educational consultant.
[13] Testimony of Parent.

evaluation, and a neurological evaluation. Parent also obtained private tutoring, OT and vision therapy services for Student during summer 2011.[14]

13. DCPS reimbursed Parent for all of the independent evaluations, except the neurological evaluation, even though Parent requested reimbursement for that evaluation as well.[15]

14. Student's 2011 independent psychological evaluation revealed that she was functioning 1 year below grade level in receptive vocabulary skills, 1 ½ years below grade level in math, pre-reading, reading and written language skills, more than 2 years below grade level in overall listening comprehension skills, and more than 3 years below grade level in her ability to make inferences and remember details. Student also exhibited attention issues, focus concerns, problems with problem solving techniques, language processing issues, and problems with social skills that were impacting her functioning in school.[16]

15. During summer 2011, Parent went to visit the nonpublic school Student currently attends. This school was one of the schools recommended by the independent psychological evaluator. Parent submitted an application to the private school and Student was accepted. Although Parent wanted Student to return to her DCPS elementary school, she accepted the slot at the private school because there was a waiting list and she was concerned she would lose the slot. Also, the private school indicated that there would be no penalty in having Student attend for a while and then go back to DCPS, because so long as the slot was filled from the waiting list Parent would not be held liable for the tuition costs.[17]

16. In August of 2011, Parent re-enrolled Student at her DCPS elementary school, where Student entered a second grade class with more than 20 students and no classroom aide. Parent also provided DCPS with copies of all the independent evaluations. Student only attended her DCPS school for approximately a week in August. Thereafter, Parent sent her to the nonpublic school because she did not want to lose her space.[18]

17. DCPS reviewed Student's independent psychological and OT evaluations in August and September of 2011, respectively, and also completed an IEE checklist, an evaluation summary report, and an analysis of existing data on September 11, 12, and 13, respectively, based upon the independent evaluation data.[19]

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[14] Testimony of Parent.
[15] Testimony of Parent.
[16] Petitioner's Exhibit 11.
[17] Testimony of Parent.
[18] Testimony of Parent.
[19] *See* Respondent's Exhibits 7 through 12.

18. DCPS was aware that Parent had applied for admission to the nonpublic school. In fact, Student's 2010/11 DCPS teacher completed the Teacher Observation portion of the application for the nonpublic school.[20]

19. In September 2011, DCPS convened an IEP meeting for Student and Parent attended because she wanted to be able to send Student back to her DCPS school. The team reviewed the independent evaluations and changed Student's disability classification from SLI to specific learning disability ("SLD"). The team recommended giving Student 10-11 hours of pullout services, but upon Parent's request for more hours, the team agreed to give Student 14 hours of pullout. Parent raised her concerns about Student being placed in general education specials, such as PE, art, computer and music, without support, but DCPS stated that 14 hours of pullout was the maximum number of hours Student could receive without going to a self-contained school. DCPS further represented that there was only one self-contained school they could offer Student, but that school was not appropriate for Student.[21]

20. Student's September 2011 IEP is inadequate to meet Student's needs because it requires Student to be in a general education setting for part of the school day, which would be detrimental because her academic and speech/language delays will prevent her from accessing the general education curriculum if she is not provided with additional support.[22]

21. Although Parent had not formally withdrawn Student from DCPS at the time of September 2011 IEP meeting, DCPS was aware that Student had begun attending the nonpublic school.[23]

22. Parent did not agree with the September 2011 IEP, because she felt that Student needed support all day in all of her classes in light of her language, processing and OT problems. Hence, Parent wrote and included with the IEP a statement indicating her disagreement and requesting reconsideration of the MDT's decision not to place Student in a self-contained setting.[24]

23. For the first time at the September 2011 meeting, Parent received a thick procedural safeguards book. She reviewed the book afterwards and learned that she needed to do more than note her disagreement on the IEP. Therefore, she wrote a formal letter to the principal at Student's DCPS school on September 16, 2011 and hand delivered the letter to the administrative assistant at the school. The letter informed DCPS that Parent was removing Student from her DCPS school and placing her in the nonpublic school, and that Parent expected DCPS to pay the tuition for the nonpublic school. The letter also detailed Student's history of academic struggles in DCPS, the

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[20] Testimony of Parent; Petitioner's Exhibit 18.
[21] Testimony of Parent.
[22] *See* testimony of educational consultant.
[23] Testimony of Parent; testimony of DCPS psychologist.
[24] Testimony of Parent; Petitioner's Exhibit 22.

independent evaluations and other relevant details of Student's academic career with DCPS.[25]

24. DCPS never responded to Parent's September 16, 2011 letter, although the previous SEC initially indicated a response would come from the District's Office of Special Education ("OSE"). Parent eventually called the previous SEC to ask whether there would be another IEP meeting would be held and was told that the DCPS school would no longer be involved in the matter because OSE would be handling it.[26]

25. Student received only instructional services and psychological services from the nonpublic school, because Parent could not afford to provide her with speech/language services there as well. Student also continued to receive the private OT and vision therapy services Parent was providing for her.[27]

26. In Spring 2012, Petitioner's counsel sent a letter to the principal at Student's former DCPS school, on Parent's behalf, asking for an IEP meeting. However, DCPS indicated that OSE would respond to Parent's meeting request.[28]

27. For SY 2011/12, Parent paid a total of $35,272 for Student to attend the nonpublic school and receive psychological services there.[29]

28. Petitioner's proposed compensatory education plan for this case requests 2-3 hours per week of tutoring for one school year in the areas of reading, math, written language and other curriculum concepts as needed, with the tutoring to be provided by the current nonpublic school; collaboration at least two times per month between the tutor and school staff; 50 hours of speech/language services to be delivered over one school year in out-of class and integrated forms, with 40 one-hour direct sessions (in addition to the services listed on Student's IEP) and 10 hours of collaboration with school staff at least once per month; and placement in a full-time special education program at the current nonpublic school.[30]

29. Student is making academic progress at the nonpublic school. Although she still struggles with reading words with more than 3 letters, she has learned to count, can do some basic math, has more basic knowledge, can identify money, uses the computer for learning activities, loves to read even though she does not do it well, and initiates learning activities by getting workbooks on her own and using them. Student was on the pre-K level when she began at the nonpublic school, she had progress to the pre-K/K/1st grade level by the end of SY 2011/12 depending upon the skill area, and she is now at the mid- to high 1st grade level depending upon the skill area. Student has also made social/emotional progress, because she was very

[25] Testimony of Parent; Petitioner's Exhibit 23.
[26] Testimony of Parent.
[27] Testimony of Parent.
[28] Testimony of Parent; testimony of DCPS principal; *see* Petitioner's Exhibits 40 and 41.
[29] Testimony of Parent; Petitioner's Exhibit 54.
[30] Petitioner's Exhibit 38; testimony of educational consultant.

withdrawn when she first entered the school but she now volunteers information, follows classroom directions, and interacts with her peers.[31]

30. During SY 2012/13, Student is receiving speech/language services at the nonpublic school 3 times per week for 30 minutes each session. The evaluator/service provider recommended services 4 times per week, but Parent can only afford 3 times per week, so that is what Student receives. Student has made progress in as a result of her speech/language services. Student initially provided inconsistent answers to questions in class, but she can now appropriately answer who, what, and when questions and follow multi-step directions.[32]

31. Student's current nonpublic school primarily services students with SLD, language-based disabilities, and attentional disorders. During SY 2011/12, Student was initially placed in a combination second grade class with 7 children, but after approximately 6 weeks she was moved to a quieter, less distracting class with children at the kindergarten to first grade level. This was more commensurate with Student's level of functioning, and she did well there. The class has a total of 8 students, a full-time special education teacher, a full-time assistant teacher, and two full-time dedicated aides who were assigned to other students.[33]

32. Although Student currently does not receive specialized instruction all day from a special education teacher, because her art, music and PE teachers are certified in their content areas but not in special education, she is with the same small group of 8 disabled children all day, and the administrator in the lower school of the nonpublic school is trained in special education and provides special education support to the art, music and PE teachers.[34]

33. The current nonpublic school has a current Certificate of Approval from OSSE. The school charges OSSE-approved rates for tutoring and speech/language services.[35]

34. Although there were some exceptions, DCPS's witnesses tended to have had little or no direct involvement with Student, or they were not involved with Student during the time at issue in this case. For example, two of the teachers DCPS presented as witnesses in this case never taught Student, and the social worker never had any direct involvement with Student and did not evaluate or observe Student.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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[31] Testimony of Parent; testimony of nonpublic school's associate head of school.
[32] Testimony of nonpublic school's speech/language pathologist.
[33] Testimony of nonpublic school's associate head of school.
[34] Testimony of nonpublic school's associate head of school.
[35] Testimony of nonpublic school's associate head of school; Petitioner's Exhibit 37.

1. **Appropriateness of 11/2/10 IEP**

Under IDEA, an IEP is a written statement for each child with a disability that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general educational curriculum; a statement of measurable annual 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 to meet each of the child's other educational needs resulting from the disability; and a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or personnel supports that will provided to enable the child to advance appropriately, to be involved in and make progress within the general education curriculum and participate in nonacademic activities, and to be educated and participate with other disabled and nondisabled children. 34 C.F.R. § 300.320(a).

Overall, the requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

In the instant case, Petitioner argues that Student's 11/2/10 IEP was inappropriate for failure to offer sufficient specialized instruction, while DCPS argues that the IEP was appropriate at the time it was developed. A review of the evidence in this case reveals that at the time Student's 11/2/10 IEP was developed, Student's teacher from the previous year had expressed concern that she had not learned all she needed in kindergarten, Student was completely overwhelmed in her new first grade classroom, and Student could not do any of the homework from first grade. Nevertheless, DCPS removed the 30 minutes per week of specialized instruction in general education from Student's IEP and determined that she would not receive any specialized instruction at all. As a result, the IEP was insufficient to meet Student's needs because it did not provide any specialized instruction to address Student's significant known academic delays. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by providing her with an inappropriate IEP on 11/2/10.

2. **DCPS's Alleged Failure to Fully Identify Student's Needs During SY 2010/11**

In connection with this claim, Petitioner argues that DCPS denied Student a FAPE by failing to fully identify Student's needs during SY 2010/11 after receipt of the independent evaluations Parent had obtained for Student. For its part, DCPS argues that Parent did not actually provide DCPS with the independent evaluation data until the start of SY 2011/12, at which point DCPS promptly reviewed the evaluations and determined Student's eligibility.

A review of the evidence reveals that Parent discuss Student's independent psychological evaluation with DCPS near the end of SY 2010/11, but did not obtain the remaining evaluations until Summer 2011. Hence, Parent did not provide copies of the evaluations to DCPS until the start of SY 2011/12. Thereafter, DCPS promptly reviewed the evaluations and convened an IEP meeting to determine to what extent, if at all, Student's IEP needed to be revised to reflect the results of the evaluation data. DCPS also reviewed Student's independent evaluations and completed various forms and checklists regarding the independent evaluations prior to and in conjunction with the IEP meeting. Based on this evidence and under the circumstances of this case, where Petitioner has also asserted separate claims that require the hearing officer to determine the appropriateness of Student's 2010 and 2011 IEPs, the hearing officer concludes that Petitioner has failed to prove that DCPS committed a separate procedural or substantive violation of IDEA that constituted a failure to fully identify Student's needs during SY 20101/11, and therefore, a denial of FAPE.

3. Appropriateness of 9/13/11 IEP

Under IDEA, an IEP is a written statement for each child with a disability that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general educational curriculum; a statement of measurable annual 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 to meet each of the child's other educational needs resulting from the disability; and a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or personnel supports that will provided to enable the child to advance appropriately, to be involved in and make progress within the general education curriculum and participate in nonacademic activities, and to be educated and participate with other disabled and nondisabled children. 34 C.F.R. § 300.320(a).

Overall, the requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

In the instant case, Petitioner argues that Student's 9/13/11 IEP is insufficient for failure to provide sufficient special education services, although Petitioner has no dispute with the amount of related services provided in the IEP. DCPS argues that the IEP is appropriate because it was based on appropriate evaluation data, Parent participated in its development, and Student would have received special education support for 21 of the 27.5 hours of academic instruction each week. DCPS acknowledges that Student would not have received support in her specials, such

as music, art and PE, and for approximately 3 additional hours of academic instruction per week.[36]

A review of the evidence in this case reveals that at the time the September 2011 IEP was developed, DCPS was aware that Student was functioning 1 year below grade level in receptive vocabulary skills, 1 ½ years below grade level in math, pre-reading, reading and written language skills, more than 2 years below grade level in overall listening comprehension skills, and more than 3 years below grade level in her ability to make inferences and remember details. DCPS was also aware that Student exhibited attention issues, focus concerns, problems with problem solving techniques, language processing issues, and problems with social skills that were impacting her functioning in school. Nevertheless, and over Parent's stated and written objection, DCPS declined to place Student in a self-contained setting that would allow her to receive special education support in all classes. As a result, Student's September 2011 IEP is inappropriate because it requires Student to be in a general education setting for part of the school day, during which her academic and speech/language delays would prevent her from accessing the general education curriculum without additional support. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by providing her with an inappropriate IEP on 9/13/11.

4. Whether the Non-Public School Provided Educational Benefit in SY 2011/12

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). "Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley, supra*, 456 U.S. 176, 202)).

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private secondary school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the 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). However, the hearing officer may limit or deny reimbursement if (i) at the last IEP meeting prior to the removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency and state their intent to enroll their child in a private school at public expense, or (ii) at least 10 business day prior to the removal of the child from public

[36] *See* DCPS written closing at 3.

school, the parents did not give written notice to the public agency of the information intent to enroll the child in a private school at public expense. *See* 34 C.F.R. § 300.148(d)(1).

In the instant case, Petitioner argues that the current nonpublic school provided Student with educational benefit when DCPS had proposed an IEP that failed to provide Student with FAPE, and Petitioner is seeking reimbursement for the tuition and related costs she incurred to send Student to the nonpublic school during SY 2011/12. DCPS argues that Parent removed Student from her previous DCPS school before placing FAPE at issue and did not provide DCPS with written notice of her intent to move Student to a private school until after Student had already left DCPS and began attending the private school.

A review of the evidence in this case confirms Petitioner's contention that the nonpublic school provided Student with educational benefit during SY 2011/12, but also confirms DCPS's contention that Parent failed to provide DCPS with written notice of her intent to place Student at the nonpublic school at least ten business days prior to placing Student at the school. However, the evidence reveals that Parent notified DCPS verbally and in writing at Student's September 2011 IEP meeting of her disagreement with the proposed IEP. Moreover, Parent had never received documentation advising her of her procedural safeguards until the September 2011 meeting, and upon reading the documentation and realizing that she was required to submit written notice to DCPS of her intent to place Student in a private school and seek reimbursement from DCPS, she promptly did so. Under these circumstances, the hearing officer has determined that it would be appropriate to decrease Petitioner's reimbursement of private school expenses by 11%, which equals approximately one month less than a 9 month academic year – representing the period from the start of SY 2011/12 to 10 days after Petitioner provided DCPS with written notice of her intent to place Student in the nonpublic school and seek public reimbursement. Hence, the hearing officer will award Petitioner $31,392 in reimbursement for SY 2011/12.

5. **Whether the Non-Public School Should be Deemed Student's "Current Educational Placement**

As noted above, "[c]ourts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *N.G. v. District of Columbia, supra.* In the instant case, the evidence reveals that Student's current nonpublic school offers and, within Parent's ability to pay, has provided Student with the services necessary to address the nature and severity of Student's disability at a reasonable cost in light of the services being provided and in the least restrictive environment for Student. The school also has a Certificate of Approval from the District's OSSE. Under these circumstances, the hearing officer concludes that it is appropriate to designate the nonpublic school as Student's current educational placement for SY 2012/13, and the hearing officer will do so.

6. **Compensatory Education**

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 516, 522 (D.C. 2005). 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. *Id.*

In the instant case, Petitioner has requested 2-3 hours of tutoring per week for one school year and 50 hours of combined direct and consultative speech-language services for one school year as compensatory education for the denials of FAPE in this case, with all services to be provided by the current nonpublic school. Petitioner provided evidence sufficient to prove that these forms and amounts of compensatory education are being requested to place Student in the position she would have occupied but for DCPS's denials of FAPE. However, Petitioner has failed to take into account, and perhaps could not anticipate with certainty, the fact that the hearing officer would award Petitioner the requested private placement for SY 2011/2. Taking this factor into account, the hearing officer concludes that 2 hours per week of tutoring and an additional one hour per week of speech and language services, over and above the speech services Student currently receives at the nonpublic school, for the remainder of the current school year, together with the award of the requested private placement for the remainder of the current school year, constitutes an appropriate award of compensatory education in this case. *See e.g., Branham. v. District of Columbia*, No. 04-7084 (D.D.C. 2005) (award of private-school placement is prospective relief aimed at ensuring child receives tomorrow the education required by IDEA); *Mr. I. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55,* 480 F.3d 1 (1st Cir. 2007) (appellate court affirmed district court's decision to decline compensatory education request where district court reasoned that IEP it ordered would necessarily take into account the identified denials of FAPE).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 30 calendar days of the issuance of this Order, DCPS shall provide Petitioner with $31,392 as reimbursement for the expense Petitioner incurred to send Student to her current nonpublic school during SY 2011/12.

2. Student's current nonpublic placement is designated Student's current educational placement for SY 2012/13.

3. DCPS shall provide Petitioner with the funding necessary for the current nonpublic school to provide Student with 2 hours per week of tutoring and an additional one hour per week of speech and language services, over and above the speech services Student currently receives at the nonpublic school, for the remainder of the current school year, which shall constitute the award of compensatory education for the denials of FAPE in this case.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 1/25/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer