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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: August 30, 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 on May 26, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns an -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 comprehensively evaluate the Student originally in 2007; (b) refusing to find the Student eligible for services on or about 03/08/2007 when he was in the Student Support Team ("SST") process; (c) failing to provide the parents with notice of their due process rights on 03/08/2007; (d) failing to timely evaluate and determine eligibility within 120 days from the date the parents requested DCPS to evaluate the Student on or about 10/13/2009; and

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

(e) proposing an inappropriate individualized education program (“IEP”) and inappropriate placement on 04/08/2010. *See* 45.

DCPS filed a Response on June 12, 2010, which asserts that the Student has not been denied a FAPE and that Petitioners’ requests for relief are not warranted. The Response asserts, *inter alia*, that Petitioners “refused consent for evaluations in this matter and therefore waived their right to FAPE”; that the Student “does not require a private segregated placement, and it would not be the LRE for the student”; and that “DCPS reserves the right to raise the affirmative defense of lack of notice of a unilateral private placement”. *Response*, pp. 5-6. In addition, DCPS contends that all claims and requests for relief based on actions occurring more than two years ago (*i.e.*, before 05/26/2008) are barred by the applicable IDEA statute of limitations.

On June 14, 2010, a resolution meeting was held, and no resolution was offered by DCPS. 46; 48. Absent any agreement in writing, the 30-day resolution period ended and the 45-day timeline began as of June 25, 2010.

On June 24, 2010, a Prehearing Conference (PHC”) was held, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order* (June 29, 2010), ¶ 5. Petitioners elected for the hearing to be closed. Five-day disclosures were thereafter filed by both parties as directed.

The Due Process Hearing was scheduled for July 28, 29, and 30, 2010. Petitioners presented their case and rested by the middle of the second day, July 29; and DCPS presented two of its three proposed witnesses by the end of that day. DCPS’ third and final witness – the DCPS School Psychologist who reviewed independent evaluations of the Student and participated in the Student’s MDT/IEP process -- was unavailable due to a death in her family. DCPS moved on the record at the conclusion of the July 29 hearing session to continue the third hearing session to August 20, 2010, in order to allow its final witness to provide relevant testimony on the issues specified for hearing in this matter. Petitioners opposed the motion.

On July 30, 2010, the Hearing Officer issued a written Order granting the continuance. The Order found that good cause existed to reschedule the final session of the due process hearing and to extend the deadline for issuance of a final determination pursuant to Section 402 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”)*. The Hearing Officer also found, *inter alia*, that the requested continuance

would not prejudice Petitioners or result in any educational harm to the Student since the parties had already requested and agreed to continue the case in order to submit written closing statements/post-hearing briefs by August 18, 2010, with the HOD due by August 28, 2010. Under the continuance, post-hearing briefs were required to be submitted by August 23, 2010, with the HOD due by August 30, 2010, on essentially the same schedule. The Order granting the continuance was approved by the Chief Hearing Officer as required under the *SOP*.

During the three-day hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners' Exhibits: -1 through -57.²

DCPS' Exhibits: DCPS-1 through DCPS-12.³

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

Petitioners' Witnesses: (1) Mother; (2) Father; (3) Dr. Maia Deubert, Clinical Psychologist (Expert); (4) Dr. Lauren Kenworthy, Pediatric Neuropsychologist (Expert); (5) Laura Solomon, Ed. D, Educational Consultant (Expert); and (6) Private School Principal.

DCPS' Witnesses: (1) Ashley Lozano, DCPS Compliance Specialist; (2) DCPS Occupational Therapist ("OT"); and (3) DCPS School Psychologist.

Petitioners filed a written closing brief on August 23, 2010. DCPS elected not to file a brief and rested on the record presented at hearing. 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 the continuance order, which is 10 days after the final hearing session and seven (7) days after written closing statements/briefs were due.

² DCPS filed no written objections to Exhibits -1 through -57, as was required by the June 29, 2010 Prehearing Order, but attempted to raise oral objections to some of the exhibits at the hearing. These objections were denied as procedurally improper. At the hearing, Petitioners also offered an additional exhibit (marked for identification as -58), consisting of Dr. Kenworthy's handwritten notes and background questionnaires. Exhibit -58 was not included in Petitioners' five-day disclosures and was objected to by DCPS. -58 was not admitted into evidence.

³ DCPS Exhibits 1 through 12 were admitted without objection.

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 in 2007** — Did DCPS deny the Student a FAPE by failing to comprehensively evaluate the Student for eligibility under the IDEA in 2007, following referral to the Student Support Team (“SST”)?
- (2) **Failure to Determine the Student Eligible on 03/08/2007** — Did DCPS deny the Student a FAPE by refusing to find the Student eligible for services on or about 03/08/2007 when he was in the SST process?
- (3) **Failure to Provide Notice of Due Process Rights on 03/08/2007** — Did DCPS deny the Student a FAPE by failing to provide the parents with notice of their due process rights on 03/08/2007?
- (4) **120-Day Violation** — Did DCPS fail to timely evaluate and determine eligibility within 120 days from the date the parents allegedly requested DCPS to evaluate the Student on 10/13/2009?
- (5) **Inappropriate IEP and Placement on 04/08/2010** — Did DCPS deny the Student a FAPE by proposing an inappropriate IEP and placement at the 04/08/2010 MDT meeting? Specifically, Petitioners allege that: (1) the disability classification is not appropriate because the Student is not on the Autism Spectrum, but rather should be classified as a student with a learning disability and ADHD; (2) the hours of special education as indicated on the IEP are not appropriate; and (3) the proposed placement in a self-contained Autism program at his neighborhood elementary school (“Neighborhood ES”) is not appropriate to meet the educational needs of the Student.

As discussed at the PHC, Issues 1-3 above are based on actions occurring more than two years before the complaint was filed. Petitioners claim an exception to the statute of limitations in this case because they allege that DCPS withheld information from the parents that was required to be provided by the IDEA – specifically, that at no time during the SST process were the parents ever advised of or provided with a copy of their procedural safeguards. *See* 34 C.F.R. 300.511 (f) (2); -45, p. 228.

As relief for the alleged denials of FAPE, Petitioners seek an order requiring that DCPS: (a) provide reimbursement for the tuition that Petitioners have previously paid both to the Private School and to another D.C. non-public school (“Previous Private School”) beginning with the 2007-08 School Year; and (2) prospectively place, fund and provide transportation for the Student to attend the Private School. -45, p. 230.

III. FINDINGS OF FACT

1. The Student is an _____-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 DCPS-8; _____-39; _____45; Parents' Testimony.
2. The Student has been determined by DCPS to have Multiple Disabilities, identified as Other Health Impairment ("OHI") and Autism. See DCPS-3, -4,-7,-8,-10.
3. On or about June 22, 2006, when the Student was aged _____ years, 9 months, Petitioners obtained an occupational therapy ("OT") evaluation of the Student at the referral of his pediatrician. _____-1.⁴ On a general preschool screening, the Student scored in the "at-risk" range overall. *Id.*, p. 8. He was in "the at-risk range for overall coordination and on the borderline between at-risk and delayed ranges for the sensory foundations." *Id.* The evaluator recommended that the Student receive direct, individual OT twice weekly for approximately one hour to improve his fine motor skills as well as to address his problems with muscle tone. _____-1, p. 10.
4. On or about December 13, 2006, while the Student was attending pre-Kindergarten at the Neighborhood ES, his teacher completed a Student Support Team ("SST") Request Form describing her concerns with a "delay in fine motor skills" and requesting a meeting to discuss these concerns. _____-2. On or about December 20, 2006, the Student's mother _____ also completed a parent request form noting her concerns with "fine motor difficulties, some sensory integration issues and developmental delays." _____-3. The parent also reported that an outside OT assessment had been completed, and later provided a copy of the evaluation to the Neighborhood ES during the SST process. *Id.*; Mother's Testimony, Tr. 97-98.

⁴ The evaluator's summary of the referral stated (*inter alia*) that teachers had "reported that he has delays in motor skills and problems with self-regulation such that he gets over-stimulated in the classroom and becomes impulsive and the pediatricians have also observed this during [the Student's] office visits." _____-1, p. 1.

5. On or about January 8, 2007, the SST at the Neighborhood ES held a meeting to discuss the request forms it had received. -4; -6. The meeting was attended by the mother, the Assistant Principal, Counsel/Special Education Coordinator, the Student's classroom teacher, and another pre-K teacher. -6, p. 23. The SST identified the concern as "fine motor development and coordination," and discussed various strategies for addressing that concern, including taller chairs, extra support with writing, and use of visual aids. *Id.*, pp. 23-25. The Student was also referred for an OT screening/observation. *Id.*, p. 24.
6. On or about January 23, 2007, DCPS completed an OT screening/observation of the Student per the request of the SST. As part of the screening/observation, the evaluator conducted a teacher interview, informal classroom observation, review of the parent's outside OT evaluation, and review of the Student's written assignments. -8. The evaluator recommended that the Student receive two 30-minute OT sessions to assist him with fine motor, visual motor integration, and related skills in order to maximize his functional performance in the classroom. *Id.*, p. 30.
7. On or about January 26, 2007, the Student's pediatrician issued a letter indicating that the Student had a "fine motor developmental delay and hypotonia." -9. She recommended OT one hour twice a week "to improve his fine motor skills, strength, and coordination." *Id.*
8. On or about February 27, 2007, the SST issued a meeting report finding that strategies for addressing the Student's fine motor concerns were impacted by a suspected medical condition, and thus that the SST should proceed to determine Section 504 eligibility and develop a 504 plan if eligible. -10; *see also* 11. However, the SST did not indicate that a disability was suspected under the IDEA, and thus did not refer the matter to the Student's MDT to determine eligibility for special education. *See* -10.
9. On or about March 8, 2007, the 504 Central Review Committee ("CRT") at the Neighborhood ES issued its Determination. The CRT determined that the Student was not eligible for a Section 504 Plan, but recommended that the SST continue to follow the OT recommendations contained in the 1/23/07 report. -12.

10. On or about March 26, 2007, the SST met with the parents to discuss the CRT determination. The SST told the mother that it would follow up with the CRT to appeal the Section 504 determination, but no changes in the determination was ever made. -13; *Mother's Testimony, Tr. 117-19.*
11. The mother testified that in the first meeting with the SST, she asked "why are we doing a 504 rather than an IEP, and they told me that there was no way I would get an IEP, and that this was the best way to proceed..." *Mother's Testimony, Tr. 121.* The mother testified that she was never advised that she had a right to have the Student evaluated to determine whether he needed special education, and that she did not recall anytime during the SST process receiving a booklet or paper outlining her legal rights with regard to requesting special education. *Tr. 123-24.*
12. At the end of the 2006-07 School Year, the parents decided to remove the Student from the Neighborhood ES because they were dissatisfied with his progress there and had not heard further from the SST about services. *Mother's Testimony, Tr. 91.*
13. In September 2007, they enrolled him in Previous Private School, a non-public general education school located in the District of Columbia. *Mother's Testimony, Tr. 126.* The parents initially thought that the Student just needed smaller classes, but as time went on it became more apparent that he needed special help. *Id., Tr. 129, 134.*
14. After enrolling the Student at the Previous Private School, the parents obtained additional evaluations and noted additional difficulties he was experiencing in the classroom such as increasing attention issues. *Id., Tr. 127-30.* The evaluations included a comprehensive neuropsychological evaluation of the Student in October and November 2007 by Maia Deubert, Psy.D., a licensed clinical psychologist (15), an updated OT evaluation in October 2008 (14), and a baseline assessment of processing/perceptual abilities in November 2008 (16).
15. The comprehensive neuropsychological evaluation completed in November 2007 concluded that the Student met the criteria for the following diagnoses: Learning Disorder, NOS (in the areas of processing speed/fluency and fine motor skills); and Sensory Processing Disorder. 15, pp. 66-67. The evaluator found (*inter alia*) that the Student's "rate of production is not commensurate with his cognitive abilities

and negatively impacts his learning in school.” *Id.*, p. 67. The report offered various recommendations for his educational environment, including untimed conditions in which to complete assignments, minimizing distractions, use of keyboarding, ample opportunity to ask for clarification or assistance, repetition of instructions, and frequent breaks. *Id.*, pp. 67-68. See also *Deubert Testimony*, Tr. 290-303.

16. The October 2008 OT evaluation found that the Student “continues to need work on improving tactile discrimination, constructional praxis, regulation, ocular motor skills, and handwriting.” *Id.*, p. 48. However, based on his progress at that time, the evaluator recommended that OT services be discontinued. *Id.*
17. The November 2008 Baseline Assessment of the Student was conducted by a school psychologist/learning specialist at the Previous Private School. The assessment was designed “to take a closer look at his processing/perceptual abilities” in light of Dr. Deubert’s earlier diagnoses of Learning Disorder, NOS and Sensory Processing Disorder. *Id.*, p. 74. The evaluator found weaknesses in how the Student processed certain visual and auditory information, including difficulties with both perception skills and memory tasks. *Id.*, pp. 74-75. The evaluator also found that the Student “may look as if he is not paying attention or he may become physically active because he is not able to process the information.” *Id.*, pp. 75-76.
18. The Student attended the Previous Private School for the entire 2007-08 School Year and the first half of the 2008-09 School Year.
19. In December 2008, shortly after receiving the results of these updated assessments, the parents decided to withdraw the Student from the Previous Private School. The parents made this decision because the staff there “said that he needed more help than they could give him and that the teachers at the school were not trained in special education and that he was going to need a more intensive program than they had to offer him.” *Mother’s Testimony*, Tr. 130-31. Thus, the parents “were advised to start looking for schools for him.” *Id.*, Tr. 131.
20. In January 2009, the Student was enrolled by his parents at the Private School, which is a full-time special education day school located in the District of Columbia. Although the parents initially preferred to let the Student finish the 1st grade at the

Previous Private School, they decided to accept a mid-year opening at the Private School to avoid losing it for the next school year. *Mother's Testimony, Tr. 131*. The Student then completed the remainder of the 2008-09 School Year and attended the entire 2009-10 School Year at the Private School.

21. In April 2009, the Private School completed a comprehensive speech and language assessment. -18. The evaluator recommended, *inter alia*, that the Student receive speech and language therapy for 45 minutes per week to address certain areas of weakness identified in her report. *Id., p. 95*.
22. In the summer of 2009, Petitioners consulted with an attorney to see "what our options were" and whether they could get some help from DCPS, as providing for the Student's educational needs had become a "huge financial obligation." *Mother's Testimony, Tr. 134-35*. As a result of that consultation, Petitioners "made a decision to go back to DCPS and ask them to comprehensively evaluate [the Student]." *Tr. 134*.
23. On or about October 13, 2009, the mother submitted a written request to the Neighborhood ES asking to conduct a "comprehensive evaluation" of the Student "for eligibility for special education services and an IEP through the District of Columbia Public Schools." 21. The mother testified that she visited the school and gave this letter to a person who sits at the front desk. She also registered her son as a non-attending student. *Mother's Testimony, Tr. 136*.
24. Approximately four months later, on February 16, 2010, Petitioners' counsel faxed a letter to the Neighborhood ES Principal to follow up on the mother's request, as over 120 days had elapsed without action by DCPS. -23. The letter from counsel enclosed and/or attached several evaluations of the Student that had been conducted by evaluators outside of DCPS, including the 6/22/06 OT Evaluation, the 11/16/07 Comprehensive Neuropsychological Evaluation, the 10/24/08 OT Evaluation, and the 4/14/09 Comprehensive Speech & Language Assessment. Petitioners' counsel also transmitted the individualized education program developed in May 2009 by the Private School. The letter requested that DCPS convene a meeting to review the independent evaluations and to determine the Student's eligibility for special education within the next 10 school days and no later than March 1, 2010. *Id., p. 151*.

25. In response to the letter, the Special Education Coordinator (“SEC”) at Neighborhood ES sent an email dated February 18, 2010, to the mother advising that the MDT/IEP Team (including the parents) would like to meet to review the documents that had been provided and determine eligibility for special education and related services. The letter further advised that if the Student was found eligible, the team would draft an appropriate IEP to provide educational support. *24, pp. 158-59.*
26. Neither in the 2/18/10 email from the SEC nor in any other communication did DCPS indicate that it wished to conduct any additional evaluations. *See -24; Tr. 254-55.*
27. After Petitioners requested that the meeting be rescheduled to allow representatives of the Private School to attend (*see -24*), an initial MDT/IEP Team meeting was convened on March 11, 2010. At this meeting, the team discussed the parents’ concerns and heard from various staff and service providers at the Private School (including classroom teacher, OT, speech pathologist, and social worker) regarding the Student’s experiences and difficulties to date. *25, pp. 161-62.* The team then stated that it wished to observe the Student at the Private School before determining eligibility and developing an IEP, and would reconvene on April 8th. *Id., p. 162.*
28. The 3/11/10 MDT/IEP Team was also presented with a diagnosis and treatment history of the Student for ADHD, Predominately Hyperactive-Impulsive Type, as well as Anxiety Disorder Not Otherwise Specified, by his treating psychiatrist, Dr. David Chen, M.D. *27.*
29. On April 8, 2010, a second MDT/IEP Team meeting was convened as scheduled following the DCPS observations at the Private School. The assessments provided by the parents and the observations performed by the IEP team were reviewed and discussed among the team members. *See 38, p. 197.* At the time of the April 8, 2010 MDT/IEP team meeting, DCPS did not request to conduct any further evaluations of the Student. *See Tr. 155.*
30. At the 4/08/10 MDT meeting, the team determined the Student to be eligible as a student with Multiple Disabilities to include Autism and Other Health Impairment. *See -33, p.183; -34, p.184; 35, p.186.* The parents did not agree with the

disability classification of Autism, but did agree with the disability determination of Other Health Impairment. *Tr.* 153-54.

31. At the conclusion of the 4/08/10 meeting, DCPS issued a Prior to Action Notice notifying the parents of its eligibility determination and proposing an initial placement for the Student. -40. The initial placement/location of services was identified as Neighborhood ES in an Out of General Education setting. *Id.* As DCPS explained both at the 4/08/10 MDT meeting and at the 6/14/10 resolution meeting, the specific educational placement being proposed for the Student was a self-contained classroom within the existing Autism program at Neighborhood ES. *See* -41; -44; -48; *Parents' Testimony; OT Testimony; School Psychologist Testimony.*
32. On or about April 8, 2010, after DCPS proposed the self-contained Autism program at Neighborhood ES, the parent agreed to go look at the program that was being proposed. *Mother's Testimony, Tr.* 167.
33. Due to technical problems, DCPS was not able to generate an IEP at the April 8, 2010 meeting, but subsequently generated it on April 14, 2010, and sent it to the parents. The parents received it on or about April 16, 2010. *See* -39, p.199 ("Fax generated on April 14, 2010); -44, pp. 220-21; *Parents' Testimony.*
34. The April 8, 2010 IEP requires 25.5 hours per week of specialized instruction to be provided in a setting Outside General Education, two (2) hours per month of speech-language pathology services, 45 minutes per week of occupational therapy ("OT") services, and two (2) hours per month of behavioral support services. *DCPS-10*, p. 000082. The team also determined that the Student would "transition to special subjects (PE, Music, Media, Art) with grade equivalent peers." *Id.* With respect to the least restrictive environment ("LRE"), the team determined that the Student's needs required removal from general education to receive all of his services, but that returning to his neighborhood school in a separate classroom represented "movement toward a less restrictive environment" as he was currently enrolled in a wholly separate private school. *Id.*, p. 000083. The team also adopted many (if not all) of the goals that had been developed by the Private School and contained in the Private School's written program for the Student dated May 15, 2009.

35. On or about April 14, 2010, DCPS also issued a Prior Written Notice-Evaluation documenting that no additional assessments were necessary to make a determination of eligibility under the IDEA and that DCPS had sufficient information to make decisions about the educational needs of the Student. -38, p. 197.
36. On or about April 19, 2010, the mother visited Neighborhood ES and observed the self-contained Autism program proposed by DCPS. *Tr. 167*. The mother concluded that it was not appropriate for the Student because the Student is “so far beyond academically, socially, emotionally” any of the children in the proposed program that “he wouldn’t develop in that classroom.” *Tr. 170-71*. In addition, Petitioners retained the services of an educational consultant (Dr. Solomon) who also had an opportunity to observe the program and agreed with the parents’ concerns.
37. On or about April 22, 2010, following the 4/08/10 MDT meeting and the mother’s 4/19/10 observation, the parents through counsel sent a letter to the SEC at Neighborhood ES formally rejecting the IEP and proposed placement and requesting public funding for the Private School. 44. The letter stated that Petitioners “are not in agreement with the IEP as it relates to the disability classification of Autism or that the IEP provides the level of support that [the Student] requires.” *Id.*, p. 221. The letter also stated that Petitioners “do not believe that the placement proposed by DCPS in the self-contained Autism program is appropriate for their son.” *Id.*
38. On or about May 13, 2010, in a further effort to determine the appropriateness of DCPS’ proposed placement prior to filing the instant complaint, Petitioners consulted with Lauren Kenworthy, Ph.D., an expert pediatric neuropsychologist and Director of the Center for Autism Spectrum Disorders at Children’s National Medical Center.⁵ Dr. Kenworthy reviewed the Student’s educational records including parent and teacher reports, conducted a detailed interview with the parent, and observed the Student in a play interaction setting. *See Tr. 366-69*.
39. On or about June 8, 2010, Petitioners obtained a letter from Dr. Kenworthy summarizing the findings of her 5/13/10 diagnostic consult. Dr. Kenworthy found

⁵ DCPS stipulated that Dr. Kenworthy is an expert in Autism.

that the Student “struggles with executive function, and flexibility is a major difficulty for him in terms of cognitive problem solving and repetitive behaviors.”

-47. She also noted “some problems with social awareness as reported by teachers and parent and evidenced by some difficulty with reciprocity during my interview.”

Id. However, she noted that the Student “also has many strengths, including the ability to read nonverbal cues, maintain social interactions with peers, maintain good eye contact, and demonstrate some reciprocity in play and in conversation.” *Id.*

Overall, she concluded that the Student “does not based on my consult meet criteria for an autism spectrum disorder.” *Id.*

40. In her testimony in this case, Dr. Kenworthy reiterated her expert opinion that the Student does not meet the diagnostic criteria for an Autism Spectrum Disorder. *See Tr. 369.* She testified that for a student to be on the autism spectrum, they require impairments across a triad of abilities: social interaction; communication; and repetitive behaviors or restricted areas of interest. Dr. Kenworthy found that the Student did not meet the criteria for an Autism Spectrum Disorder primarily because he did not meet the first component of the triad, *i.e.*, the qualitative impairment in social interaction. *Tr. 373.* She further testified that the Student has “many core social strengths which are not consistent with the diagnosis of autism, including social reciprocity and the ability to have a social give and take....” *Id.* Additionally, she testified that he has demonstrated the ability to develop appropriate peer interaction. *Id.*⁶

41. Dr. Kenworthy also testified that, in her opinion, a self-contained classroom for students with Autism would be inappropriate for the Student, as the skills targeted in an Autism program would not be the appropriate remediation that the Student requires and would be detrimental to his development. *See Tr. 384-85.* She testified that the Student is a “very complex child with multiple areas of difficulty including language, attention, organization, flexibility and also anxiety in response to these

⁶ Dr. Kenworthy testified that the restrictive and repetitive behaviors that she saw in the Student, which may be characteristic of autism, are in his case actually the result of anxiety affecting his behavior. *See Tr. 376.*

difficulties”; and so “he’s a child with a complex set of developmental and learning disorders and requires a specialized educational setting that’s designed to address those sets of difficulties.” *Tr.385.*⁷

42. Dr. Deubert, the author of the November 2007 neuropsychological evaluation report, similarly testified that the Student was “demonstrating signs of what would likely be complicated learning disabilities combined with sensory processing disorder.” *Tr. 303.*

303. Dr. Deubert testified that a self-contained Autism program would have been inappropriate for the Student and that there would be a concern for regression in both academic and emotional ways. *Tr. 304.*

43. Dr. Solomon, the educational consultant retained by Petitioners, also testified that in her opinion the Student does not meet the criteria for a classification of Autism, either diagnostically or educationally. *See Day 2 Tr.164.* She testified that in her opinion the Student has a primary Specific Learning Disability and a secondary disability under the classification of Other Health Impairment for both Sensory Processing Disorder as well as ADHD. *Day 2 Tr. 170-71.*⁸ *See also Tr. 154;* 43 (4/20/10 letter from social worker who has worked with the Student at the Private School describing her observations and opinion that he did not fall on the Autism Spectrum).

44. Dr. Solomon observed the proposed program at Neighborhood ES and found it to be very chaotic. She testified that there were five children in the class; and there were several students who were not verbal. *Day 2, Tr. 172, 178.* She further testified that it would not be appropriate for the Student as it was not structured to serve students with multiple learning disabilities. *Day 2, Tr. 179.* Dr. Solomon’s written report

⁷ On cross examination, Dr. Kenworthy was asked if certain features were commonly associated with children diagnosed with autism, and in response she indicated that they were not specific to autism and were seen in a wide range of developmental disabilities. *See Tr. 406, 413.*

⁸ DCPS stipulated to Dr. Solomon as an expert witness in the areas of special education as it relates to the instruction of special education students, identification of disabilities, development of IEP’s and placement decisions. *Tr.123-24.* Dr. Solomon testified that of the hundreds of MDT eligibility meetings that she has been involved in, approximately 15 to 20 percent involved eligibility determinations of Autism. *Day 2-Tr.160.*

dated July 10, 2010, further outlines her specific concerns with the DCPS proposed placement of the Student in the self-contained Autism program at Neighborhood ES. *See 49, pp. 251-53.*

45. Additionally, Dr. Solomon testified that most of the goals on the 4/08/10 IEP drafted by DCPS were taken from the Private School "IEP" and are appropriate for a student with multiple learning disabilities along with a sensory processing disorder, ADHD and executive dysfunction. *Day 2, Tr. 184.*
46. On or about June 14, 2010, DCPS convened a resolution meeting on the instant complaint. DCPS maintained its position and disability classification. Petitioners did not agree with the proposed placement because it was a self-contained classroom for students with Autism and Neighborhood ES did not offer other alternatives. *-48, p. 237.* Petitioners stated that they did not believe the Student was autistic. *Id.* DCPS maintained that the decision made by the MDT was appropriate. *Id., p. 238.*
47. The evidence shows that the self-contained Autism program at Neighborhood ES was not an appropriate educational placement to meet the unique special education needs of the Student as of April 8, 2010. The proposed placement would have required the Student to be educated with students who had significantly different academic, social, and emotional needs from his; it would have targeted different skills; and it would have been detrimental to his overall development. In addition, it appears that the program could not implement the 4/08/10 IEP as written, since the IEP incorporates the individual goals developed by the Private School to address the Student's unique and complex set of developmental and learning disorders, rather than needs more typically addressed with autistic students for whom the Neighborhood ES program was designed.
48. The evidence shows that the Private School is able to implement the April 2010 IEP and otherwise is a proper educational placement for the Student. Since attending the Private School, the Student has made significant educational progress. *See Testimony of Parents, Educational Consultant, and Private School Principal; . -49* (Diagnostic Evaluation and School Placement Report, dated July 10, 2010). Moreover, except for not offering the opportunity to transition to special subjects with

non-disabled peers, the Private School would not really provide any more restrictive environment than the self-contained program at Neighborhood ES.

49. Petitioners paid Private School _____ in tuition from January 26 to June 5, 2009, plus _____ in other expenses (including for speech/language services) through Summer School 2009. _____ -56, p. 281. Petitioners also paid Private School _____ in tuition from August 26, 2009 to June 4, 2010, plus _____ in other expenses (including for speech/language and OT services) through Summer School 2010. _____ 56, p. 282. In addition, Petitioners paid Previous Private School a total of _____ for the 2007-08 School Year and _____ for the 2008-09 School Year. . . -55. *See also Parents' Testimony.*

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

For the reasons discussed below, the Hearing Officer concludes that Petitioners have *not* carried their burden of proof seeking relief on Issues 1 through 3, even assuming *arguendo* that Petitioners have demonstrated an exception to the applicable statutory limitations period. The Hearing Officer concludes that Petitioners have carried their burden of proof on Issue 4 and have carried their burden of proof, in part, on Issue 5.

Issues 1-3

- (1) **Failure to Evaluate in 2007**
- (2) **Failure to Determine the Student Eligible on March 8, 2007**
- (3) **Failure to Provide Notice of Due Process Rights on March 8, 2007**

As Petitioners did in their Closing Argument, the Hearing Officer groups the first three issues together for purposes of this discussion because the relevant events and analysis overlap. Petitioners claim that in early 2007 (over three years before the complaint was filed), DCPS denied the Student a FAPE by failing in its obligations to (1) comprehensively evaluate the Student, (2) find the Student eligible for special education, and (3) provide the parents with notice of their due process rights. For several reasons, the Hearing Officer concludes that Petitioners have not met their burden of proof to establish entitlement to relief under these Issues.

First, the Hearing Officer is not persuaded that Petitioners have demonstrated an exception to the two-year statutory timeline for requesting a hearing about these alleged actions. Petitioners allege that they were prevented from filing a complaint due to DCPS' withholding of information from the parent that was required to be provided under the IDEA. *See* 34 C.F.R. 300.511(f). Specifically, Petitioners argue that DCPS failed to provide the parents with their procedural safeguards "either upon the *initial referral* by the parent and the teacher and/or upon the *LEA's decision to refuse to change [the Student's] identification*" under 34 C.F.R. 300.504. *Petitioners' Closing Argument* (filed Aug. 23, 2010), p. 19 (emphasis in original). However, it does not appear that an "initial referral" under IDEA (as opposed to Section 504) was ever made in this case at any time before October 2009, and DCPS does not appear to have refused any request to change the Student's "identification" to a disabled student eligible for special education services.⁹ DCPS merely conducted a Section 504 review, which apparently ended in a decision that the Student was not eligible for a 504 plan. -12. Neither the CRT nor SST ever referred the matter to an MDT for an evaluation of special education eligibility, and the parents did not make any specific request for such referral or determination. At most, Petitioners showed that they might have been discouraged from pursuing this path by informal comments

⁹ Petitioners argue that "[i]n this case, the LEA refused to change the identification of [the Student] when it denied [him] eligibility under a 504 plan." *Petitioners' Closing Argument*, p. 19. But this is not the test under 34 C.F.R. 300.503(a), which concerns identification of a child for *IDEA* eligibility.

concerning the likelihood of IDEA eligibility at that point (*Tr. 121*) – which, as discussed below, may well have been accurate and consistent with DCPS’ “child find” obligations under the circumstances then present.

Second, even assuming *arguendo* that an exception to the statute of limitations applies, Petitioners have not shown that DCPS failed in its “child find” obligations *as of March 8, 2007*. 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); 34 C.F.R. §§300.111(a); DCMR 5-E3002.1(d). Child find “must include” all children “who are *suspected* of being a child with a disability in need of special education, even though they are advancing from grade to grade....” 34 C.F.R. 300.111(c).¹⁰ In this case, Petitioners essentially argue that DCPS should have identified the Student as a child suspected of being disabled and comprehensively evaluated him *prior* to, or as of, the March 8, 2007 determination of Section 504 eligibility. *See Petitioners’ Closing Argument*, p. 16. However, Petitioners have not shown that the Student should have been suspected of being disabled under the IDEA at that time, or that DCPS’ actions were in any way unreasonable. In fact, Petitioners never say what disability DCPS should have “suspected” at that time, when the concern focused on OT support for fine motor skills issues, which of itself would not appear to establish eligibility for special education under the IDEA. *See* 34 C.F.R. §§300.8, 300.34, 300.39.¹¹

According to Petitioners’ own proposed findings, even by September 2007 when they enrolled the Student in a general education private school, the mother “testified that initially she and her husband thought that [the Student] just needed smaller classes but as time went on it was obvious that he really needed help.” *Petitioners’ Closing Argument*, p. 5, ¶ 19; *see also Findings, supra*, ¶ 13. It was not until after the Student began attending Previous Private School in fall 2007 that the issues became “more apparent” (*Tr. 129*) to the mother

, as she noted additional difficulties he was experiencing such as increasing attention issues and decided to have him evaluated by a neuropsychologist. *Findings*, ¶ 14. It

¹⁰ *See also* 34 C.F.R. §300.301(a); DCMR §5-E3005.2; *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008).

¹¹ Again, since DCPS was not making an eligibility determination under the IDEA on 3/08/07, Petitioners’ arguments concerning reliance on a single assessment under 34 CFR 300.304(b) (2), *Closing Argument*, p. 16, are inapposite.

was not until December 2008 that Petitioners decided that the Student needed specialized instruction that could not be offered at Previous Private School. *Tr. 130-31; Findings, ¶ 19*. And it was not until the Student began attending Private School in 2009 that the parents believe they “have really started to truly identify what his issues are.” *Tr. 132*. None of this information was presented to DCPS until February 2010, after he had been removed from DCPS schools for almost three years. There simply is no credible evidence that DCPS should have suspected that the Student was a child with one or more disabilities as early as March 2007, when many of his present difficulties were yet to be revealed even to his parents.

Third, even assuming *arguendo* that some procedural violation occurred during this earlier time period (such as a failure to provide notice of due process rights at some point), Petitioners have not shown that any such failure resulted in any specific denial of FAPE or other deprivation of educational benefit under 34 C.F.R. 300.513(a). Nor, for the reasons discussed in Part C below, have they shown that any such procedural inadequacy (or even a denial of FAPE) would entitle them to the only relief they seek in this action other than prospective placement – *i.e.*, retroactive reimbursement of tuition beginning with the 2007-08 School Year. Notably, Petitioners have not alleged that any other relief (such as compensatory education) would be appropriate for these alleged denials of FAPE during the 2006-07 School Year.

4. 120-Day Violation

District of Columbia law requires that DCPS “shall assess or evaluate a student, who may have a disability and who may require special education services, *within 120 days from the date that the student was referred* for an evaluation or assessment.” D.C. Code §38-2561.02 (a) (emphasis added). As this statute has been construed by the courts, DCPS “must conduct a full and individual initial evaluation” within the required time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); DCMR §5-3005.2. This means that DCPS must complete and review the initial evaluation in all areas of suspected disability, determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within 120 days. *See Hawkins v. D.C.*, 539 F. Supp. 2d 108 (D.D.C. 2008); *D.C. v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); DCMR §§ 5-3002, 5-3013.

In this case, it is undisputed that the Student was “referred” for an initial evaluation or assessment within the meaning of the statute no later than October 13, 2009. On that date, the parent delivered a formal written request to DCPS, requesting that DCPS evaluate the Student to determine his eligibility for specialized instruction and related services. Accordingly, the mandatory 120-day timeline specified in D.C. Code §38-2561.02 (a) expired on or about February 10, 2010. By the time DCPS determined eligibility and developed an IEP for the Student, approximately two more months had elapsed beyond the 120-day timeline. DCPS’ counsel effectively conceded this point at hearing. *Tr.* 84-85. Accordingly, the Hearing Officer concludes that DCPS violated its obligations under IDEA and D.C. Code § 38-2561.02 (a) by not determining eligibility and developing an IEP until April 8, 2010.

Courts have held that a delay in completing required evaluations is not a “mere procedural inadequacy”; rather, “such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA.” *Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008).¹² As in *Harris*, the “intransigence of DCPS as exhibited in its failure to respond quickly to [parent’s] simple request has certainly compromised the effectiveness of the IDEA as applied to [the Student].” 561 F. Supp. 2d at 69.¹³ Alternatively, the Hearing Officer concludes on the basis of the record evidence presented by Petitioners that by delaying the eligibility and IEP dates by almost two months, this procedural violation has (i) impeded the Student’s right to a FAPE, (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, and/or (iii) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a).

¹² See also *IDEA Public Charter School, supra* (failure to perform child-find duty and comply with DC’s 120-day timeline constitutes substantive denial of FAPE); *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008)(same); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007) (noting that DCPS is obligated to “offer FAPE by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement”) (emphasis added).

¹³ Between October 13, 2009 and February 16, 2010, the date of Petitioners’ follow-up letter, it is undisputed that DCPS did not take steps to initiate or complete any evaluations of the Student. DCPS also did not present any testimony at hearing to explain its failure to take action during this period.

5. Appropriateness of April 2010 IEP and Placement

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) (emphasis added).

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).¹⁴ 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

¹⁴ 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. “). In addition,

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”).

“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* D.C. Code 38-2561.02 (“DCPS shall place a student with a disability in an *appropriate* special education *school or program* in accordance with this chapter and the IDEA”) (emphasis added); *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); *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*”) (emphasis added). Among other things, the placement must be “based on the child’s IEP,” 34 C.F.R. 300.116(b)(2), and must also be in conformity with the least restrictive environment (“LRE”) provisions of the IDEA. 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).

In this case, Petitioners claim that the April 2010 IEP and placement were inappropriate for three main reasons. As noted above, Petitioners claim that: (1) the disability classification is not appropriate because the Student is not on the Autism spectrum, but rather should be classified as a student with a learning disability and ADHD; (2) the hours of special education as indicated on the IEP are not appropriate; and (3) the proposed placement in a self-contained Autism program at Neighborhood ES is not appropriate to meet the educational needs of the Student. “Ultimately, the question before the [Hearing Officer] is whether or not the defects in the [April 2010] 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.

(a) Disability classification

First, Petitioners “strongly oppose the classification of [the Student] as a child with Autism,” and argue that they “overwhelmingly met their burden of proving that [the Student] is

not a child who should be classified under IDEA with Autism.” *Petitioners’ Closing Argument*, pp. 22-23. The Hearing Officer agrees that the expert testimony and other evidence presented by Petitioners support this position, which is discussed further below under Point 5 (c) regarding the appropriateness of DCPS’ proposed placement in the self-contained Autism program at Neighborhood ES. However, misclassification of disabilities for an otherwise eligible child does not *per se* give rise to a cognizable claim under the IDEA.¹⁵ The key question is whether the IEP properly addresses the educational needs of the child that result from his disability (or disabilities), whether or not commonly linked to the disability category in which the child has been classified. *See* 34 C.F.R. §§300.304(b)(6), 300.305(a), 300.320(a).¹⁶

In this case, Petitioners have not shown that the Autism classification has caused the content of the IEP itself (as opposed to placement) to fail to meet specific educational needs resulting from the Student’s disability. To the contrary, as Petitioners themselves point out, the measurable annual goals contained in the 4/08/10 IEP are *not* really geared to an autistic child. *See Petitioners’ Closing Argument*, p. 13; *Testimony of Educational Consultant*. Rather, they largely incorporate the goals previously developed by the Private School, which Petitioners assert are designed specifically to address the Student’s needs that result from his own unique set of disabilities. In this respect, the IEP comports with IDEA requirements. *See, e.g.*, 34 C.F.R. 300.320 (a) (2). Petitioners have thus failed to meet their burden of proof.

(b) Hours of special education

In their complaint, Petitioners next claimed that “the hours of special education services as indicated on the IEP” were not appropriate for the Student. -45, p. 230. This allegation was discussed at the PHC and confirmed in the Prehearing Order (§5. e.). However, Petitioners’ Closing Argument appears to restate this allegation in arguing that “Petitioners met their burden of proving that the hours on the IEP were not appropriate with regard to [the Student] being mainstreamed for specials such as Art, Music and PE.” *Petitioners’ Closing Argument*, p. 24.

¹⁵ *See generally* 34 C.F.R. 300.111(d) (“Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of this Act.”).

¹⁶ However, Petitioners have not asserted any claim that DCPS failed to conduct necessary evaluations in the 2009-10 time period before determining IDEA eligibility.

Those are not special education hours. With respect to special education, there appears to be no dispute that the full-time hours stated on the IEP (consisting of 25.5 hours of specialized instruction, plus speech/language, OT, and counseling) are appropriate for the Student at this time. The only dispute concerns whether the Student should transition to “special” subjects (*i.e.*, electives not taught by special education teachers) with non-disabled peers (as he would at Neighborhood School) or with all disabled peers (as he would at Private School).

The Hearing Officer therefore concludes that Petitioners have failed to carry their burden of proof on this aspect of Issue 5, as the issue was stated in the complaint and Prehearing Order. And to the extent Petitioners go beyond this issue to argue that the Student cannot under any circumstances attend special elective subjects with non-disabled peers, the Hearing Officer concludes that Petitioners have not demonstrated that point on this record. Moreover, as noted above, the law does not require DCPS to “maximize” the Student’s potential or provide the “best possible education.” DCPS need only offer an IEP that is “sufficient to confer some educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200.

(c) *Placement in self-contained Autism program*

Finally, Petitioners claim that DCPS denied the Student a FAPE by failing to propose an appropriate placement at the 4/08/10 MDT/IEP Team meeting. Specifically, Petitioners allege that the proposed placement in the self-contained Autism program at Neighborhood ES is not appropriate to meet the unique educational needs of the Student, as defined in the IEP. The Hearing Officer concludes that Petitioners have carried their burden of proving that the placement proposed by DCPS was not appropriate as of the date it was offered on April 8, 2010. 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 and complex disabilities who is in need of specifically tailored interventions.

At the hearing, Petitioners presented several highly credible expert witnesses who testified at length about the nature of the Student’s disabilities, the Student’s educational needs, his progress at the Private School, and the inappropriateness of DCPS’ proposed placement at Neighborhood ES. *See Findings*, ¶¶ 41, 42, 44, 45, 47. In response, DCPS presented the testimony of three witnesses, including the School Psychologist who classified the Student as autistic. However, none of the DCPS witnesses were able to rebut Petitioners’ showing that the

self-contained Autism program at Neighborhood ES would not be appropriate to meet the Student's unique educational needs – regardless of the Student's disability classification. DCPS' witnesses thus failed to address how the Student's placement in this particular program at Neighborhood ES would be "reasonably calculated to enable the child to receive educational benefit," as required by the IDEA (*Rowley*, 458 U.S. at 207). Also, little or no evidence was introduced to show that the Neighborhood ES program could implement the goals of the 4/08/10 IEP, as the evidence shows that they were designed around the needs of a student with a complex set of developmental and learning disorders, rather than needs more typically presented by autistic students such as those placed in the Neighborhood ES program. The DCPS witnesses who did testify about the program at Neighborhood ES specifically declined to say that they thought the proposed placement would be appropriate for the Student.

Accordingly, based on the extensive testimony from experts and other individuals who know the Student well – as well as 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 Neighborhood ES self-contained Autism program – 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 April 2010. The Hearing Officer therefore finds that DCPS has denied the Student a FAPE in this regard.

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, 15-16 (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 only remedies Petitioners seek are: (1) retroactive reimbursement for the parental placements at the Previous Private School (9/07-1/09) and the Private School (1/09 to present); and (2) prospective placement and funding of the Student to attend the Private School for the 2010-11 School Year. 45, p. 230; *Prehearing Order*, p. 3; *Petitioners' Closing Argument*, p. 27. DCPS opposes such relief.

1. **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 addition, “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 16.¹⁷

In this case, the Hearing Officer has concluded that DCPS did not make a FAPE available to the Student in a timely manner, as follows: (a) by failing to complete an initial evaluation of the Student (including determining eligibility, developing an IEP and determining placement) by February 10, 2010, *i.e.*, within the 120-day timeline mandated by D.C. law; and (b) by failing to offer an appropriate educational placement for the Student on or about April 8, 2010. The Hearing Officer further concludes, for the reasons discussed above, 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.

Since DCPS’ denials of FAPE did not begin until approximately February 10, 2010, the Hearing Officer concludes that Petitioners are not entitled to reimbursement for any tuition prior to that date. However, 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 for the period *beginning February 10, 2010*.

¹⁷ 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).

Assuming *arguendo* that DCPS were found to have denied a FAPE prior to that date, as alleged by Petitioners, the Hearing Officer would still exercise his discretion to deny reimbursement for any time period prior to February 2010, since that was when Petitioners first provided DCPS with their independent evaluations and other updated information concerning the Student's disabilities and educational needs. 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). These factors would dictate denial of reimbursement for expenses prior to February 2010 in this case.

2. 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 demonstrated that the Private School is an appropriate placement for the Student. As noted above, Petitioners presented several highly credible expert witnesses who testified at length about the nature and severity of the Student’s disabilities, the Student’s specialized educational needs, and the link between those needs and the services offered by the Private School. Petitioners also presented the testimony of the Private School Principal to substantiate many of the same points. *See, e.g., Findings*, ¶¶ 15, 39-45, 48.¹⁸

Finally, to the extent the relative equities based on the parties’ respective conduct have any bearing on this issue, they would seem to support the prospective placement award in this case. Following DCPS’ proposal of the Neighborhood ES Autism program, Petitioners and their educational consultant appear to have acted promptly and in good faith to visit and observe the program to see if it would meet the Student’s needs. Petitioners then sent a letter through counsel to DCPS a few days later rejecting the proposed placement and explaining their concerns. The letter then asked DCPS to contact them should they wish to reconsider the proposed placement. 44. DCPS did not respond further, although Petitioners waited over 30 days before filing the instant complaint. DCPS also offered no alternative placement at the resolution meeting.

DCPS will have another opportunity to review the Student’s IEP and placement at the next annual review, which must be conducted by April 2011. At that review, DCPS will be able to review the Student’s progress, review any evaluation data or other updated information, and determine whether the annual IEP goals of the Student are being achieved. *See* 34 C.F.R.

¹⁸ With respect to LRE considerations, the MDT determined that the Student’s needs required removal from general education to receive all of his services, which can be met at Private School. It also suggested that returning to his neighborhood school in a separate classroom represented “movement toward a less restrictive environment” compared with a wholly separate private school. *DCPS-10*, p. 000083. However, the only demonstrated difference relates to the opportunity to transition to special subjects such as Art and Music with non-disabled peers. *See Findings*, ¶¶ 34, 48.

300.324(b).¹⁹ DCPS will then be free to make its own determination as to the appropriate placement for the Student for the 2011-12 school year, depending on the facts then presented. *See Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006): “While [Private School] might be an appropriate placement for [the Student] at the current time, another school – including a D.C. public school – might be an appropriate placement at a later date depending on [the Student’s] progress. Indeed, the purpose of a student’s annual MDT/IEP meeting is to track his or her progress and determine what educational and other services are needed.”

At this point, the Hearing Officer decides only that, in the absence of an appropriate placement having been offered by DCPS, the prospective placement proposed by Petitioners should be awarded for the 2010-11 School Year. Accordingly, the Hearing Officer will exercise his discretion to grant the specific equitable relief set forth in the accompanying Order below.

V. ORDER

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

1. DCPS shall reimburse Petitioners for the tuition that they have previously paid to the **Private School**²⁰ for the Student’s enrollment from February 16, 2010 through the end of the 2009-10 School Year.
2. The Student shall immediately be placed at the **Private School**, at DCPS expense, for the 2010-11 School Year and until such time as the Student’s educational placement changes. DCPS shall issue an appropriate Notice confirming this placement and funding within ten (10) school days, and shall arrange and provide transportation for the Student if needed beginning no later than **September 15, 2010**.
3. Within approximately **30 calendar days** of this Order (*i.e.*, by **September 30, 2010**), DCPS shall convene a meeting of the Student’s MDT/IEP Team with all necessary members (including the Parents and representatives of Private School) to review and revise, as appropriate, the Student’s IEP to conform to this placement for the 2010-11 School Year, to the extent such review and revision is deemed necessary in light of the findings and conclusions of this HOD.

¹⁹ “Because the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities, and must be amended if its objectives are not met. *See* 20 U.S.C. 1414 (b)-(d).” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op.* at p. 6.

²⁰ Private School is identified by name in the Appendix to this HOD.

4. All written communications from DCPS concerning the above matters shall include copies to Petitioners and to Petitioners' counsel, Ellen Dalton, Esq.
5. 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.
6. Petitioners' other requests for relief contained in the Due Process Complaint filed May 26, 2010, are hereby **DENIED**.
7. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: August 30, 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).