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

STUDENT, ¹)	
By and through PARENTS,)	
)	
<i>Petitioners,</i>)	Case No.
)	
v.)	Bruce Ryan, Hearing Officer
)	
DISTRICT OF COLUMBIA)	Issued: July 19, 2010
PUBLIC SCHOOLS,)	
)	
<i>Respondent.</i>)	

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND AND RECORD

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The Complaint was filed April 29, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a -year old student (the "Student") who resides in the District of Columbia, currently attends a non-public school located in D.C. (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.

Petitioners claim that DCPS has denied the Student a free appropriate public education ("FAPE") by: (a) failing to appropriately evaluate the Student's special education needs; (b) failing to provide the Student with an appropriate individualized education program ("IEP") in February 2009; (c) failing to propose an appropriate placement in February 2009; (d) failing to find the Student eligible for speech/language therapy; (e) proposing an inappropriate level of service and inappropriate placement in December 2009; and (f) committing certain procedural violations, as detailed further below. -1, pp. 9-10.

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

DCPS filed a Response on May 13, 2010, which asserts that the Student has not been denied a FAPE and that Petitioner's request for relief is not warranted. The Response denies failing to propose an appropriate IEP and placement in either February or December 2009, denies failing to appropriately evaluate the Student or to find him eligible for speech/language therapy, and denies the alleged procedural violations. *DCPS-1*.

A resolution meeting was held on or about May 11, 2010, which did not resolve the complaint. *See* -67; -68. A Prehearing Conference was held on June 9, 2010, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order* (June 11, 2010), ¶ 6.² Five-day disclosures were thereafter filed by both parties as directed.

The Due Process Hearing was held in four sessions, on June 17, 18, and 30, and July 2, 2010. Petitioners elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence, without objection:

Petitioners' Exhibits: -1 through -75.

DCPS' Exhibits: DCPS-1 through DCPS-30.

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

Petitioners' Witnesses: (1) Parent-Petitioner; (2) Educational Advocate ("Advocate"); and (3) Private School Director.

DCPS' Witnesses: (1) DCPS Placement Specialist (K. Copeland); (2) DCPS Compliance Case Manager (B. Persett); (3) English Coach; (4) Special Education Teacher ("Teacher"); (5) Special Education Coordinator ("SEC") of Charter School ("Charter School SEC"); (6) SEC of Proposed DCPS School Placement SEC"); and (7) Speech/Language Pathologist ("SLP").

² DCPS argued at the PHC that Petitioners' request for prospective placement should not be entertained since the complaint by its terms requested such placement only "for the remainder of the 2009-10 school year," and the 2009-10 school year would be ended by the time the hearing were concluded and an HOD issued in this case. DCPS also opposed an amendment or correction of the complaint without restarting the timeline. However, the Hearing Officer ruled that an amendment of the complaint was not required to clarify the requested relief, which could be accomplished at the PHC and in the Prehearing Order. The Hearing Officer ruled that he has discretion to grant any relief deemed necessary and appropriate to ensure that a child receives FAPE, and also has discretion under 34 CFR 300.511(d) to the extent such rule were argued to be applicable in these circumstances. *See, e.g., Letter to Kohn*, 17 IDELR 522 (OSEP 1991); 71 *Fed. Reg.* 46706 (Aug. 14, 2006).

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD is being issued within the timeline specified pursuant to a joint motion for continuance and the parties' stipulation on the record at the close of the hearing (*i.e.*, 10 days after written closing statements/briefs were filed on July 9, 2010).

II. ISSUES AND REQUESTED RELIEF

Based on review of the pleadings and discussion at the PHC, it was determined that the following issues and requested relief would be presented for determination at hearing:

- (1) **Failure to Evaluate** — Did DCPS deny the Student a FAPE by failing to appropriately evaluate his special education needs, as more specifically alleged in the complaint -*I*, p. 9, ¶ 1)?
- (2) **Inappropriate Feb. 2009 IEP** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP in February 2009, as more specifically alleged in the complaint -*I*, pp. 9-10, ¶¶ 2-4)?
- (3) **Inappropriate Feb. 2009 Placement** — Did DCPS deny the Student a FAPE by failing to propose an appropriate placement in February 2009 -*I*, p. 10, ¶5)?
- (4) **Speech and Language Services** — Did DCPS deny the Student a FAPE by failing to find him eligible for speech and language therapy -*I*, p. 10, ¶ 9)?
- (5) **Procedural Violations** — Did DCPS deny the Student a FAPE as a result of various procedural violations, as alleged in the complaint -*I*, p. 10, ¶¶ 6-8, 10)? Specifically, Petitioners allege that DCPS (a) failed to hold a timely IEP meeting per the parents' request, (b) failed to "monitor" the Student's placement at the Charter School, (c) failed to timely review evaluations and timely propose a program and placement for the 2009-10 school year, and (d) failed to ensure that the parents participated in placement decisions. To the extent not encompassed by the other, substantive issues, the Hearing Officer will determine whether such violations occurred and, if so, whether such violations resulted in a denial of FAPE and/or had one or more of the substantive effects set forth in 34 CFR 300.513(a)(2).
- (6) **Inappropriate Dec. 2009 IEP/Placement** — Did DCPS deny the Student a FAPE in December 2009 by proposing an "inappropriate level of service" as well as an inappropriate placement at the Proposed ES for the 2009-10 school year -*I*, p. 10, ¶¶ 11-12)?

As relief for the alleged denials of FAPE, Petitioners seek both (a) reimbursement for the costs of attending the Private School from the start of the 2009-10 school year, with all related

services, costs and fees; and (b) prospective placement of the Student at the Private School. *See* I, p. 9.

III. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia, currently attends the Private School located in D.C. pursuant to parental placement, and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. *See* -1; -23; -24.
2. The Student has been determined to have a Specific Learning Disability (“SLD”) and an Other Health Impairment (“OHI”), due in significant part to his diagnosed Attention Deficit Hyperactivity Disorder (“ADHD”). -23; -24.
3. During the 2007-08 and 2008-09 school years, the Student attended the Charter School located in the District of Columbia. DCPS acts as the local educational authority (“LEA”) for the Charter School. -1; DCPS-1; *Parent Testimony*.
4. On or about February 11, 2008, the Student was initially found eligible for special education as a child with a learning disability, following educational and psychological testing.³ The Student’s multi-disciplinary team (“MDT”) proposed that the Student receive 10 hours per week of specialized instruction, and the parents signed the IEP agreeing to the proposal. -5. At this meeting, the team made a referral for an occupational therapy (“OT”) evaluation and also noted that the Student should be further assessed for ADHD after he began receiving services. DCPS-7.
5. On or about May 15, 2008, the MDT met again to review the OT evaluation and determined that the Student was not eligible for OT services. DCPS-6. And in August, 2008, the Conner’s Rating Scales were given to one of the Student’s teachers,

³ The psychological evaluation, completed on January 2, 2008, yielded a full scale IQ of 79. 4, p. 3. However, the examiner noted a 23-point discrepancy between the Student’s highest and lowest index scores, suggesting that his full scale score was not an accurate measure of his intelligence. She indicated that the Student appeared to be a bright child with many intellectual resources and that his scores suggested his overall functioning was impaired by a difficulty with organization and concentration. *Id.* The evaluator concluded that the Student faced “serious academic challenges” and recommended “a stable and supportive environment to progress and meet the demands of school.” *Id.*, p. 5.

- to help determine whether he was showing signs associated with ADHD. The Conner's results yielded "very elevated" scores on most of the scales. . . -9.
6. The Student returned to the Charter School for the 2008-09 school year, where he struggled academically and experienced behavioral difficulties. See -20, pp. 3-4; *Testimony of Parent, Advocate, Teacher, and English Coach*. The Student was suspended from school due to misbehaviors on multiple occasions. He also struggled with distractibility, peer interaction, and respecting authority. See . . . 26; *Testimony of SEC, Teacher, English Coach, and Parent*.
 7. On or about October 15, 2008, the MDT met to discuss the Student's ongoing behavioral difficulties. The MDT agreed to add the related service of counseling to the Student's IEP. . . 13; *DCPS-4; DCPS-5*. The MDT also ordered a functional behavior assessment ("FBA"), which was completed and a behavioral intervention plan ("BIP") put in place by December 2008. . . 15; *DCPS-4*.
 8. As a result of the Student's continued difficulties at the Charter School, his parents applied and secured a spot for the Student at the Private School in early 2009, prior to the February 2009 MDT/IEP team meeting. See *Testimony of Parent and Private School Director*.
 9. In early February 2009, the Student's mother (Parent-Petitioner) met with the SEC/Director of Student Support Services at the Charter School to discuss her concerns regarding continued placement at the Charter School. The SEC and Parent discussed possible alternative schools that the Parent may wish to consider in the event the Parent decided to look elsewhere. While the Parent testified that the SEC expressed the opinion that the Charter School was no longer appropriate for the Student, the SEC denied stating that the Charter School was no longer an appropriate placement and indicated that it was simply consistent with her normal practice to provide additional information to parents concerning other available educational resources.⁴

⁴ The Hearing Officer finds the testimony of the SEC to be more credible in this respect, and believes that the differing interpretations of the conversation may simply reflect some honest miscommunication or misperceptions by the parent.

10. On or about February 10, 2009, the MDT convened a meeting at the Charter School to conduct an annual review of the Student's IEP. Both parents attended the meeting. There were reports of some progress, both academically and behaviorally. *E.g.*, *DCPS-2*, p. 000010 (Student's "behavior has improved and he is telling the truth more often"). The parents also reported that the Student's pediatrician had diagnosed him with ADHD on January 30, 2010. *Id.*, p. 000011.
11. Based on the Student's recent diagnosis of ADHD, the 2/10/09 MDT added the OHI disability classification to the Student's IEP. -23, -24. However, goals and objectives to address weaknesses in attention, organization, and/or other areas affected by his ADHD were not developed at this time. *Compare -5 to -23; Testimony of SEC, Teacher, and Advocate.*⁵ In addition, the present levels of academic and functional performance contained in the 2/10/09 IEP were left incorrect and incomplete. *See Advocate Testimony;* -23.
12. The 2/10/09 IEP required 10 hours per week of specialized instruction to be provided in a Special Education setting (with services to be delivered by "special ed./general ed." providers), plus one hour per week of counseling services in a Special Education setting (by a social work provider). *DCPS-3*, p. 000013. With respect to the least restrictive environment ("LRE"), the team determined that accommodations and modifications needed to be "scheduled in an inclusive setting." *Id.*, p. 000019. The parent signed the IEP as having agreed with the contents and being involved in its development.
13. At the conclusion of the 2/10/09 MDT/IEP team meeting, the parents indicated their desire for the Student to attend a full-time special education program at the Private School. The team disagreed with the parents' request and determined that the current placement at the Charter School was appropriate to meet the Student's needs. No other school placement and/or location options were discussed. *See -24, p. 24; Parent Testimony.*

⁵ Indeed, the team made almost no changes to the previous year's goals and objectives, except for adding one objective in the area of reading to address turning in homework. *DCPS-3*. The

14. Following the 2/10/09 meeting, the parents sent a letter through counsel formally rejecting the IEP and proposed placement and requesting public funding for the Private School. . . 25. The parents then retained the services of ABC's For Life Success ("ABC"), an educational consulting firm. ABC conducted additional educational testing of the Student, spoke to some of his teachers, and observed him at the Charter School. . . 30; *Advocate Testimony*. The results of the educational testing confirmed academic difficulties in virtually all areas. *Id.*
15. In April, 2010, the Charter School issued an IEP Report Card for the Student showing progress on virtually all goals for the 2008-09 school year. *DCPS-10*. However, the report card also noted that the Student "struggles with his reading, writing and math skills" and that "behavior is a major issue." *Id.*, p. 000049. The counselor indicated that while "managing his behavior in the classroom continues to be a challenge for him," she was "hopeful that his new behavior contract and behavior chart, including a home reward system, will give him the extra support he needs...." *Id.*
16. The Student completed the 2008-09 school year at the Charter School, but the evidence shows that his behavioral difficulties continued to impact his ability to make academic progress. The Student made little to no progress in the area of reading, having started and ended the school year at a second grade level. . . 71; *Testimony of Teacher, English Coach, and Advocate*. He also scored in the "below basic" level on the DC-CAS in both reading and mathematics in April 2009. . . 27.
17. On or about June 10, 2009, the parents through counsel sent a letter to the Charter School and DCPS requesting another MDT/IEP team meeting to discuss the parents' "growing concerns" about the Student's educational program at the Charter School. The letter stated, *inter alia*, that the parents "continue to believe that [Charter School] is not able to meet [the Student's] needs and request that he be placed and funded at [Private School]." . . 29.
18. In response to the parents' June 10 letter, the Charter School SEC contacted counsel for the parents and informed her that she would be scheduling an MDT/IEP team

social/emotional goals "were not amended because they were adopted on 10/15/08," and the Student was "doing well in therapy group" and "doing better in a social-emotional perspective." *DCPS-2*, p. 000011.

- meeting prior to the end of the school year. . . . 33. However, several more weeks passed, and despite parent follow-ups no further meeting was successfully scheduled.
19. In early July, 2009, the Charter School sent the parents letters of invitation for an MDT/IEP team meeting, and they ultimately agreed to hold it on July 14, 2009. *See* .33. However, on July 13, 2009, the day before the scheduled meeting, the parents provided the school with a lengthy independent evaluation report that had been prepared by ABC a few weeks earlier. As a result, the SEC stated that the meeting would need to be rescheduled. *Id.*
20. On or about July 20, 2009, the parents filed a due process complaint against DCPS, and a resolution meeting was held on July 27, 2009. DCPS agreed to conduct additional assessments, including speech and language and assistive technology, before discussing any changes in programming and placement. . . . 34. DCPS also sent a further invitation letter on or about 7/22/09 to convene an MDT/IEP team meeting to review the recent independent evaluation, but the parents (through counsel) declined to schedule a meeting with the school. *See DCPS-11.*
21. On or about August 10, 2009, the parents sent a letter to the Charter School and DCPS informing them that the Student would be attending the Private School as of the beginning of the 2009-10 school year. The parents further notified DCPS of their intent to seek public funding for the Private School parental placement. . . .37.
22. In the meantime, the Charter School issued multiple requests to return to an MDT/IEP team meeting to review the private educational testing done by ABC, to discuss IEP and placement, and to better understand the parents' concerns. *See DCPS-11; DCPS-12; DCPS-13.* The parents responded to each invitation by informing the Charter School and DCPS that they wanted to wait for the completion of all evaluations before returning to an IEP meeting. . . .38, .40. The Charter School agreed to this course of action. *DCPS-13.*
23. DCPS completed the speech/language evaluation on August 26, 2009 (within the agreed 30-day time frame), but failed to complete its own assistive technology evaluation. Instead, on or about 9/18/09, DCPS issued permission for the parents to

- obtain an Independent Educational Evaluation (“IEE”) in the latter area. *See* .-39; 42.
24. On or about September 1, 2009, counsel for the parents sent a letter to DCPS confirming that the parents would not attend an IEP meeting until “all evaluations have been completed.” *DCPS-13*, p. 000057. The letter emphasized that the “results of the outstanding evaluations are essential to understanding [the Student] and the program, services, and placement he requires.” *Id.*
25. On or about September 2, 2009, the Student began attending the Private School. *See Testimony of Private School Director.*
26. On or about October 9, 2009, DCPS proposed additional, multiple dates over the following two-week period for an IEP meeting to review all current evaluations. *See -46* (resolution meeting notes). DCPS informed the parents that it could no longer delay the meeting to await parents’ completion of the outstanding independent evaluation.
27. On or about October 26, 2009, an MDT/IEP team meeting was finally convened at the Charter School to review additional evaluations and consider the Student’s program and educational placement for the 2009-10 school year. .-48; .-49. However, DCPS was not prepared to complete such review at this meeting, apparently because team members were unaware that a Speech and Language Evaluation had been completed by DCPS a couple months earlier, as part of the resolution process. .-49, p. 4; .-50.
28. On November 3, 2009, the parents forwarded the independent assistive technology evaluation that they had obtained as a result of the IEE. .51, .47. The parents also forwarded draft goals and objectives from the Private School for the team to review in preparation for the upcoming IEP meeting. .-53.
29. The team reconvened on or about November 16, 2009, although DCPS’ representatives were late and were not prepared to review the assistive technology evaluation and draft goals and objectives provided on 11/3/09. *See* .-55. The team was able to discuss the speech/language evaluation, in which the DCPS SLP found

that the Student did not require speech and language services. The parents and the Private School speech/language therapist disagreed with this finding. *See* . 54; *Testimony of SLP and Private School Director*. The DCPS team offered to stay late to complete the meeting and develop the IEP, but the parent was unable to remain due to conflicts. DCPS offered to reconvene again in November, but the parents declined and requested a meeting on December 9, 2009. *See DCPS-27; DCPS-28*.

30. On December 9, 2009, the team reconvened to finalize the IEP. *DCPS-29; DCPS-30*. At the meeting, the team confirmed the Student's eligibility as a child with a disability and changed his classification to Multiply Disabled (LD/OHI). The MDT received and reviewed the parents' independent assistive technology evaluation, agreeing upon assistive technology services and accommodations for the Student. The team also reviewed the speech/language evaluation data and determined that the Student did not meet the eligibility criteria for speech/language impairment. Finally, the team reviewed the goals and objectives and proposed hours of service.
31. As a result of the 12/9/09 MDT meeting, the team developed a revised IEP calling for the Student to receive 19 hours per week of specialized instruction outside of general education, 1.5 hours per week of behavioral support/counseling outside of general education, and one hour per month of behavioral consultation. *See* -56; *Testimony of Advocate, Charter School SEC, Placement Specialist, and Compliance Case Manager*.
32. The 12/09/09 MDT/IEP team did not discuss school placement options or propose a specific school placement for the parents' consideration at the meeting; and no one from _____ was present at the meeting. Instead, the DCPS representative informed the parents that the Student's IEP would be sent to a DCPS "cluster supervisor" for a determination of placement. The parents objected to this process and requested to participate in this placement discussion, but were informed that it would not be possible. *See* -56; -57; *Testimony of Compliance Case Manager, Placement Specialist, Parent, and Advocate*.
33. Following the 12/09/09 MDT/IEP team meeting, several individuals including the Compliance Case Manager _____ and a DCPS "cluster supervisor" met to

determine the Student's school placement and/or location. None of the individuals involved in the decision had any personal knowledge of the Student or had even observed him. *Testimony of Compliance Case Manager, Placement Specialist.*

34. Prior to making a determination about placement, _____ spoke with the Special Education Coordinator ("SEC") at the _____ who explained her program over the telephone. The parents did not participate in this telephone conversation. *See Testimony of Compliance Case Manager, SEC, and Parent.* The SEC of the _____ had never seen a copy of the Student's IEP, and she had no knowledge of the Student's history of behavioral difficulties, when she reportedly informed _____ that the _____ program could meet the Student's needs. *Testimony of SEC.*

35. On or about December 14, 2009, DCPS issued what it termed a "notice of placement" identifying the _____ as the Student's "location of services." 58; 59. The notice stated that a "multidisciplinary team (MDT) of which you were an invited member has made the following decisions about your child: ...Student will receive specialized instruction and related services at the student's neighborhood school," identified as the _____ 59. ⁶ In fact, however, this decision was made unilaterally by DCPS officials subsequent to the MDT meeting and without the parents' participation.

36. The parents did not receive a finalized copy of the IEP for several weeks following the 12/09/09 MDT meeting. *See* -60; *Testimony of Placement Specialist.* The parents' educational consultant contacted the _____ in January 2010 and requested an opportunity to visit the program. -60, -61. However, it took several months for a meeting to be scheduled due to the schedules of the people

⁶ The notice explained (*inter alia*) that "the child's neighborhood school can provide the specialized instruction and related services outlined in the IEP" and that the child "will benefit from interaction with his non-disabled peers." -59. The notice further stated that the "level of services proscribed [sic] in the IEP does not warrant a more restrictive setting: either a full self-contained program or a separate special education school." *Id.*

involved,⁷ as well as unexpected, severe winter weather in Washington, D.C. during this time period. *See Testimony of Parent, Advocate, and SEC.*

37. In March, 2010, the parents and educational advocate visited the _____ for an observation and tour of the school. During their observation and tour, the parents and advocate were able to observe a self-contained classroom where the Student would receive the bulk (approximately 15 hours per week) of his specialized instruction, as well as a general education classroom with special education supports. They also met with the SEC and the social worker who would be providing counseling services to discuss the specific program there. *See Testimony of Parent, Advocate, and SEC.*
38. The parents concluded that the program was not appropriate for the Student and declined DCPS' offer of a placement there. *Id.* The self-contained special education classroom at the _____ where the Student was to receive approximately 15 of his specialized instruction hours contained a mix of 6th, 7th, and 8th grade students; the Student would have been the only _____ grader in the classroom. *Testimony of SEC, Parent, and Advocate.* The parents were also concerned with the general education classroom that they observed; several students in the back of the class were not paying attention, sleeping, and/or otherwise not engaged in the classroom instruction. *Testimony of Parent, and Advocate.*
39. The evidence shows that the _____ program was not an appropriate educational placement to meet the unique special education needs of the Student as of 12/09/09. The proposed placement would have required the Student to be educated with students who were significantly older than him, and were not developmentally close enough to provide an appropriate peer group and social modeling. In addition, it appears that the _____ program could not implement the IEP as presently written, since the program would have included only 15 hours (rather than 19 hours)

⁷ For example, the SEC scheduled an observation and tour with the family, but when the parents and advocate arrived, they learned that the observation and tour could not happen because several teachers were unavailable. The observation and tour were then rescheduled. *Testimony of SEC, Parent, and Advocate.*

per week of specialized instruction outside the general education setting. See *Testimony of SEC, Parent, and Advocate*.⁸

40. The evidence shows that the Private School is able to implement the December 2009 IEP and otherwise is a proper educational placement for the Student, who is in a classroom with a small student-to-teacher ratio. Since attending the Private School, the Student has made significant educational progress. *Testimony of Advocate and Private School Director*; . -41, -62, -63, -64, -69, -72. He has shown great improvement on his Woodcock-Johnson tests of achievement in all areas except math calculation. Compare -69 with -30, p. 3; see also *Testimony of Advocate; Petitioners' Proposed Findings of Fact and Conclusions of Law*, p. 18. He also is a much happier child who is better behaved and enthusiastic about going to school. See *Testimony of Parent and Private School Director*.
41. The parents have not paid any monies toward the Student's tuition at the Private School for the 2009-10 school year. Nor does it appear that the Private School has demanded any payment from the parents up to this point. See *Testimony of Parent and Private School Director*. Pursuant to a July 28, 2009 addendum to its enrollment agreement with the parents, the Private School "agreed to defer payment of tuition and related fees until [DCPS] funding has been secured or December 31, 2009, whichever comes first." -28.⁹

⁸ The social worker also reported that she had never seen any other student at the school receiving the level of counseling provided in the Student's IEP, and that she would likely revise it to reduce the hours of counseling. She also commented on the counseling goals, noting that they should really be classroom goals. *Testimony of Parent and Advocate*.

⁹ The hearing record revealed that DCPS apparently paid the Student's tuition at Private School in error from September 2009 through March, 2010, even though it had not agreed to place the Student there. The Private School Director testified that the school would be returning these funds to DCPS as required. See *Testimony of Private School Director*.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as other alleged denials of FAPE.

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 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., NG v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

As discussed further below, the Hearing Officer concludes that Petitioners have *not* carried their burden of proof on Issues 1, 3, and 4; and that Petitioners have carried their burden of proof *in part only* on Issues 2, 5 and 6.

1. Failure to Evaluate

Under its “child find” mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). *See also* 34 C.F.R. §300.301(a); DCMR §5-3005.2; *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008). 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 [is] 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).

Petitioners have not shown that DCPS failed to conduct any appropriate evaluation of the Student in any area relating to his suspected disabilities, or that it failed to complete such evaluation in a reasonably timely manner under the circumstances. Nor have they shown that

any delay in completing any particular evaluation found warranted by the team caused educational harm to the Student and/or constituted a denial of FAPE. These conclusions apply to all areas of the Student's evaluations, including psycho-educational, OT, behavioral, speech/language, and assistive technology assessments, which were ordered and conducted at various points during the past two school years (and within the two-year statutory limitations period beginning April 29, 2008).

2. Appropriateness of February 2009 IEP

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).¹⁰ In addition, "[b]ecause

¹⁰ 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. ").

the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. 1414 (b)-(d).” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op. at p. 6*.

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). 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); 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”).

Petitioners claim that the February 2009 IEP was inappropriate for several reasons. See -1, pp. 9-10. “Ultimately, the question before the [Hearing Officer] is whether or not the defects in the [February 2009] 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. Against this standard, the Hearing Officer has carefully reviewed the record evidence and Proposed Conclusions of Law with respect to each of these claims and concludes as follows:

(a) Failure to include present levels of performance

Present levels of performance are required under the IDEA, to provide a baseline from which educators and evaluators can track a student’s progress. 20 U.S.C. § 1414(d)(1)(A)(I). Specifying present levels of performance enables educators and parents to know where the IEP begins and where it is intended to go (*i.e.*, how much progress the student is expected to make). In this case, the Advocate testified that not only were the present levels of performance lacking in several areas including communication, motor/health, and social emotional,¹¹ but the levels

¹¹ In February, 2009, the team agreed to add an additional disability code of OHI to the Student’s IEP to account for his ADHD condition. -23, -24, *Testimony of Charter School SEC*. Therefore, it

that were reflected on page 2 of the IEP were not updated from the previous year's IEP. *See Advocate Testimony; compare AS-23 with AS-5.*¹² Present levels of performance were particularly important, because the parents had expressed doubt and concern over the Student's lack of progress. *Parent Testimony.* Because the parents were unsure of where the Student was starting from, it was critical to set forth specifically his current levels of performance and how much progress the IEP team felt he could reasonably attain within one year's time. DCPS' failure to include this required information denied the Student a FAPE. *See, e.g., Omidian v. Board of Education of New Hartford Central School District*, 2009 WL 904077 (N.D.N.Y. 2009) (incomplete present levels, among other violations, created an inadequate IEP that denied the student a FAPE because it failed to provide guidance to the teachers or the parents as to the expectations for the student).

(b) Failure to include supplementary aids and services

Petitioners claim that the February 2009 IEP omitted any supplementary aids and services that the Charter School was providing or planned to provide the Student in the classroom. *Petitioners' Closing Brief*, p. 22; *see AS-23*, p. 6. The IDEA requires that these aids and services be included in the IEP. 20 U.S.C. § 1414(d)(1)(A)(IV). However, the box where the school was required to list these services on the Student's IEP was left blank. At the hearing, DCPS' witness (Charter School SEC) testified that these services were necessary for the Student to be successful in the classroom. However, she had erroneously recorded such supplementary aids and services under the immediately following space provided on the form for "testing accommodations," rather than in the space provided for "classroom needs." *Charter School SEC Testimony.* She also testified that, despite listing these services under the wrong heading, the teachers did in fact provide them to the Student within the classroom setting. *Id.*

While the IEP may not be perfect in this respect, the Hearing Officer finds that this error did not prevent DCPS from providing an appropriate education to the Student, *i.e.*, one that was at least "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458

was essential that the above information be reflected in the IEP. Strikingly, the section where this information should be recorded (Social Emotional/ Behavioral Areas) is blank. AS-23.

¹² The Hearing officer finds the Advocate's testimony credible, as it was based on her review of the record, discussions with the Student's family and staff at the school, as well as her knowledge and observations of the Student. Moreover, no DCPS witness was presented to contradict this testimony.

U.S. at 207. This portion of the IEP, together with the discussion at the IEP meeting, is “specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate.” *N.S. v. District of Columbia, supra*, pp. 21, 25.

(c) *Inappropriate goals and objectives*

Petitioners next claim that DCPS failed to update and/or add necessary goals and objectives as part of the February IEP. *See Petitioners’ Closing Brief*, pp. 25-28. The IDEA requires that an IEP include goals and objectives to meet *each* need resulting from the child’s disability. 20 U.S.C. § 1414(d)(1)(A)(II). It further requires that the MDT/IEP team meet at least annually to “determine whether the annual goals for the child are being achieved,” and then revise the IEP to address, “any lack of expected progress toward the annual goals.” 34 C.F.R. § 300.324(b) (i). Among other things, the IEP team must consider behavioral interventions and supports to address any behavior that impedes the child’s learning or that of others. *Id.*, § 300.324(a) (2).

Here, the evidence shows that the team had recently added an overall goal designed to better manage the Student’s impulsivity in October 2008, completed an FBA, and developed a BIP in December 2008, which steps arguably had not yet been in effect long enough to reasonably assess their impact. Beyond that, however, the February 2009 IEP primarily just continued without change the Student’s goals from his previous year’s IEP, which the evidence suggests was not appropriate to meet his needs. The team also failed to add certain new and necessary goals relating to the Student’s continued behavioral difficulties and ADHD disability condition, in areas such as sustaining attention, starting/completing work assignments, and transitioning. *Petitioners’ Closing Brief*, pp. 26-28; *see, e.g., Testimony of Advocate and Charter School SEC*. These goals were eventually added in December 2009. *See AS-56* (12/09 IEP social/emotional goals). The failure to include them as of February 2009 constitutes a significant deficiency that likely resulted in a denial of FAPE.

3. Appropriateness of February 2009 Placement

“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the

requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). See also *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”). Like the IEP, a child’s educational placement must be “reasonably calculated” to confer educational benefit. *Board of Education v. Rowley*, 458 U.S. 176 (1982). The placement also must be based upon the child’s IEP and be in conformity with the least restrictive environment (“LRE”) provisions of the IDEA. See 34 C.F.R. §§ 300.114 -300.116; DCMR §§ 5-3011, 5-3013; *Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006).

As noted above, Petitioners allege that DCPS denied the Student a FAPE “by failing to propose an appropriate placement in February 2009.” *Id.*, p. 10 ¶5. Petitioners claim that the Charter School was no longer an appropriate school placement for the Student as of February 2009, primarily because the parents believed he required a full-time, out-of-general education placement at the Private School at that time. *Id.*, p. 6. However, the evidence adduced at hearing does not establish such requirement as of February 2009, the operative date for judging the appropriateness of the DCPS placement offer to continue the Student at the Charter School. The team’s annual review indicated some progress, both academically and behaviorally. *E.g.*, DCPS-2, p. 000010-11. This also was prior to the further evaluations and observations conducted by the parents’ educational consultant, which would be considered at subsequent meetings. Based on the information available to the team as of February 2009, Petitioners have not shown that the team’s determination that the Charter School placement remained appropriate (*id.*, p. 000012) was wrong. As a result, the Hearing Officer concludes that Petitioners have not carried their burden of proof on this issue.

4. Speech and Language Services

As noted above, Petitioners next claim that DCPS denied the Student a FAPE by “failing to find him eligible for Speech and Language therapy.” *Id.*, p. 10, ¶9. The Hearing Officer agrees with Petitioners that DCPS appears to confuse threshold eligibility for special education under the IDEA with “eligibility” of a student to receive speech and language therapy as a related service under his or her IEP, once already determined to have another qualifying disability. See *Petitioners’ Closing Brief*, p. 45. In addition, DCPS’ 8/26/09 speech and language evaluation revealed weaknesses in several areas, with the Student receiving below average scores

in sentence combining and word ordering, as well as a low average score in spoken language.

39. At the same time, however, Petitioners have not shown by a preponderance of the evidence that the Student in fact requires speech and language pathology services in order to benefit from special education.¹³ In fact, the testimony indicated that the Student does not currently receive speech/language therapy at the Private School, and that the Student is making progress without it. *See Testimony of Private School Director.*

Accordingly, the Hearing Officer concludes that Petitioners have not met their burden of proof on this issue, but also concludes that MDT/IEP team should reconvene to consider the appropriateness of the Student's receiving speech/language therapy as a related service.

5. Procedural Violations - Parental Participation in Placement Decision

Petitioners claim that DCPS committed certain procedural violations resulting in a denial of FAPE to the Student. *See* -1 p. 10; *Petitioners' Closing Brief*, p. 32. The primary claim (and the only one seriously argued in Petitioners' Closing Brief) is that DCPS failed to include the parents in the December 2009 placement decision. The Hearing Officer concludes that Petitioner has carried her burden of proof on this specific claim. The Hearing Officer finds that a procedural violation occurred in this respect and have resulted in a denial of FAPE in accordance with the criteria set forth in 34 C.F.R. 300.513 (a).¹⁴

The IDEA requires that parents have meaningful participation in the placement decisions involving their child. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically, each public agency must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.*, 1414(e);

¹³ "Related services" are defined by the IDEA and accompanying regulations as, "transportation and such developmental, corrective, and other supportive services as are required *to assist a child with a disability to benefit from special education*, and includes speech-language pathology . . ." 34 C.F.R. § 300.34(a) (emphasis added).

¹⁴ The Hearing Officer concludes that the remainder of the alleged procedural violations cited in Petitioners' complaint either overlap with the substantive issue addressed elsewhere (*i.e.*, failure to timely review evaluations and propose an appropriate program for the 2009-10 school year) or do not rise to the level of a denial of FAPE (*i.e.*, failure to "monitor" the Student's placement at the Charter School). Regarding the alleged failure to monitor, Petitioners also argue that "DCPS failed to present any evidence or testimony that it was meeting [the Student's] needs while he was attending [Charter school]." *Petitioners' Closing Brief*, pp. 31-32. However, that was not DCPS' burden of proof in this hearing.

300.327. The team does not have to agree with the parent's proposal or concerns,¹⁵ but it is required to listen to the parent's concerns and consider them, rather than issuing unilateral decrees. DCPS also is permitted to conduct its own investigation and identification of possible placement sites (*i.e.*, those that meet regulatory requirements and have available space and resources to accommodate a particular student), as long as the parent participates meaningfully in the placement process. Meaningful participation necessarily includes being part of the discussion of appropriate and available schools, as well as the ultimate team placement determination. *See, e.g., T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) ("The IDEA requires that the parents of a student with a disability be members of any group making a decision regarding the student's placement....In [DCPS'] typical placement process, the [DCPS] placement recommendations are then "offer[ed] to the parent during an MDT placement meeting.").

In this case, the evidence shows that the IEP team met in December, 2009, and proposed a significantly more intensive IEP, including an increase in goals as well as almost double the amount of hours of specialized instruction. The team also proposed a change in the delivery of those hours. However, instead of completing the process and moving on to discuss placement options for the Student, the team then informed the parents that a placement decision would be made at a later date and that they would be informed of that decision by certified mail. The parents objected. This did not comport with DCPS' obligations to ensure parental participation under 20 U.S.C. 1414(e) and 34 C.F.R. 300.327. *See, e.g., A.K.*, 484 F.3d at 680.

Nor did it comply with the requirement that placement decisions be made by "a group of persons, including the parents, and other persons *knowledgeable about the child*, the meaning of the evaluation data, and the placement options" 34 C.F.R. § 300.116 (emphasis added). As Petitioners' Closing Brief points out (at pp. 36-37), the placement decision appears to have been made by individuals without any specific knowledge of the Student and without reference to his IEP.¹⁶

¹⁵ *See, e.g., T.Y. v. New York City Dept. of Educ.*, 2009 U.S. App. LEXIS 22238 (Oct. 9, 2009), at *5 (parents entitled to "input" into, not "veto" over, school choice).

¹⁶ [redacted] testified that the placement decision was made by him and his cluster supervisor – two individuals with no real knowledge of the Student. *Compliance Case Manager Testimony*. The cluster supervisor had never attended any of the Student's IEP meetings; Mr. Persett had only been involved in the December, 2009 meeting and participated via telephone.

Finally, the Hearing Officer rejects DCPS' argument that the determination to educate the Student in an educational program offered at a particular DCPS school (the constitutes merely a "site selection," rather than placement decision, and that DCPS has unfettered discretion to designate this unilaterally. The D.C. Code expressly provides that "DCPS shall place a student with a disability in an appropriate special education *school or program* in accordance with this chapter and the IDEA." D.C. Code 38-2561.02 (emphasis added). Moreover, federal courts in this Circuit have consistently characterized such decisions as "placement" decisions under IDEA, in which the parents are entitled to participate.¹⁷ OSEP also has made clear that LEAs do *not* have the "unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents." *Letter to Veazey*, 37 IDELR 10 (OSEP Nov. 26, 2001).¹⁸

Id. In addition, _____ testified that when he spoke with the SEC at the _____ (prior to making the decision regarding whether that school could implement the 12/09 IEP), he failed to ask any questions regarding the specific delivery of services, including the peers that would be available to the Student in his academic classes. _____ also was unable to confirm that he had the IEP in front of him or that he shared the IEP with the SEC prior to this conversation. *Id.* In fact, the SEC testified that she did not recall seeing the IEP until sometime in February or March, 2010, after the placement decision had already been made by DCPS. She also testified that she was largely unfamiliar with the Student and knew nothing about his behavioral issues as of December 2009. *Testimony of Proposed ES SEC.*

¹⁷ See, e.g., *Paoella v. District of Columbia*, 210 F. Appx. 1 (D.C. Cir. 2006) (DCPS' designation of a particular public school conformed with IDEA's placement requirements where record showed that parents "had a meaningful opportunity to participate" and "placement suggested by DCPS was not predetermined"); *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"); *McKenzie v. Smith*, 771 F. 2d 1527, 1534-35 (D.C. Cir. 1985) (when DCPS chose to propose a change from private day school to a special education program at Coolidge SHS, it was "essential that DCPS adequately explain the basis for its placement decision and the services to be provided at Coolidge, as well as how those services could meet [the student's] individual needs"); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (MDT meeting convened to discuss two public placement options identified by DCPS site review committee). See also *A.K. v. Alexandria City School Board*, 484 F. 3d 672 (4th Cir. 2007) ("certainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE").

¹⁸ This is not an instance in which an LEA is merely making a limited "administrative determination" among "two or more equally appropriate locations" that admittedly can meet the child's needs, "consistent with the placement team's decision," *Letter to Veazey*. Cf. *Testimony of Compliance Case Manager*.

The evidence shows that this procedural inadequacy resulted in a denial of FAPE to the Student. The failure to ensure parent participation in the placement decision “significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child,” as well as “impeded the child’s right to a FAPE.” 20 U.S.C. 1415(f)(3)(E)(ii); 34 C.F.R. 300.513 (a) (2) (i), (ii); *see Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006). *See also A.K., supra* (suggesting lack of parental participation as a substantive violation of IDEA).

6. Appropriateness of December 2009 IEP/Placement

Petitioners next claim that DCPS denied the Student a FAPE in December 2009 by proposing an “inappropriate level of service,” as well as an inappropriate placement at [redacted] for the 2009-10 school year. . . -1, p. 10, ¶¶ 11-12). Petitioners clarified at the PHC that “inappropriate level of service” refers to the amount (*i.e.*, 19 hours/week instead of full-time) of special education and the setting in which the special education was to be provided (*i.e.*, General Education vs. Out of General Education), and that Petitioners do not challenge the goals or other content of the December 2009 IEP. *See Prehearing Order* (June 11, 2010), ¶ 6.

At the hearing, Petitioners presented several witnesses who testified at length about the Student’s educational needs, his progress at the Private School, and the inappropriateness of DCPS’ proposed placement at [redacted]. In response, DCPS failed to provide any expert or lay testimony to rebut the parents’ witnesses. DCPS’ witnesses failed to address how the Student’s placement at [redacted] would be “reasonably calculated to enable the child to receive educational benefit,” as required by the IDEA (*Rowley*, 458 U.S. at 207), and little or no evidence was introduced to support DCPS’ position that the [redacted] could implement the December 2009 IEP. The witnesses who did testify about the program at [redacted] generally had no personal knowledge of the Student and were unable to support the appropriateness of the proposed placement.¹⁹

¹⁹ DCPS’ sole witness with specific, first-hand knowledge about the program at [redacted] (the SEC) had never met or observed the Student and had limited access to his IEP. Accordingly, she was unable to provide specific information about how the proposed placement could meet the Student’s needs. *See Testimony of [redacted] SEC*. Remarkably, the SEC was not even aware of the Student’s behavioral history and struggles at the Charter School, particularly in the general education environment. Moreover, [redacted] had also never met the

The evidence shows that the particular school environment is likely to have a significant impact on the Student's ability to access his education. He is a child with significant disabilities who is in need of specific interventions. *See Testimony of Advocate and Private School Director.* If the Student had been placed at _____, he would have received the bulk of his specialized instruction in a resource room with 6th, 7th and 8th grade students, and would have been the only _____ grade student in the class. Thus, not only would he have been the youngest student in a classroom, but he would have been placed with students up to three years older than him. Placement in a classroom with *no same-aged peers* would have been inappropriate. This was likely to be detrimental to the Student's social and emotional growth, since the other students were not developmentally close enough to provide an appropriate peer group, especially given the Student's significant behavioral needs and the fact that he is socially immature and influenced by other students. *Id.*

Based on the extensive testimony from experts and individuals who know the Student well, and DCPS' failure to present any knowledgeable, contradicting witnesses who could testify about the Student's specific needs and how they would be met in the _____ program,²⁰ the Hearing Officer concludes that Petitioners have met their burden of showing that the _____ program was not an appropriate educational placement to meet the identified needs of the Student as of December 2009. Taken together with the procedural violation of failing to ensure parental participation in this placement decision (discussed under Issue 5 above), the Hearing Officer finds that DCPS has therefore denied the Student a FAPE.²¹

Student and had been to only one IEP meeting. He testified that he had never visited the _____ and only spoke over the telephone with the SEC. Similarly, _____ (DCPS Placement Specialist) had never visited the _____ or any other DCPS school on behalf of the Student. *Testimony of Compliance Case Mgr. and Placement Specialist.* The witnesses from Charter School who did have personal knowledge about the Student and his needs had no knowledge of _____ and were therefore unable to testify regarding the program.

²⁰ See note 15 *supra* & accompanying text under Issue 5.

²¹ However, the Hearing Officer agrees with DCPS that Petitioners have not demonstrated on this record that the December 2009 IEP was inappropriate at the time it was developed to the extent it failed to provide a full-time program of special education in an out-of-general education setting, for the entire school day, as alleged in the complaint. Petitioners also stipulated that they did not challenge the goals or other content of the IEP in any other respect. *See DCPS' Closing Brief*, p. 7.

C. Appropriate Equitable Relief

Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the record developed at hearing, the Hearing Officer has exercised his discretion to order appropriate equitable relief, as described below.

In this case, the primary remedies Petitioners seek are retroactive reimbursement for the parental placement at the Private School -- back “to the date when the Student was first denied an appropriate education” -- along with prospective placement at the Private School. *Petitioners’ Closing Brief*, p. 46; *see also* . . . -1, p. 9. DCPS opposes such relief.

Retroactive Reimbursement

IDEA provides that “a court or a hearing officer may require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. § 300.148 (c); *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006). In this case, the Hearing Officer has concluded that DCPS did not make a FAPE available to the Student by (a) failing to provide an appropriate IEP in February 2009, and (b) failing to offer an appropriate placement and ensure parental participation in the placement decision in December 2009. The Hearing Officer also concludes that the Private School placement chosen by the parents is “proper under the Act,” which is a lesser standard than FAPE. *See Carter*, 510 U.S. at 15; *Burlington*, 471 U.S. at 370.

However, “equitable considerations are relevant in fashioning relief,” *Burlington*, 471 U.S. at 374, and courts and hearing officers have “broad discretion” in the matter. *Id.* at 369. The Hearing Officer therefore “must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” *Carter*, 510 U.S. at 16. As the Supreme Court made clear last term in *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” (emphasis added). Moreover, where the child previously received special education under the authority of a public agency, IDEA itself provides that the cost of reimbursement may be reduced or denied upon a “finding of unreasonableness with respect to the actions taken by the parents.” 34 C.F.R. §300.148 (d) (3).

Considering all relevant factors based on the record in this case, including the conduct of the parents, the Hearing Officer concludes that reimbursement is warranted only for the period *January 2010 through the end of the 2009-10 school year*. The reasons include the following:

First, under the terms of the parents’ contract with the Private School, the parents do not appear even to have had any obligation to pay tuition or other expenses until at least 12/31/09. *See* ¶-28; *Testimony of Parent and Private School Director*.

Second, prior to the beginning of the 2009-10 school year, the parents specifically requested and the parties agreed to wait for completion of all further evaluations (including pursuant to IEE obtained by parents) before returning to an IEP meeting. *See Findings*, ¶¶ 22-24. For example, parents wrote to DCPS on 9/10/09 confirming that they would not attend an IEP meeting until “all evaluations have been completed.” *DCPS-13*, p. 000057. The letter claimed that the “results of the outstanding evaluations are essential to understanding [the Student] and the program, services, and placement he requires.” *Id.* Yet at the same time the parents sought to block further MDT meetings pending “essential” evaluations, they were enrolling the Student in private school prior to their completion. The Hearing Officer agrees with DCPS that a limitation on reimbursement is appropriate in these circumstances “as the parents never allowed sufficient time for the evaluations to be completed before they placed the Student at [Private School].” *DCPS’ Closing Brief*, p. 12.

Third, the evidence suggests that the parents may have predetermined the Student’s placement at the Private School as early as February 2009, over six months before the speech/language and assistive technology evaluations were completed. The Hearing Officer agrees with DCPS that such predetermined course of action appears to be unreasonable under the

circumstances and acted to deprive DCPS of a fair opportunity to evaluate the Student. See *DCPS' Closing Brief*, pp. 12-13.

Prospective Placement

As the U.S. Court of Appeals for the District of Columbia Circuit has explained, “an award of private-school placement is not...retroactive relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.” *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (emphasis in original). With respect to prospective private placement awards, *Branham* makes clear that they “must be tailored to meet the child’s specific needs” through a fact-intensive inquiry. *Id.* at 11-12. “To inform this individualized assessment, ‘[c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.’” *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“the nature and severity of the student’s disability, the student’s specialized educational needs, the link between these needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment.” *Branham*, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

“Because placement decisions implicate equitable considerations, moreover, courts [and hearing officers] may also consider the parties’ conduct.” *Id.*; *Reid*, 401 F.3d at 524.

The Hearing Officer concludes that Petitioners have not demonstrated in this hearing that a full-time, out of general education placement at the Private School, going forward, is necessary and appropriately tailored to meet the specific needs of the Student. Among other things, Petitioners have not shown on the present record that the Private School represents the least restrictive environment (LRE) capable of meeting the Student’s special education needs, where the Private School has only disabled students and cannot offer any interaction with non-disabled peers (including at lunch, specials, or unstructured times). See *DCPS' Closing Brief*, pp. 13-14.

HOD. Programs to be considered include the Private School and any other appropriate public or non-public program identified by DCPS and/or the Parents that can implement the IEP and meet the Student's unique needs.

4. DCPS shall immediately issue any notice of proposed placement following the MDT/IEP meeting, in order to ensure that an appropriate placement is in effect at the beginning of the 2010-11 school year. In the event that DCPS does not complete the process and issue a notice of placement prior to the beginning of the 2010-11 school year, the Student shall be placed at the **Private School** on an interim basis, until the completion of that process. DCPS shall provide funding and transportation for the Student to the **Private School** until such time as the Student's educational placement changes.
5. The MDT/IEP Team shall also meet to discuss and determine, in its discretion, whether any additional services may be appropriate to meet the unique needs of the Student and to compensate for any failure to provide FAPE to the Student since February 10, 2009, as determined in this HOD.
6. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioners, Paula A. Rosenstock, Esq., 5454 Wisconsin Avenue, Suite 760, Chevy Chase, Maryland 20815, via facsimile (301-657-3843), or via email (paula.rosenstock@lawforchildren.com).
7. Any delay in meeting any of the deadlines in this Order caused by Petitioners or Petitioners' 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.
8. Petitioners' other requests for relief contained in the Due Process Complaint filed April 29, 2010, are hereby **DENIED**.
9. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: July 19, 2010



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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