

Petitioner alleges that LEA Charter has denied Student a free appropriate public education (“FAPE”), on multiple grounds, as described below under the specified hearing issues. LEA Charter filed a timely response to the Complaint on June 10, 2013, which denies the allegations that it failed to provide FAPE to Student. LEA Charter further asserted that both a re-evaluation and a placement review process involving the Office of the State Superintendent of Education (“OSSE”) were then pending for Student.

On June 10, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief. A resolution meeting had not been held as of the date of the PHC, and neither party requested the Hearing Officer’s intervention under 34 C.F.R. § 300.510. On June 25, 2013, the Hearing Officer issued a Prehearing Order (“PHO”) based on the PHC and certain follow-up communications through June 21, 2013. The 30-day resolution period then ended without agreement on June 28, 2013.²

The parties filed their five-day disclosures, as required, by July 2, 2013. The Due Process Hearing was then held in Hearing Room 2004 on July 10, 19, and 29, 2013. The following documentary exhibits were admitted into evidence:³

Petitioner’s Exhibits: P-1–P-3; P-6; P-7; P-9 through P-16; P-19 through P-27; and P-29 through P-37.

Respondent’s Exhibits: R-1 through R-34; R-36; R-37.

² As originally filed, the Complaint also included an expedited discipline claim under the IDEA. However, on June 21, 2013, following discussions between the parties, Petitioner moved to withdraw the expedited discipline claim without prejudice. Respondent did not oppose such motion, and the motion was granted by written Order issued June 25, 2013. As a result of the withdrawal, an expedited hearing pursuant to 34 C.F.R. § 300.532 was not required in this case.

³ Petitioner withdrew Exhibits P-4, P-5, P-8, P-17, P-18, and P-28 in response to LEA Charter’s objections. LEA Charter withdrew Exhibit R-35. LEA Charter’s objections to other Petitioner Exhibits were overruled for the reasons stated on the record.

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

Petitioner’s Witnesses: (1) Parent; (2) Educational Advocate (“EA”); (3) expert Audiologist (“Aud.”); and (4) Educational Consultant (“EC”) - expert re: compensatory education.

Respondent’s Witnesses: (1) Case Manager (“CM”); (2) expert Speech-Language Pathologist (“SLP”); (3) expert Clinical Psychologist (“Psych.”); and (4) Special Education Director (“SED”).

The parties presented oral closing statements on July 29, 2013.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* (“SOP”). The HOD deadline is August 12, 2013.

III. ISSUES AND REQUESTED RELIEF

As stated in the PHO, the issues presented for determination at hearing were:

- (1) **Failure to Provide Appropriate IEP (June 2012)** — Did LEA Charter deny Student a FAPE by failing to provide an appropriate individualized education program (“IEP”), *i.e.*, one that was reasonably calculated to confer educational benefit for Student, on or about 6/14/2012, in that the IEP failed to (a) include sufficient hours of specialized instruction in an outside general education setting, (b) place Student in her least restrictive environment (“LRE”), and/or (c) include appropriate behavior supports?
- (2) **Failure to Provide Behavior Intervention Plan (2011-12)** — Did LEA Charter deny Student a FAPE by failing to (a) include a behavior intervention plan (“BIP”) in her July 2011 IEP and/or (b) timely develop a BIP during the 2011-12 school year to address Student’s negative behaviors and their impact on her education?

- (3) **Failure to Implement July 2011 IEP (Counseling Services)** — Did LEA Charter deny Student a FAPE by materially failing to implement the requirements of her July 2011 IEP from August to November 2011, with respect to counseling services? Specifically, Petitioner alleges that Student missed approximately one-third of these services (12 sessions) during this period.
- (4) **Failure to Re-Evaluate** — Did LEA Charter deny Student a FAPE by failing to conduct a comprehensive re-evaluation as requested by parent on February 27, 2013? Petitioner alleges that she requested comprehensive psychological, functional behavior assessment (“FBA”), occupational therapy (“OT”), speech/language, audiological, and auditory processing re-evaluations.
- (5) **Access to Educational Records** — Did LEA Charter fail to provide Petitioner with full access to education records relating to Student pursuant to the IDEA and 34 C.F.R. § 300.613, including service logs, discipline records, behavior contracts, and IEP progress reports?

Note: If a procedural violation is found under any of the above issues, then Petitioner must prove that such violation has had one or more of the substantive effects listed in 34 C.F.R. § 300.513 (a) (2).

Petitioner requests that LEA Charter be ordered to: (a) fund independent evaluations in the areas of comprehensive psychological, OT, speech/language, FBA, audiology and auditory processing; (b) reconvene a meeting of Student’s multi-disciplinary team (“MDT”) to review the re-evaluations; (c) revise Student’s IEP and provide placement in a full-time, therapeutic setting; and (d) award compensatory education. *See PHO*, ¶ 6.

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Student is a 15-year old student who resides with Petitioner in the District of Columbia. *See Parent Test.*

2. In July 2011, while she was enrolled at her prior D.C. public charter school (“Prior School”), Student was determined to be eligible for special education and related services as a child with a disability under the IDEA. Her primary disability was and is Emotional Disturbance (“ED”). *See R-1; P-4; Parent Test.; EA Test.* ⁴
3. An initial IEP was also developed for Student by Prior School in July 2011 at a meeting attended by Petitioner. The July 2011 IEP provided 12.5 hours per week of Specialized Instruction and 30 minutes per week of Behavioral Support Services (*i.e.*, counseling), both in an Outside General Education setting. *P-7, p. 6; R-2, p. 6.* In explaining the need for specialized instruction in an outside general education setting, the IEP noted that Student “works best when separated from peers whom she feels threatened by academically,” and she “also has a deficit of skills that will be best addressed in class with small teacher to student ratio.” *Id., p. 7.* ⁵ *See also EA Test.*
4. Student experienced behavior problems at Prior School, but no behavior intervention plan (“BIP”) was developed or incorporated into the July 2011 IEP. *See EA Test.; R-2.* Student also experienced attendance problems at Prior School, with 42 days absent and 15 days tardy during the 2010-11 school year. *See EA Test.; R-1.*
5. In August 2011, Petitioner enrolled Student at LEA Charter for the 2010-11 school year, where she repeated the 7th grade. *Parent Test.; P-5; see also*

⁴ The data used to determine eligibility included the Woodcock-Johnson III Tests of Achievement administered in March 2011, which showed Borderline functioning in Broad Math and the Extremely Low range in Broad Reading and Broad Written Expression; and a psychological evaluation conducted in May 2011, which measured Student’s overall cognitive ability as falling within the Borderline range (FSIQ=77) . *See R-1.*

⁵ In context, it is clear that the IEP Team meant a small student-to-teacher ratio, rather than the other way around.

CM Test.; *SED Test.* The school year began on August 20, 2011, but Student did not attend her first day of classes until at least September 15, 2011. *CM Test.*; *P-5, p. 3*; *R-5.* LEA Charter obtained access to Student's IEP via the SEDS database no later than October 2011. *CM Test.*; *SED Test.*

6. Student's attendance problems continued throughout the 2011-12 school year. She frequently arrived to school late, between 8:30 and 10:00 or 11:00 AM, without an excuse. *P-5, p. 3*; *R-19, p. 146*; *CM Test.* As of early June 2012, Student had logged 75 tardies and 37 absences. *Id.* See also *R-22* (2011-12 attendance records). Student's frequent absences and late arrivals to school resulted in missed instruction and adversely affected her academic performance during the 2011-12 school year. See *P-18*; *CM Test.*; *Parent Test.*
7. During the 2011-12 school year, Student also engaged in various behaviors in school that were subject to disciplinary actions by LEA Charter. Student was suspended for fighting other students, skipping classes on numerous occasions, missing Saturday detention, repeated dress-code violations, disrespect toward staff (screaming, cursing, yelling, displaying defiance, etc.), and other disruptive behaviors. See *P-5, p. 2*; *R-3*; *R-5*; *CM Test.*; *Parent Test.*
8. During the 2011-12 school year, Student's Case Manager regularly contacted Petitioner (as well as Student's father on occasion) by telephone, text, and/or email when Student arrived late for school, in efforts to work with the parents to improve Student's attendance. See *CM Test.*; *R-5, p. 36.* See also *R-7, pp. 55-56*; *Parent Test.* School staff also took various actions to address Student's defiant or negative behaviors, short of disciplinary suspensions, including allowing Student to calm down and "process the situation"; to spend time in another class or alternative learning center or in isolation with

the Case Manager; to meet with her counselor; and to participate in lunch and weekend detention. *CM Test.*; *R-5*, p. 37. In addition, a system was developed for Student to receive signed progress reports from her teachers after each class period, which would then be brought home for review and signing by parent and returned to school. *CM Test.*; *R-5*, p. 38. The Case Manager also developed written “behavior contracts” and provided supports to reach the goals therein. *R-21*, pp. 173-75; *CM Test.* (redirect examination). She also offered to provide school-bus transportation for Student to help with attendance, but Petitioner declined this service. *See CM Test.* (cross and redirect examination). *See also R-3*, p. 26; *R-7*, pp. 58-59; *R-8*, p. 62; *Pet’s Closing Argument*; *CM Test.* regarding behavioral supports generally.⁶

9. On or about May 15, 2012, LEA Charter developed a written behavior intervention plan (“BIP”) for Student, which incorporated positive behavior supports and strategies being used at school to address targeted misbehaviors. Tactics included redirecting Student through non-verbal cues, allowing Student to de-escalate through written reflection, and verbally processing situations one-on-one with Student. *See R-4*, p. 30; *CM Test.*
10. On or about June 14, 2012, LEA Charter convened a meeting of Student’s MDT/IEP Team to conduct an annual IEP review. At this meeting, the IEP Team reviewed Student’s progress and developed a revised IEP. *See P-5*; *R-6*; *R-7*. The IEP Team members noted Student’s continued poor attendance record and its significant impact on her academic performance. *E.g.*, *R-7*, pp.

⁶ To the extent there is any conflict between the testimony of Student’s Case Manager and the testimony of Petitioner regarding these efforts, the Hearing Officer finds the Case Manager’s testimony to be more credible based on observation of witness demeanor and the fact that the Case Manager’s testimony was generally consistent with her detailed and contemporaneous written statements in the record.

53-54 (comments of math and reading teachers regarding missed instruction); *id.*, p. 55 (comments of Case Manager regarding failure to complete make-up work).

11. The Student's IEP developed June 14, 2012 provided four (4) hours per week of Specialized Instruction in an Outside General Education setting; 11 hours per week of Specialized Instruction in a General Education setting; and two (2) hours per month of Behavioral Support Services in an Outside General Education setting. *P-4*, p. 7. The IEP included annual goals in the academic areas of Mathematics, Reading, and Written Expression; and additional goals in the area of Emotional, Social and Behavioral Development. *Id.*, pp. 2-6. The IEP also included various classroom accommodations such as flexible scheduling, extended time and breaks between subtests, repetition of directions, preferential seating, and location with minimal distractions. *Id.*, p. 9. *See also R-6; R-7.* Petitioner testified that she disagreed with the level of services and support in the June 2012 IEP at the time it was developed. *Parent Test.*
12. In explaining the need for specialized instruction in an outside general education setting under the LRE section of the June 2012 IEP, the IEP Team repeated the same statement contained in the July 2011 IEP – *i.e.*, that Student “works best when separated from peers whom she feels threatened by academically,” and that she “also has a deficit of skills that will be best addressed in class with small teacher to student ratio.” *R-6*, p. 47. The IEP Team did not explain why the same LRE justification now supported only four (4) hours per week of specialized instruction in an outside general education setting, rather than the 12.5 hours per week previously determined. The 6/14/2012 meeting notes are silent on this issue. *See R-7*, p.57. At the same time, the June 2012 IEP noted that Student's “behavior is

- an outgrowth of her inability to comprehend materials on the same level as the students in her class,” *R-6*, p. 43, further suggesting the continued need for substantial specialized instruction outside the general education setting.
13. Student’s Present Levels of Educational Performance (“PLOPs”) contained in the June 2012 IEP did not reveal significant progress over the PLOPs contained in July 2011 IEP across her academic areas of concern. *See R-6*. Student also failed to make progress on a number of her July 2011 IEP goals. *See P-9; R-20*.⁷
 14. Academically, Student performed poorly during the 2011-12 school year. “Due to [her] low performance in all academic subject areas,” LEA Charter decided that Student should be retained in the 7th grade. *P-18* (6/14/2012 End of School Year Inclusion Summary Report), p. 3.
 15. On or about September 7, 2012, LEA Charter convened another meeting of Student’s MDT/IEP Team to obtain a progress update. *R-8*. The IEP Team discussed Petitioner’s concerns regarding Student’s current placement, including whether she needed a more structured environment. The Team also discussed Student’s need to improve her school attendance in order to benefit from the special education services available to her. At Petitioner’s request, LEA Charter agreed to promote Student to the 8th grade despite her academic struggles. *Id.*; *CM Test.*; *Parent Test*.
 16. On or about September 21, 2012, and February 20, 2013, LEA Charter developed revised BIPs for Student in an effort to better address her targeted behaviors. *See R-9; R-10; CM Test*. Despite LEA Charter’s efforts, Student

⁷ In addition, LEA Charter’s May 2012 Special Education Inclusion Progress Report for Student indicated poor performances on a number of criteria, although the report noted that attendance problems as well as failure to complete assignments significantly contributed to her struggles in class. *See R-20*, p. 154.

continued to experience behavior problems in school during the 2012-13 school year. *See Parent Test.; CM Test.*

17. On or about February 27, 2013, Petitioner through counsel requested a comprehensive re-evaluation of Student, to include psychological, FBA, speech/language, OT, audiological and auditory processing assessments. The request was accompanied by an evaluation consent form executed by Petitioner. *See P-1; Parent Test.* Petitioner also requested access to Student's education records. *P-2.* The parties then corresponded about these requests and Petitioner's concerns regarding Student's educational program. *See R-25; R-26.*
18. On or about March 22, 2013, LEA Charter proposed to place Student into a special education program that provided full-time services to emotionally disturbed students in an outside general education setting using the facilities of another D.C. public charter school. *See R-26; SED Test,* The proposal was intended as an "interim placement" while LEA Charter proceeded with re-evaluations. *R-26, p. 197.* Petitioner did not accept this proposed placement. *Parent Test.; CM Test.*
19. On or about April 11, 2013, LEA Charter issued a Prior Written Notice ("PWN") notifying Petitioner that it proposed to conduct a re-evaluation of Student, to include comprehensive psychological, FBA, speech/language, and OT assessments. *P-25.* LEA Charter did not propose to conduct an audiological or auditory processing evaluations. *Id.; see also SED Test.*
20. On or about May 29, 2013, the same date the Complaint was filed, LEA Charter completed an OT evaluation of Student. *See P-24; R-12.*
21. During May 2013, LEA Charter also completed a functional behavior assessment ("FBA") for Student to address her identified behaviors of concern, including defiance, verbal aggression, and poor motivation. *See R-*

13. Student was observed in English class and in the community with her peers. The assessment of Student's behavior indicated that she will often become resistant to direction in order to avoid unpleasant situations or to prevent feelings of embarrassment around peers. *Id.*; *see also R-15, pp.100-01*. An updated BIP was then developed based on the FBA. *Id.*
22. On or about June 7, 2013, LEA Charter completed a Speech and Language Evaluation of Student. *P-23; R-14*. Overall, the testing results suggest that Student may have difficulty accessing the general education curriculum as a result of identified language deficits, and the evaluator recommends that speech/language therapy services be provided to Student. *R-14, pp. 95-96*. *See also SLP Test*.
23. On or about June 18, 2013, LEA Charter completed an updated Comprehensive Psychological Evaluation of Student. *P-22; R-15*. *See also Psych.Test*. Stanford-Binet testing indicates that Student's cognitive abilities are within the Borderline to Low Average range. *Id.* Results of social-emotional functioning indicate that Student "continues to have significant difficulty with regulating her behavior in the classroom and in the school environment." *R-15, p. 108*. "Specifically, she has difficulty with effectively monitoring herself, inhibiting her verbal and behavioral responses, and shifting from one activity to another." *Id.*
24. The 6/18/2013 Comprehensive Psychological Evaluation also included assessment of academic functioning using the Wechsler Individual Achievement Test – 3d Edition ("WIAT-III"), which revealed severe academic deficits. Student received composite scores of 62 (1%) in Total Reading, 63 (1%) in Written Expression, and 69 (2%) in Math. Most of her grade equivalencies on subtests were in the 2d and 3d grade ranges. *See R-15, pp. 103-04*. When the June 2013 WIAT-III testing is compared with the

2011 W-J III scores, Student shows little, if any, improvement in the past two years. For example, reading comprehension increased only slightly (from 74/4% to 80/9%); Broad Written Language was flat (63/1% on both tests); and Broad Math and Math Fluency actually declined over time (74/4% to 69/2%; 79/9% to 76/5%). *Compare R-1, pp. 4-5 to R-15, p. 103.*

25. On or about June 21, 2013, LEA Charter convened a meeting of Student's MDT/IEP Team to review the re-evaluations and to review Student's IEP and placement (with an OSSE representative present). Although Petitioner had confirmed the meeting date, she was out of town that day and unable to attend the meeting in person. She attempted to participate by wireless telephone, but was unable to obtain serviceable signal reception. *See Parent Test.; EA Test.; CM Test.* LEA Charter went ahead with the meeting in her absence, and the IEP Team developed a revised IEP based on the updated data and information. *Id.; see R-16.*
26. The Student's IEP developed June 21, 2013, provides the following services: 27.5 hours per week of Specialized Instruction in an Outside General Education setting; two (2) hours per week of Behavioral Support Services in an Outside General Education setting; 0.75 hours per week of speech/language pathology ("SLP") services in an Outside General Education setting; and 0.50 hours⁸ per week of occupational therapy ("OT") services in an Outside General Education setting. *R-16, p. 123.* In addition, the IEP provides both SLP and OT consultative services, and states that Student "is also in need of an attendance contract that includes incentives for arriving to school daily and on time." *Id.*

⁸ The IEP document actually says ".50 mins" per week (*R-16, p. 123*; emphasis added), but that is believed to be a typographical error.

27. At the June 21, 2013 IEP meeting, the Team agreed that Student needs a *full-time, outside general education, therapeutic program*, and that LEA Charter was prepared to place Student into such a program for the 2013-14 school year. *See R-17, p. 135* (6/21/2013 meeting notes); *Psych. Test*. However, the OSSE representative was not willing to complete the placement review process at this meeting without the parent in attendance. *R-17, p. 135, See also SED Test*.
28. On or about June 25, 2013, LEA Charter issued a Prior Written Notice proposing a full-time, outside general education placement at the facilities of another D.C. public charter school, along the lines of its earlier 3/22/2013 interim placement proposal. *See R-18*. At the time of the due process hearing, this 6/25/2013 proposed placement was still pending, and LEA stipulated that a meeting to include Petitioner and OSSE personnel would be rescheduled for a date prior to the start of the 2013-14 school year on 8/26/2013.⁹
29. Student continued to experience attendance problems during the 2012-13 school year. As of early May 2013, attendance records show that Student was absent approximately 57 days (excluding suspensions) and was tardy another 77 days during that school year. *See R-23*. Student's frequent absences and late arrivals to school again resulted in missed instruction and adversely affected her academic performance and ability to achieve her IEP

⁹ Where an IEP team at an LEA Charter recommends services for an enrolled student that the LEA Charter does not have immediately available, the services may be arranged through an agreement with another LEA or other appropriate means. *See* 5-E DCMR § 3019.7. The LEA Charter must also contact OSSE to initiate a placement review process whenever a more restrictive placement for an enrolled student cannot be implemented within the LEA Charter. *Id.*, § 3019.8 (b). *See also EA Test.; SED Test*.

goals during the 2012-13 school year. *See R-24; CM Test.; SED Test.; Parent Test.*

30. Despite Petitioner's requests, LEA Charter has declined to conduct an audiological or auditory processing evaluation of Student to assess her educational needs. *See SED Test.; Pet's Admission at Hearing.* Petitioner's expert audiologist testified that evaluations in this area are warranted based on available test results and parent observations that Student was having difficulty understanding information presented to her orally and as a result would "shut down" or throw tantrums. *Aud. Test.*¹⁰ *See also Parent Test.* In the audiologist's opinion, the results of the June 2013 psychological and speech/language evaluations support the need for an auditory processing evaluation given, *inter alia*: (a) that Student's decoding score is approximately two standard deviations below her reading comprehension score; (b) that her receptive language scores are poorer than her expressive language scores; and (c) his analysis of certain other academic functioning strengths and weaknesses. *Id.*¹¹

¹⁰ The audiologist was qualified without objection as an expert in speech/language pathology, audiology, and auditory processing. He holds an Ed. D. degree specializing in Auditory Perception from Columbia University and is on the faculty at Howard University. *See P-34.* "Auditory processing" refers to the "process people use when they take in verbal information and get it to their brain to act on it cognitively and linguistically." *Aud. Test.* The audiologist gave very detailed and thorough testimony, which the Hearing Officer finds credible.

¹¹ An auditory processing evaluation includes assessment of the educational impact of phonological, distractibility, auditory interpretation, and auditory memory conditions. *See Aud. Test.* In the Washington, D.C. area, such an evaluation typically costs approximately \$1,200, and includes an audiology evaluation (which typically costs approximately \$300 separately). *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE).” 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer’s determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

B. Issues/Alleged Denials of FAPE

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

For the reasons discussed below, the Hearing Officer concludes that Petitioner met her burden of proof, in whole or in part, on **Issues 1, 3, and 4**; and that she failed to meet her burden of proof on **Issues 2 and 5**.

Issue 1: Failure to Develop Appropriate IEP (June 2012)

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. “The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), 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). In the case of a student whose behavior impedes the learning of the student or others, the IEP Team must “consider use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324 (a) (2). Overall, the “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). “[A]n individualized education program (“IEP”) is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d

Cir. 1993) (citations omitted). *See also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (same); *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (same). In the event of challenge, the issue of whether an IEP is appropriate is a question of fact (or, more accurately, a mixed question of law and fact) for hearing. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

In this case, Petitioner claims that the June 14, 2012 IEP was not reasonably calculated to confer educational benefits on Student because it failed to (a) include sufficient hours of specialized instruction in an Outside General Education setting, (b) place Student in her least restrictive environment (“LRE”), and/or (c) include appropriate behavior supports. *See Prehearing Order*, ¶ 5 (1). Petitioner alleges that Student “clearly needed a more restrictive placement in light [of] the lack of progress she had made that school year.” *Complaint*, p. 9. “The student was not able to be successful in a combination setting - she needed a full-time, therapeutic placement to address her behavior concerns.” *Id.*

The Hearing Officer concludes that Petitioner failed to prove by a preponderance of the evidence that a full-time, therapeutic placement was required as of June 14, 2012, based on the information available to the IEP Team at that time the IEP was developed.¹² However, Petitioner did prove by a preponderance of the evidence that Student required more than four (4) hours per week of specialized instruction in an outside general education setting as of that date.

¹² Petitioner also failed to prove by a preponderance of the evidence that the June 2012 IEP lacked appropriate behavior supports. The IEP provided two (2) hours per month of Behavioral Support Services in an Outside General Education setting, included additional goals in the area of Emotional, Social and Behavioral Development, and effectively incorporated a behavior intervention plan to address Student’s negative behaviors that were adversely affecting her learning. *See Findings*, ¶¶ 8, 10. *See also* discussion under Issue 2 above. .

While courts and hearing officers cannot "substitute [their] own notions of sound educational policy for those of the school authorities which they review," *Rowley*, 458 U.S at 206, the evidence indicates that LEA Charter's substantial reduction in the levels of pull-out specialized instruction being provided under the prior IEP (from 12.5 to 4 hours per week) was not objectively reasonable in this case. The evidence shows that Student could not reasonably have been expected to access the general education curriculum and make adequate progress toward achieving her IEP goals with only a few hours per week of instruction in a concentrated special education setting, given her continued severe academic and behavioral challenges and her performance in a more restrictive setting during the 2011-12 school year.

As noted above, in explaining the need for specialized instruction in an outside general education setting under the LRE section of the June 2012 IEP, the IEP Team repeated verbatim the same statement contained in the July 2011 IEP – *i.e.*, that Student “works best when separated from peers whom she feels threatened by academically,” and she “also has a deficit of skills that will be best addressed in class with small teacher to student ratio.” *R-6, p. 47.*¹³ In doing so, the IEP Team did not explain why the same rationale supported substantially fewer hours of more intensive pull-out instruction; nor did LEA Charter's witnesses do so in their hearing testimony. *See also R-20, p. 154* (May 2012 Special Education Inclusion Progress Report); *Findings*, ¶ 12.

Moreover, Student's Present Levels of Educational Performance (“PLOPs”) contained in the June 2012 IEP did not show significant progress over the PLOPs

¹³ The IEP Team also noted that Student's “behavior is an outgrowth of her inability to comprehend materials on the same level as the students in her class,” *R-6, p. 43*, thus suggesting a further behavioral need for continued, substantial specialized instruction outside the general education setting.

contained in July 2011 IEP across her academic areas of concern; Student failed to make meaningful progress on a number of her July 2011 IEP goals; and she performed poorly in all academic subjects during the 2011-12 school year. *See R-6; R-20; P-18*. As a result, on the same date the IEP was being developed, her Case Manager determined that she should be retained in the 7th grade for the second time. *P-18* (6/14/2012 End of School Year Inclusion Summary Report), p. 3. *See also Findings*, ¶¶ 13-14.

Obviously, Student's attendance problems and resulting missed instruction substantially contributed to her academic struggles during the 2011-12 school year (*see Findings*, ¶¶ 6-13), but that does not eliminate LEA Charter's obligation to offer an educational program reasonably calculated to enable Student to receive educational benefits, assuming she chooses to avail herself of such benefits. (The impact of Student's severe truancy on appropriate equitable relief is addressed separately in Part C, *infra*.)

Accordingly, to the extent discussed above, Petitioner has met her burden of proof in part under Issue 1.

Issue 2: Failure to Provide Behavior Intervention Plan (BIP)

Under Issue #2, Petitioner claims that LEA Charter denied Student a FAPE by failing to (a) include a behavior intervention plan ("BIP") in her July 2011 IEP and/or (b) timely develop a BIP during the 2011-12 school year to address the educational impact of Student's truancy and other negative behaviors. *See Complaint*, p. 9; *Prehearing Order*, ¶ 5 (2). Neither claim bears scrutiny.

First, LEA Charter cannot be held responsible for the contents of the July 2011 IEP, which was developed by Prior School when it was acting as Student's LEA. When Student transferred schools, LEA Charter became "responsible *upon*

enrollment for ensuring that the child receive[d] special education and related services according to the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA.” 5-E DCMR § 3019.5 (d) (emphasis added). *See also* 34 C.F.R. § 300.323 (e) (receiving LEA “must provide FAPE to the child (including services comparable to those described in the child’s IEP from the previous public agency)”). Even assuming *arguendo* that LEA Charter effectively “adopted” the IEP for purposes of providing a FAPE to Student during the 2011-12 school year, it was not the LEA that developed this IEP. Thus, LEA Charter was not charged with determining “what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the [July 2011] IEP was drafted.” *Fuhrmann, supra*, 993 F.2d at 1041). Prior School had that responsibility, and it has not been named as a respondent in this case.

Second, Petitioner has not shown that LEA Charter denied Student a FAPE by failing timely to develop a BIP after assuming LEA duties during the 2011-12 school year. Procedurally, the only IDEA requirement for LEAs to develop and implement a “behavior intervention plan” (in such terms) is contained in the section on discipline procedures where a disabled student’s conduct is found to be a manifestation of his or her disability. *See* 34 C.F.R. § 300.530 (f).¹⁴ Other IDEA requirements are less specific: “In the case of a child whose behavior impedes the child’s learning or that of others,” the IEP Team must “consider use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324 (a) (2). *Accord Springfield School Committee v. Doe*, 623 F. Supp. 2d 150, 158-60 (D. Mass. 2009) (cited by Petitioner; discussing

¹⁴ As noted above, Petitioner withdrew with prejudice her claim that LEA Charter violated the discipline procedures of IDEA, so these provisions are not at issue.

“affirmative duty to take some sort of responsive action” to respond to chronic absenteeism of disabled student).

To be sure, where truancy and defiance of school authorities result from a student’s emotional disturbance and substantially prevent her from receiving educational benefit, the LEA may not ignore such problems. Nor may it simply “blame” the student or parent (or vice versa). Rather, the LEA has the responsibility to address these issues within the structure of the student’s special education program. *See, e.g., Independent School District No. 284 v. A.C.*, 258 F.3d 769, 775-77 (8th Cir. 2001); *Springfield School Committee v. Doe, supra*; other case authorities cited by Petitioner. *See also Honig v. Doe*, 484 U.S. 305, 320 (1988) (stating, of an emotionally disturbed student, that “[i]t is [the student’s] very inability to conform his conduct to socially acceptable norms that renders him ‘handicapped’ within the meaning of the EHA”).

The preponderance of the evidence in the record supports the conclusion that LEA Charter met such responsibility in this case. Although LEA Charter did not formalize a BIP until May 2012, the evidence shows that it employed various interventions, supports, and strategies to address Student’s truancy and other negative behaviors throughout the 2011-12 school year. *See, e.g., Findings*, ¶¶ 7-8. Despite these diligent and extensive efforts, LEA Charter was unable to obtain effective student and parental cooperation to ensure that Student attended school on a timely and consistent basis. *Cf. Presely v. Friendship Public Charter School*, 60 IDELR 224 (D.D.C. Mag. Feb. 7, 2013) (11th-grader who frequently skipped class despite receiving multiple behavioral interventions to address her truancy was not denied FAPE).

Evan assuming *arguendo* that LEA Charter committed a procedural violation by not actually ***convening an IEP Team meeting*** to review the truancy

and other behavioral issues earlier in the 2011-12 school year, the Hearing Officer concludes that such violation has not affected Student's or Petitioner's substantive rights. *See Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006). Petitioner has failed to show that any such procedural inadequacy impeded Student's right to a FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and/or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513 (a) (2) (i), (ii). Although the specific measures employed by LEA Charter to address Student's attendance and behavioral concerns were not formally incorporated into a BIP until May 2012, Petitioner was made aware of these measures, and Student received the benefit of them on a day-to-day basis. *See, e.g., CM Test*.

Accordingly, the Hearing Officer concludes that Petitioner failed to meet her burden of proof under Issue 2.

Issue 3: Failure to Implement July 2011 IEP (Counseling Services)

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. *See* 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have

addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*”); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d at 76 (failure to implement claims require “contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements”).

LEA Charter admits that Student did not receive any behavioral support services until November 2011, but argues that this was only a “brief delay” that “does not constitute a material failure to implement the IEP. “ *Answer*, p. 5 ¶ 27; *id.*, p. 7 ¶ 6. The Hearing Officer disagrees and concludes that this amounted to a substantial or significant deviation from IEP requirements over a substantial period of time, resulting in a material adverse impact on Student’s education.

The evidence indicates that Student was especially in need of the IEP-prescribed counseling services at the beginning of the 2011-12 school year, when she had to adjust to a new school environment and struggled to address her truancy issues. LEA Charter’s Case Manager and Special Education Director also testified that Student was enrolled at the school at the beginning of the 2011-12 school year and that they had access to Student’s IEP no later than October 2011. *CM Test.*; *SED Test.* Even prior to effectively adopting the July 2011 IEP, LEA Charter was obligated to provide at least comparable services. 34 C.F.R. § 300.323 (e).

Accordingly, Petitioner met her burden of proof on Issue 3.¹⁵

¹⁵ In closing argument, Petitioner argued that Student also missed some of her counseling services between November 2011 and May 2012, but this claim exceeds the scope of Issue 3 as defined in the Complaint and Prehearing Order.

Issue 4: Failure to Re-Evaluate

(a) Timeliness

The IDEA and its implementing regulations provide that a public agency “must ensure that a reevaluation of each child with a disability is conducted ” if either (1) the public agency determines that the educational or related services needs ... of the child warrant a reevaluation” or (2) “the child’s parent or teacher requests a reevaluation.” 34 C.F.R. §300.303 (a). The regulations further provide (as a “Limitation”) that such a reevaluation: “(1) **may occur** not more than once a year, unless the parent and the public agency agree otherwise; and (2) **must occur** at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.” *Id.* §300.303 (b) (emphasis added).

However, “IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student’s parent.” *Smith v. District of Columbia*, Civ. Action No. 08-2216 (RWR) (D.D.C. Nov. 30, 2010), slip op. at 6. In light of the lack of statutory guidance, OSEP and the courts have concluded that “[r]e-evaluations should be conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Herbin v. District of Columbia*, 362 F. Supp. 254, 259 (D.D.C. 2005) (quoting *Saperstone*, 21 IDELR 1127, 1129 (OSEP 1995)). *See also SAIL Public Charter School v. Johnson*, 45 IDELR 187 (D.D.C. 2006).

In this case, Petitioner requested on February 27, 2013, that Student be tested or re-evaluated in the areas of comprehensive psychological, functional behavior assessment (“FBA”), occupational therapy (“OT”), speech/language, audiological, and auditory processing. LEA Charter completed the first four evaluations within approximately 3 ½ months of the parent’s request, while also developing a proposal for interim placement that parent considered but ultimately

rejected. LEA Charter then scheduled and convened an IEP Team meeting to review the re-evaluations within several days of receiving the last of the evaluation reports; and the re-evaluation process was completed entirely less than two years after initial eligibility. Overall, the Hearing Officer concludes that LEA Charter acted within a reasonable period of time and without undue delay, consistent with IDEA's timing requirements.

(b) Scope of Re-evaluation

In conducting evaluations or re-evaluations, an LEA must ensure that the child “is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. § 300.304 (c) (4). The LEA must also ensure that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” *Id.*, § 300.304 (c) (6). *See also Harris v. DC*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008); *Herbin, supra*; *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability”); 34 C.F.R. § 300.304 (b) (1) (evaluations are to be conducted to determine both a child’s disabilities and the content of the child’s IEP).

Moreover, where an IEP team determines that additional data is not needed, parents have a right to request assessments to determine whether their child has a disability and the child’s educational needs. *See* 34 C.F.R. § 300.305 (d) (1) (ii). “The public agency is not ***required*** to conduct the assessment described in paragraph (d)(1)(ii) of this section ***unless requested to do so by the child's parents***. *Id.*, § 300.305 (d) (2) (emphasis added).

In this case, Petitioner did specifically request, in writing, that LEA Charter conduct audiological and auditory processing evaluations based on her concern that Student was having difficulty understanding information presented to her orally and as a result would “shut down” or throw tantrums. *Pet’s Closing Statement; Parent Test.* In addition, Petitioner presented the testimony of an expert audiologist, who concluded that evaluations in this area were warranted based on available test results and parent observations. The audiologist testified that he believed Student may have auditory deficits that are impeding her in the classroom and are at least contributing to her negative behaviors. *See Aud. Test.; id.* (cross examination) (testifying to “great possibility” that Student has a “phonological auditory processing disorder”).¹⁶

Overall, the evidence adduced by Petitioner appears to meet the minimum threshold of reasonable suspicion needed to corroborate a parental request, especially when coupled with Student’s persistent, severe and otherwise unexplained academic deficits. Thus, the Hearing Officer agrees that the re-evaluation has not been sufficiently comprehensive in this respect. *See generally I.T. v. Dep’t of Education, State of Hawaii, 59 IDELR 129 (D. Ha. July 30, 2013).*

However, a “failure to timely reevaluate is at base a procedural violation of IDEA.” *Smith v. District of Columbia*, slip op. at 8 (citing *Lesesne v. D.C.*, 2005 WL 3276205 (D.D.C. 2005), and distinguishing *Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008)). *See also I.T., supra.* Procedural delays give rise to viable

¹⁶ Petitioner argued in closing that the audiologist was “grasping at straws.” While the Hearing Officer agrees that the evidentiary basis for the audiologist’s recommendation is thin in some places, *see Aud. Test.* (cross examination regarding, *e.g.*, similarity of verbal and non-verbal IQ scores , small differences in receptive and expressive language scores, etc.), his opinion was not contradicted by any competing audiology expert presented by LEA Charter. Its SLP expert questioned some of the conclusions, but he was not qualified by education or experience in the field of audiology or auditory processing. *See SLP Test.*

IDEA claims for denial of FAPE only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006); 34 C.F.R. 300.513 (a) (2). Here, Petitioner has not proved that any procedural violation in failing to conduct an auditory processing evaluation prior to the June 21, 2013, IEP meeting has (a) impeded the Student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate meaningfully in the decision-making process as to the Student's educational programming, or (c) deprived Student of educational benefit. *See* 34 C.F.R. 300.513 (a) (2). Shortly after Petitioner requested the evaluation, LEA Charter offered Student a full-time, outside general education placement on an interim basis while the re-evaluation process was being completed, and the 6/21/2013 IEP now incorporates such LRE into her educational program. Accordingly, Petitioner met her burden of proof in part under Issue 4.

Issue 5: Access to Educational Records

IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 C.F.R. § 300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing or resolution session ... , and in no case more than 45 days after the request has been made." *Id.* In addition, a parent's right to inspect and review includes: (1) the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records"; (2) the "right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records"; and

(3) the “right to have a representative of the parent inspect and review the records.” *Id.* § 300.613 (b).

There is no evidence that LEA Charter responded to Petitioner’s request in an untimely manner, or that it ever denied Petitioner or her representative access to inspect and review all available education records relating to Student. LEA Charter also appears to have adequately responded to all reasonable requests for explanations and interpretations of the records, as well as to requests that the agency provide copies of the records. *See R-31; SED Test.*

To the extent Petitioner complains about access to records from Prior School, her complaint appears misdirected. As the “sending LEA” of a transferring student, Prior School was responsible for providing a copy of Student’s records to the receiving LEA (LEA Charter) within 10 days of receipt of notice of enrollment in the receiving LEA pursuant to 5-E DCMR § 3019.5 (a). If Petitioner had concerns about the transfer of records in Fall 2011, it could have brought a separate due process complaint against Prior School, but apparently it has not done so. LEA Charter can only provide access to the records it now has. Nor has Petitioner shown that LEA Charter failed to cooperate with Prior School regarding the transfer of any records. *Id.*, § 3019.5 (b).

Moreover, to the extent Petitioner complains about the unavailability of certain other categories of records (*e.g.*, service logs, discipline records, behavior contracts, and IEP progress reports), Section 300.613 does not afford relief. The records access rights granted to parents under the IDEA do not ensure the discovery or production of any particular category of documents; much less does it regulate the posting of documents on the “SEDS” computer database system maintained for all D.C. public school special education students (*EA Test.*). Such recordkeeping issues are beyond the scope of a hearing officer’s jurisdiction over

due process complaints. *See generally Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 21-22 (D.D.C. 2008) (rejecting claim that LEA failed to provide certain types of school records in response to parent’s request): “Counsel misses the point: although Ms. Jalloh and her counsel requested access to records regarding R.H., neither Ms. Jalloh nor her counsel followed up by going to Hamilton where the records were located to achieve that access. Thus, the hearing officer correctly concluded that he could not find that DCPS denied R.H. a FAPE based solely on the absence of records.”

C. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005).

As noted above, Petitioner requested that the Hearing Officer order LEA Charter to: (a) fund independent evaluations in the areas of comprehensive psychological, OT, speech/language, FBA, audiology and auditory processing; (b) reconvene a meeting of Student’s MDT/IEP Team to review re-evaluations; (c) revise Student’s IEP and provide placement in a full-time, therapeutic setting; and (d) award compensatory education. In light of further developments occurring since the Complaint was filed, most of items (a), (b) and (c) are now moot. The remainder, along with compensatory education, is considered below.

Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the following relief is appropriate and is reasonably tailored to address the specific violations and denials of FAPE found herein.

Independent Evaluation/IEP Team Review

Based on the outcome under Issue 4 above, LEA Charter will be required to fund an independent auditory processing evaluation, to be reviewed by the IEP Team to assist in determining Student's educational needs.

Compensatory Education

Compensatory education is one of the equitable remedies 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 516, 521 (D.C.Cir. 2005) (quotations omitted). Compensatory education is fact-specific relief designed to compensate a student for the educational benefits of which he or she was deprived. *See, e.g., Gill v. District of Columbia*, 751 F. Supp. 2d 104, 110-12 (D.D.C. 2010); *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008). An IDEA petitioner generally has the burden of proposing a well-articulated plan demonstrating what it is he wants and the reasoning why his request would ameliorate the denial of FAPE, although a court or hearing officer ultimately must determine what is equitable. *Gill, supra*. *See also Reid*, 401 F. 3d at 523 ("compensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student") (citation omitted).

Under the standards established by *Reid*, "compensatory education should be fact-specific, individualized, and reasonably calculated to ameliorate the educational deficit suffered by the child and should be designed with the goal of

ensuring that the student is ‘appropriately educated within the meaning of the IDEA.’” *Gill*, 751 F. Supp. 2d at 111, *quoting* 401 F. 3d. at 524 (citation and quotations omitted). *See also Reid*, 401 F.3d at 524 (“[T]he 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.”). “Thus, an award of compensatory education must be specifically and individually tailored to the student to compensate the student for the educational lapse suffered in violation of the IDEA.” *Gill*, 751 F. Supp. 2d at 111.

In this case, the Hearing Officer has determined that LEA Charter denied Student a FAPE under Issue 1 by significantly reducing the level of specialized instruction in an outside general education setting in the June 2012 IEP; and denied Student a FAPE under Issue 3 by failing to provide counseling services prescribed by the July 2011 IEP for up to two months at the beginning of the 2011-12 school year.¹⁷

LEA Charter thereby deprived Student of the educational benefits of these services during the relevant periods of time. Petitioner has shown that this has caused educational harm to Student that entitles her to an award of compensatory education reasonably designed to compensate Student for these deprived educational benefits. Without the necessary support – particularly sufficient pull-out specialized instruction in the June 2012 IEP – Student’s unaddressed weaknesses adversely affected her ability to access the curriculum across multiple academic areas, and she appears to have made little if any academic progress over

¹⁷ No denials of FAPE were found under Issues 2, 4, and 5, and no other findings support an award of compensatory education. LEA Charter was found to have committed a procedural violation under Issue 4 by failing to conduct an auditory processing evaluation (to include an audiological assessment) as part of Student’s comprehensive re-evaluation, but “compensatory education is not an appropriate remedy for a procedural violation of the IDEA.” *Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1122-23 (10th Cir.1999) . That violation is adequately addressed by requiring LEA Charter to fund an independent auditory processing evaluation.

the 2012-13 school year. As noted above, LEA Charter's June 2013 standardized testing documents Student's continued severe academic deficits. *See Findings*, ¶ 24. It also appears that the absence of adequate outside instruction may have exacerbated Student's negative behaviors and increased her need for counseling.

On the other hand, the Hearing Officer finds that the likely educational impact of LEA Charter's denials of FAPE necessarily must be reduced as a result of: (a) the harm attributable to Student's continued poor attendance record during the 2012-13 school year (despite reasonable interventions by LEA Charter);¹⁸ (b) the harm attributable to Petitioner's rejection of LEA Charter's offer to provide full-time specialized instruction in an outside general education setting during the final three months of the 2012-13 school year; and (c) the benefit to Student of LEA Charter's delivery of increased amounts of specialized instruction overall (15 hours per week), including 11 hours per week of inclusion services.

Regarding the specific type and amount of compensatory education services that are appropriate, Petitioner submitted a written compensatory education proposal prepared by her expert educational consultant, who also testified at hearing.¹⁹ The proposal called for 240 hours of academic tutoring, 80 hours of

¹⁸ *See, e.g., Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008) (discussing effect of student's severe truancy); *Hinson ex rel. NH v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008) (poor academic performance may not be caused by lack of appropriate services to extent student is not "availing himself of educational benefit" due to extended absences from school); *Findings of Fact*, ¶ 28. As the *Garcia* court noted, "the limited resources devoted to providing education benefits for disabled children are not effectively allocated where schools expend resources on students who not only fail to use the educational opportunities provided them but also affirmatively avoid attending school altogether." 520 F. 3d at 1130.

¹⁹ Petitioner's witness was qualified as an expert in developing and implementing compensatory education plans as part of IEP teams under the IDEA. *See EC Test.; P-35*. The written proposal, contained in Exhibit P-37, was admitted by agreement of the parties as Petitioner's compensatory education proposal in response to the Prehearing Order, but not as evidence except as specifically adopted in her expert's hearing testimony subject to cross-examination..

counseling/behavior support services, 40 hours of speech/language services, and 40 hours of occupational therapy (OT) services. *See P-37, pp. 6-7.*

However, the proposal is based on denials of FAPE much broader in scope and duration than actually found to have occurred in this case. For example, it assumes that LEA Charter should have provided Student with a full-time, outside general education program since the beginning of the 2011-12 school year. *P-37, p. 5.* Moreover, the proposal arbitrarily ignores or minimizes other significant contributing factors such as Student's severe truancy, as well as the offsetting benefits of the increased level of inclusion services provided under the June 2012 IEP. *Id.; EC Test.* (cross examination). Thus, the proposal grossly overstates the volume and impact of missed services. Finally, the requests for speech/language and OT compensatory services are unsupported by any alleged and proven denials of FAPE, and they appeared to have been largely abandoned in the testimony of Petitioner's expert.

Based on all available evidence, and balancing the relative harm factors and equitable considerations noted above, the Hearing Officer concludes that LEA Charter should pay the cost of (a) 75 hours of individual (one-on-one)²⁰ academic tutoring for Student; and (b) 25 hours of individual (one-on-one) counseling services for Student, to be provided independently by qualified providers selected by Petitioner, at OSSE-approved hourly rates. The Hearing Officer finds that these services are necessary and sufficient to provide the educational benefits that likely would have accrued from the services that Student missed between approximately September and November 2011 (in the case of counseling services) and between

²⁰ The one-on-one independent academic tutoring, in particular, can be expected to provide more intensive remediation of deficits than the small-group outside instruction that Student may have missed during the 2012-13 school year on days when she attended school on a timely basis.

approximately August 2012 and March 2013 (in the case of specialized academic instruction in an outside general education setting), which can fairly be attributed to LEA Charter's denials of FAPE. The remedy is supported by the record evidence, including the testimony of both Petitioner's and LEA Charter's witnesses and the substantial documentary evidence adduced at hearing, as summarized in the Findings of Fact herein.

VI. ORDER

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

1. Petitioner shall be authorized to obtain an **auditory-processing evaluation of Student independently**, at the expense of Respondent LEA Charter and consistent with any publicly announced criteria for independent educational evaluations ("IEEs") issued by OSSE and/or LEA Charter. The reimbursed cost of the evaluation shall be the OSSE-approved rate, if any, not to exceed **\$1,200.00**.
2. Upon completion of the above independent evaluation, Petitioner shall promptly submit a copy of the written report(s) of evaluation to LEA Charter. Unless otherwise agreed to by the parties, the evaluation shall be completed within **forty-five (45) calendar days** of this Order (*i.e.*, **by September 24, 2013**).
3. Within **twenty (20) calendar days** of the submission of the report(s) of independent evaluation specified in Paragraph 2 above, LEA Charter shall convene a **meeting of the Student's MDT/IEP Team**, to review the results and to review and revise, as appropriate, the Student's individualized education program ("IEP"); *provided* that LEA Charter continues to be the local education agency ("LEA") for Student based on her enrollment at LEA Charter. Otherwise, LEA Charter shall promptly forward the results to Student's then-current LEA, along with Student's other education records.

4. As **compensatory education**, Respondent LEA Charter shall pay for: (a) **seventy-five (75) hours of one-to-one academic tutoring services**; and (b) **twenty-five (25) hours of one-to-one counseling services**. The services shall be performed by qualified independent provider(s) of Petitioner's choice at hourly rates not to exceed the current established OSSE-approved rates for such services. Unless the parties agree otherwise, these services shall be completed by no later than **August 10, 2014**.
5. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
6. Petitioner's other requests for relief in her Due Process Complaint filed May 29, 2013, are hereby **DENIED**; and
7. The case shall be **CLOSED**.



Dated: August 10, 2013

Bruce Ryan, Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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