

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

STUDENT,¹)
By and through PARENT,)
)
 Petitioner,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
 Respondent.)

Case No.

Bruce Ryan, Hearing Officer

Issued: April 13, 2011

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION/ PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed January 28, 2011, on behalf of a -year old student (the "Student") who resides in the District of Columbia, currently attends a non-public special education vocational school (the "Private School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. He previously attended his neighborhood DCPS high school (the "High School").

Petitioner is the Student's mother. She claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to conduct a re-evaluation of the Student; (2) failing to conduct a vocational assessment; (3) failing to develop an appropriate individualized education program ("IEP"); and (4) failing to provide an appropriate educational placement and/or location of services during the current (2010-11) school year.²

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

² As of February 18, 2011, Petitioner withdrew her additional claim that DCPS denied the Student a FAPE by failing to conduct a functional behavior assessment ("FBA") and to provide the Student with an appropriate interim alternative educational setting pursuant to 34 C.F.R. 300.530, in light of the fact that a disciplinary hearing had overturned the Student's suspension. This was confirmed by Petitioner's counsel at the prehearing conference.

DCPS filed its Response on February 14, 2011, which responds that DCPS has not denied the Student a FAPE. DCPS asserts (*inter alia*) that the Student's most recent IEP was finalized on or about December 14, 2010, and that the Student's evaluations are current.

A Prehearing Conference ("PHC") was held on March 7, 2011, at which the parties discussed and clarified the issues and requested relief. It was agreed that the Due Process Hearing ("DPH") would be held April 7, 2011; and that five-day disclosures would be filed by March 31, 2011.

A resolution session had not been held by the time of the PHC, but was subsequently held on March 9, 2011. It failed to resolve the Complaint. *See P-19*. The statutory 30-day resolution period ended on February 27, 2011.

No motions were thereafter filed by either party, and the case proceeded to hearing. Five-day disclosures were filed as directed on March 31; and the DPH was held on April 7, 2011. Petitioner elected for the hearing to be closed.

During the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-24.

Respondent's Exhibits: R-1 through R-6.

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

Petitioner's Witnesses: (1) Parent; (2) Case Manager; and (3) Director of Private School.

Respondent's Witnesses: Special Education Coordinator, DCPS High School.

II. JURISDICTION

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513,

and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is April 13, 2011.

III. ISSUES AND REQUESTED RELIEF

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at hearing:

- (1) **Triennial Reevaluation** — Did DCPS deny the Student a FAPE by failing to conduct a timely re-evaluation of the Student pursuant to 34 C.F.R. 303 (a) (2), which allegedly harmed the Student?

Specifically, Petitioner alleges that the Student's last evaluations were conducted on January 23, 2008, and therefore "expired" on January 23, 2011. Petitioner further alleges that "given the student's documented difficulties at _____ a reevaluation of the student prior to his removal from Foundations should have been performed to make certain the student was ready for such move." Complaint, pp. 4-5.

- (2) **Failure to Evaluate (Vocational)** — Did DCPS deny the Student a FAPE by failing to conduct a vocational assessment of the Student in order to develop an appropriate post-secondary transition plan?
- (3) **Failure to Develop an Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) at a November 10, 2010 MDT/IEP team meeting?

Specifically, Petitioner alleges that the IEP (a) fails to include a behavior intervention plan ("BIP"), (b) fails to provide an appropriate post-secondary transition plan, and (c) fails to provide a full-time special education program in an out-of-general-education setting.

- (4) **Failure to Provide an Appropriate Educational Placement** — Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate educational placement and/or location of services during the current (2010-11) school year? Petitioner alleges that the Student requires a full-time therapeutic setting and that DCPS High School has been unable to meet his educational needs.

Petitioner requests that DCPS be ordered to: (a) fund the Student's placement at Private School for the remainder of the 2010-11 school year; (b) fund the parent's independent comprehensive psychological, FBA, and vocational level II assessments; and (c) reconvene an MDT meeting to review the evaluations, and to revise and update the IEP.³

³ Petitioner's counsel clarified at the PHC that private placement funding is being requested beginning the date of the Complaint, *i.e.*, January 28, 2011, and also confirmed that no compensatory education relief is requested.

IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with an Emotional Disturbance (“ED”). *See P-7* (IEP dated 11/10/2010); *R-1* (same); *see also Parent Test*.
2. The Student’s initial eligibility date was February 13, 2008. *See R-2*, p. 1. The Student’s last educational and psychological testing was conducted at the end of January, 2008. *See P-7*, pp. 2-3; *P-13*; *P-14*.
3. During the 2008-09 school year, the Student attended a non-public school in suburban Maryland, where he was in a full-time special education program. While at that school, the Student experienced numerous behavioral difficulties and was unsuccessful. *See P-12*.⁴
4. On or about December 8, 2009, DCPS developed an IEP for the Student, which provided for 31.3 hours per week of specialized instruction and 40 hours per year of behavioral support services in a setting Outside General Education. *See P-6*; *R-2*. The IEP included a Least Restrictive Environment (“LRE”) justification, which stated that “[d]ue to the nature of the student’s disability, a highly structured, small, therapeutic setting with individual counseling, behavior management & high staff to student ratio is required to address social/emotional & academic deficits.” *Id.*, p. 7.
5. At the start of the 2010-11 school year, the Student was enrolled at his neighborhood DCPS high school (“High School”), where he repeated 9th grade. *See Parent Test*.⁵
6. On or about November 10, 2010, DCPS convened a meeting of the Student’s MDT/IEP team at High School, and it developed a revised IEP. The 11/10/2010 IEP provides 13 hours per week of specialized instruction Outside General Education, 13 hours per week of specialized instruction in General Education (*i.e.*, inclusion services), and two hours per month of

⁴ Petitioner did not provide the High School IEP team with any incident reports from this school prior to the November 10, 2010 IEP meeting, but that the IEP team also did not request such information. *See Parent Test*; *SEC Test*.

⁵ A group home in which the Student was then temporarily residing following a period of detention actually took the Student to the school for enrollment. The group home was located within High School’s local boundaries, and the Student was in the custody of the under the authority of the OSSE. *See D.C. Code §38-2602 (b) (10)*. Petitioner then agreed to the enrollment because she had been told it had a good program for ED students. The Student moved back in with Petitioner at the end of January 2011. *See Parent Test*.

behavioral support services in a setting Outside General Education. *R-1*, p. 5; *P-7*, p. 5. No notes of this meeting were put into evidence to explain the change in services on this IEP. Testimony indicated that the change was motivated by a desire for greater interaction with non-disabled peers. *See Parent Test.*; *SEC Test.* However, concerns were expressed regarding the Student's behaviors, including negative interactions with peers and teachers. *Case Manager Test.*; *Parent Test.*

7. According to the 11/10/2010 IEP, the Student "struggles to maintain appropriate classroom behavior, has difficulty transitioning from one class to another, often engages in negative attention seeking behaviors, [and] requires frequent redirection to stay on tasks and not disrupt others." *P-7*, p. 4. Although the Student's behavior appears to impact his learning and that of others, the IEP does not contain a behavior intervention plan for the Student.
8. The Student's Post-Secondary Transition Plan included in the 11/10/2010 IEP states that the following assessment tools were administered on that same date (11/10/2010): transition planning inventory; student interview; and skills inventory. *P-7*, p. 9. However, no evidence was submitted to substantiate these assessments.
9. Following the November 10, 2010 IEP meeting, the Student continued to attend the High School, where he continued to experience significant behavioral difficulties. For example, on December 16, 2010, the Student was involved in an incident wherein he choked another student and threatened other students and staff members. *P-2* (DCPS' Response), p. 2. An MDR meeting was held on January 4, 2011, at which it was determined that the Student's behavior was a manifestation of his disability. *P-2*, p. 2; *P-8*. Another incident took place on January 14, 2011. The Student was allowed to return to school, but asked to refrain from any contact with the other student. When he did not comply with this request, he was removed from school due to safety reasons. *P-8*.
10. On or about January 14, 2011, the Student was removed from the High School. DCPS states that the Student was asked at that time to remain out of school pending another disciplinary hearing. *See P-2*, p. 2. Petitioner testified that she removed the Student from High School at the urging of the SEC and other staff because she was told that High School was not a good fit for the Student and his behavior was too aggressive for the program there. *See Parent Test.*; *P-1*, p. 3; *see also P-10* (Notice of Proposed Disciplinary Action dated 02/07/2011 regarding 01/14/2011 events); *P-11* (Student Incident History and related email

- correspondence). Petitioner was then advised by her attorney to return the Student to the High School, but when she visited the school she was unable to re-enroll him. *Parent Test.*
11. On or about January 20, 2011, Petitioner received a letter of acceptance from Private School, accepting the Student into its program. The letter stated that Private School's Admissions Review team had determined that its program would meet the academic/vocational needs of the Student. The acceptance letter was valid for 45 days, subject to Petitioner's "taking all necessary steps to secure your student's placement." *P-3.*
 12. On or about January 21, 2011, Petitioner's counsel sent a letter to Dr. Richard Nyankori, Deputy Chancellor. The letter notified him that Petitioner "intends to remove" the Student from DCPS and "unilaterally place him" at Private School within 10 business days of receipt by facsimile, for the remainder of the 2010-11 school year, at DCPS expense. *P-4.*
 13. On or about January 24, 2011, a Project Coordinator in DCPS' Office of Special Education replied by letter, stating that "DCPS does not agree to bear the cost of a private placement in this case." *P-5.* DCPS stated its position that High School can meet the Student's educational needs and provide a FAPE. *Id.*
 14. Also on January 24, 2011, Petitioner submitted a written request for a re-evaluation of the Student, to include a comprehensive psychological, FBA, and Vocational Level II assessment. *P-21.* The request included a Consent to Evaluate form executed by Petitioner. *Id.*
 15. The evidence shows that Petitioner enrolled the Student at Private School on or about January 28, 2011, the same date that her Complaint was filed. *See Parent Test.; Private School Director Test.* This date was less than 10 business days after Petitioner's 01/21/2011 notification letter to DCPS.
 16. During the 2010-11 school year, the Student did not make significant academic progress at the High School. *See, e.g., P-17* (01/21/2011 report card). However, he also missed numerous classes at school. *See P-18* (attendance summary 08/16/2010-02/07/2011); *Parent Test.*
 17. As a result of the resolution process, DCPS has issued a letter dated March 7, 2011 ("IEE letter"), which authorizes Petitioner to obtain the following independent educational evaluations of the Student, at DCPS expense: (a) comprehensive psychological evaluation

(including cognitive, educational, and clinical components, as well as social history); (b) FBA; and (c) vocational assessment (the latter at a cost not to exceed *See HO-1.*⁶

18. The Student is presently attending Private School, which offers a full-time special education vocational program for students with various disabilities. It is undisputed that the Student is receiving educational benefit at Private School, where he is in a diploma-track program. The Student's current schedule includes courses in English, Science, Spanish, Life Skills, and Vocational (automotive). He is doing better both academically and behaviorally, and his attendance has improved. *See Testimony of Parent, Case Manager, and Private School Director. Id.* The 2010-11 regular school year at Private School ends on or about June 10, 2011. *Private School Director Test.* Private School charges per day, plus additional costs for related services. Their rates have been approved by the OSSE. *Id.* Both Petitioner and the Student want him to remain there through the end of the current school year.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to (a) develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) in November 2010, and (b) failing to provide the Student with an appropriate educational placement and/or location of services as of January 2011. Petitioner did not meet her burden of proving that DCPS denied the Student a FAPE by failing timely to conduct a triennial re-evaluation and/or vocational assessment of the Student. Petitioner was awarded equitable relief in the form of funding of her parental placement of the Student at Private School from February 7, 2011, to the end of the current 2010-11 school year (on or about June 10, 2011), on an interim basis pending completion of independent evaluations and a further MDT/IEP team process as specified herein.

⁶ A corrected copy of the IEE letter was provided by DCPS counsel following the DPH and has been added to the hearing record as a Hearing Officer Exhibit. *See also P-20* (03/11/2011 email correspondence).

B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate educational program or implement an IEP as written. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issues/Alleged Denials of FAPE

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

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

In this case, Petitioner has *not* proved by a preponderance of the evidence that DCPS denied the Student a FAPE under **Issues 1 and 2**, but she has proved by a preponderance of the evidence that DCPS denied the Student a FAPE under **Issues 3 and 4**.

1. Triennial Reevaluation

Petitioner claims that DCPS denied the Student a FAPE by failing to conduct a timely reevaluation of the Student pursuant to 34 C.F.R. 303 (a) (2), and that such failure harmed the Student. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to present sufficient evidence to prevail on this issue in accordance with applicable legal standards.

The IDEA provides that DCPS “must ensure that a reevaluation of each child with a disability is conducted ... if [DCPS] determines that the educational or related services needs ... of the child warrant a reevaluation” or the child’s parent or teacher requests it. 34 C.F.R. §300.303 (a). Such a reevaluation “may occur” not more than once a year and “must occur” at least once every three years, unless the parent and DCPS agree otherwise. *Id.* §300.303 (b)(2). *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” §300.304(c) (6); *see also 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....”).

In this case, the evidence shows that Petitioner first requested in writing that DCPS conduct a re-evaluation of the Student on January 24, 2011, just four days before the Complaint was filed; that the three-year anniversary date of the Student’s initial eligibility was February 13, 2011; and that DCPS has now issued an IEE letter authorizing independent evaluations, at DCPS expense, in all of the areas that Petitioner requested. DCPS is permitted a reasonable period of time to complete a triennial re-evaluation. *See Herbin, supra*. Petitioner has not shown that this re-evaluation has been untimely or that DCPS denied a FAPE to the Student in this regard. Finally, even assuming *arguendo* that DCPS failed to conduct any timely re-evaluations, Petitioner has not shown that she would be entitled to any requested relief beyond the already authorized independent evaluations.

2. Failure to Evaluate (Vocational)

Petitioner next claims that DCPS denied the Student a FAPE by failing to conduct a vocational assessment of the Student in order to develop an appropriate post-secondary transition plan.

As part of both an initial evaluation and any re-evaluation, DCPS must (*inter alia*) ensure that the child “is assessed in all areas related to the suspected disability,” and that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been

classified.” 34 C.F.R. §300.304 (c) (4), (6); *see also id.* §§ 300.303, 300.305, 300.324; *Harris v. DC*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008) (noting necessity and importance of continual evaluations under the IDEA). Parents also have a right to request particular assessments to determine whether their child has a disability and the child’s educational needs. *See, e.g.*, 34 C.F.R. 300.305 (d); *Herbin v. District of Columbia, supra*.

The evidence shows that Petitioner did not request a vocational evaluation until January 24, 2011, four days before the Complaint was filed; and that DCPS has now issued an IEE letter authorizing an independent vocational evaluation, at DCPS expense. Under these circumstances, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving a denial of FAPE. Moreover, assuming *arguendo* that DCPS failed to conduct a timely vocational evaluation, Petitioner has not shown that she would be entitled to any requested relief beyond the already authorized independent evaluation. When the results of the independent vocational evaluation are received, DCPS will be expected to consider those results along with other relevant information in developing an updated post-secondary transition plan as part of the IEP at the re-convened IEP team meeting (see discussion under Issue 3 below).

3. Claim that November 2010 IEP is Inappropriate

Petitioner next claims that the November 10, 2010 IEP was inappropriate (*i.e.*, was not reasonably calculated to provide meaningful educational benefit to the Student). Specifically, Petitioner alleges that the IEP (a) fails to include a behavior intervention plan (“BIP”), (b) fails to provide an appropriate post-secondary transition plan, and (c) fails to provide a full-time special education program in an out-of-general-education setting. The Hearing Officer concludes that Petitioner has met her burden of proof on this issue, to the extent discussed herein.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) “a statement of the child’s present levels of academic achievement and functional performance, including ... how the child’s disability affects the child’s improvement and progress in the general education curriculum”; (2) “a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child’s needs that result from the child’s disability to enable the child to be involved in

and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i).

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982).⁷ 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.'"⁸ Moreover, DCPS must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities." *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6.; see 34 C.F.R. 300.324.

The issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia*, 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, the evidence shows that DCPS revised the Student's IEP very significantly, by reducing the number of special education hours overall and providing that one-half of the specialized instruction would be provided in a general education (inclusion) setting. In doing so,

⁷ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

⁸ *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

DCPS provided no reasoning for the changes in the form of MDT meeting notes, including with respect to the dramatically altered LRE explanation. Petitioner suggests that it was done to “conform” the IEP to the existing school placement (rather than vice versa, as required); DCPS disputes that, saying that High School can implement either a full-time out of general education IEP or a combination setting with some pull-out and some inclusion services (*see SEC Test.*).

In either event, the most troubling aspect is that DCPS undertook these material changes without the benefit of any updated evaluations of the Student’s behavior and disabilities, despite the fact that he was about to be due for a comprehensive triennial re-evaluation. Indeed, the SEC testified that she had never seen any evaluations of the Student, whether initial or more recent. *See Harris, supra*, 561 F. Supp. 2d at 67 (“an evaluation’s primary role is to contribute to the development of a sound IEP”), *citing Honig*, 484 U.S. at 311-12. *See also* 34 C.F.R. 300.324 (a), (b). In addition, the Student appears to have made little, if any, academic progress during the course of the school year.

It is undisputed, moreover, that the Student continued to experience severe behavioral difficulties under even a full-time program. Yet the 11/10/2010 IEP team did not even discuss why counseling services were being reduced from one hour to 30 minutes per week, according to the SEC. *See SEC Test.* Also, DCPS conducted no FBA, and the 11/10/2010 IEP contained no BIP, despite substantial evidence that the Student’s behavior was impeding his learning and that of others. 34 C.F.R. 300.324 (a) (2). The SEC specifically agreed in her testimony that the Student’s IEP should include an appropriate BIP. *SEC Test. See also Harris*, 561 F. Supp. 2d at 68 (“IDEA further recognizes that the quality of a child’s education is inextricably linked to that child’s behavior”).

Under these circumstances, the Hearing Officer concludes that the Student’s November 2010 IEP was not reasonably calculated to confer educational benefits on the Student at the time it was created, and that DCPS thereby denied the Student a FAPE. DCPS should reconvene a meeting of the Student’s MDT/IEP team following receipt of the independent evaluations and consider any appropriate revisions to his IEP based on those results, as well as any other updated information regarding the child’s performance, behavior, and disabilities.

4. Claim that DCPS Failed to Provide Appropriate Placement (2010-11 SY)

Petitioner claims that DCPS denied the Student a FAPE by failing to provide the Student with an appropriate educational placement and/or location of services during the current (2010-11) school year. Petitioner alleges that the Student requires a full-time therapeutic setting and that DCPS High School has been unable to meet his educational needs. ...

As noted above, under the IDEA, FAPE includes “an appropriate preschool, elementary school, or secondary school education ... provided in conformity with the [IEP].” 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1. In determining the educational placement of a child with a disability, the LEA must ensure that the placement decision is made at least annually by a group of people that includes the parent, 34 C.F.R. 300.116; and it must ensure that a continuum of alternative placements is available to meet the needs of such child, *id.* at 300.115 (a). “If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an ‘appropriate’ public school program available, *i.e.*, one ‘reasonably calculated to enable the child to receive educational benefits,’ the District need not consider private placement, even though a private school might be *more* appropriate or better able to serve the child.” *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (emphasis in original). See *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005) (affirming “placement based on **match between a student’s needs and the services offered at a particular school**”) (emphasis added); D.C. Code 38-2561.02 (requiring DCPS to place a student with a disability in “**an appropriate special education school or program in accordance with this chapter and the IDEA**”) (emphasis added).⁹

Here, the evidence suggests that, at least as of January 2011, the High School was not able to provide an appropriate special education program for the Student, and there was not an appropriate “match” between the Student’s needs and the services offered at the school. Additionally, it appears that the SEC and other responsible staff at the High School had

⁹ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988) (quoting *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 207 (1982); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.”); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (“Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student’s needs”).

communicated that the Student's behavior was too aggressive for the setting and that his unique needs could not be met by the school at that time. The Student's grades had also declined. See P-17 (Reading fell from A to D, Social Studies fell from B to D, and Algebra declined to an F). The bottom line is the placement was not working. Thus, the Hearing Officer concludes on the basis of the evidence and findings described herein that Petitioner has met her burden of proof on Issue 4.

D. Requested Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, the primary relief sought is the funding of the Student's placement at Private School for the remainder of the 2010-11 school year, beginning on the date the Complaint was filed (i.e., January 28, 2011).

IDEA provides that "a court or a hearing officer *may* require the agency to reimburse the parents for the cost of [private school] enrollment *if* the court or hearing officer finds [1] that the agency had not made FAPE available to the child in a timely manner prior to that enrollment *and* [2] that the private placement is appropriate." 34 C.F.R. § 300.148 (c) (emphasis added). See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006). Moreover, "equitable considerations are relevant in fashioning relief," *Burlington*, 471 U.S. at 374, and courts and hearing officers have "broad discretion" in the matter. *Id.* at 369. The Hearing Officer therefore "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 16.

IDEA further provides that the cost of reimbursement may be reduced or denied if: (1) "at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team ...[of] their intent to enroll their child in a private school at public expense"; or (2) at least 10 business days prior to removal, the parents did not give written notice of their intent to the public agency; or (3) "upon a judicial finding of unreasonableness with respect to the actions taken by the parents." 34 C.F.R.

§300.148 (d). *See also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009), slip op. at 16-17 (“When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted”).

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner, as of January 2011, when Petitioner enrolled the Student at Private School. The Hearing Officer further concludes that the unilateral placement at Private School appears to be proper, as the Student has received educational benefit from this program. He appears to have made progress, both academically and emotionally, with the support of that program. He is also receiving significant benefit from the school’s vocational program, and his behaviors and attendance have improved. *See Testimony of Petitioner, Case Manager, and Private School Director; P-23; P-24*. The remaining question is “the appropriate and reasonable level of reimbursement that should be required” based on all relevant factors and equitable considerations. *Carter*, 510 U.S. at 16; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009).

Considering all relevant factors based on the record in this case – including the conduct of Petitioner, the notice provided to DCPS, and its opportunity to evaluate the Student – the Hearing Officer concludes that DCPS should reimburse Petitioner for the costs of the Private School program, including tuition and transportation, from ***February 7, 2011 through June 10, 2011, the end of the 2010-11 school year***. The Hearing Officer finds that Petitioner did not provide at least 10 business days notice of the Student’s removal and placement at Private School. Moreover, since the educational placement decision for a child should be based on the IEP (*see, e.g.*, DCMR 5-E3013.1(e)), and since the IEP is still in the process of being reviewed and revised (as appropriate) based on recently authorized independent evaluations, the Hearing Officer concludes that only an *interim* placement at Private School for the remainder of the 2010-11 school year is warranted as appropriate equitable relief under the circumstances.

This equitable relief is intended as a temporary placement pending completion of the process outlined in the Order below. *See, e.g., Verhoeven v. Brunswick Sch. Comm.*, 207 F. 3d 1

(1st Cir. 1999); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); *Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006). Should such further review demonstrate that an appropriate special education school or program is available within the D.C. public school system, that option may be given priority going forward under D.C. Code 38-2561.02, and consistent with LRE requirements, even if a private school might be *more* appropriate or better able to serve the Student. *See, e.g., Roark v. District of Columbia*, 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006). Given DYRS' role in registering the Student at High School at the beginning of the 2010-11 school year, it appears that DCPS may not yet have conducted its normal placement review for the Student. This underscores the present need for a thorough and properly sequenced process (evaluations, then IEP review, then placement), as set forth in the Order.

VI. ORDER

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

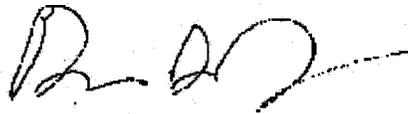
1. Within **30 calendar days** of this Order, DCPS shall reimburse Petitioner or otherwise fund the costs of the Student's enrollment at the **Private School**¹⁰ for the period from **February 7, 2011, through June 10, 2011**, the end of the 2010-11 regular school year at Private School.
2. The Student's placement and funding at Private School shall be on an **interim basis**, until such time as any change is effected in the Student's educational placement following completion of the MDT/IEP Team's IEP and placement review process set forth in this Order.
3. Within **30 calendar days** of the receipt of the final report of independent evaluations authorized by DCPS by letter dated March 7, 2011, DCPS shall convene a meeting of the Student's MDT/IEP Team, with all necessary members including the Parent and LEA representatives participating. The purposes of the meeting shall include: (a) to review all reports of independent evaluations, along with all other updated information concerning the Student's performance, behavior, and disabilities; (b) to review and revise, as appropriate, the Student's Individualized Education Program (IEP) in light of such information; (c) to develop an appropriate Behavior Intervention Plan (BIP) for the Student, and incorporate the BIP into the IEP; and (d) to discuss and determine an appropriate educational placement and/or location of services that can meet the Student's needs and implement an appropriate revised IEP.

¹⁰ **Private School** is identified in the Appendix to this HOD.

4. DCPS shall issue any proposed notice of placement (PNOP) within **20 calendar days** of the determination of educational placement and/or location of services at the IEP team meeting convened pursuant to Paragraph 3 of this Order, and in any event no later than **July 15, 2011**.
5. All written communications from DCPS concerning the above matters shall include copies to Petitioner and to Petitioner's counsel, Domiento Hill, Esq., by facsimile (202-742-2098) or email (dhill@jeblaw.biz).
6. Any delay in meeting any of the deadlines 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 deadlines by the number of days attributable to such delay.
7. Petitioner's other requests for relief in her Due Process Complaint filed January 28, 2011 are hereby **DENIED**.
8. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: April 13, 2011



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).