

In March 2011, the parents registered the Student with DCPS' Private & Religious School Office ("PRO") and requested special education services from DCPS. On November 17, 2011, DCPS again found the Student to be eligible for special education and began to develop a new IEP. However, in December 2011, DCPS informed the parents that pursuant to newly announced PRO policy, it declined to complete the IEP and offer it to the Student because she was not enrolled in and attending a DCPS public school at that time.

As described further below, Petitioners claim that DCPS has committed various procedural violations of the IDEA and has denied the Student a free appropriate public education ("FAPE") since March 2011. *See Administrative Due Process Complaint*, filed Oct. 11, 2012, pp. 7-8; *Prehearing Order* (Nov. 23, 2012), pp. 2-4.

On October 25, 2012, a resolution meeting was held, which did not result in an agreement to resolve the Complaint. Petitioners requested to end the 30-day resolution period early, but DCPS did not agree. Accordingly, the resolution period ended on November 10, 2012; and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") was originally scheduled to expire on December 25, 2012 (before being extended, as noted below).

On November 3, 2012, DCPS filed a Response to the Complaint, which was 12 days late under the IDEA. DCPS did not dispute eligibility, but responded that it has not denied a FAPE to the Student. DCPS asserts, *inter alia*, that it is only required to develop an IEP or placement for students who are enrolled in and attend a DCPS school. *DCPS Response*, p. 2; *DCPS Post-Hearing Brief*, p. 18.

On November 13 and 14, 2012, prehearing conferences ("PHCs") were held to discuss and clarify the issues and requested relief. The parties agreed to schedule the due process hearing for December 14, 17, and 18, 2012, which were the only dates and times that both parties were available for hearing within the prescribed HOD timeline. If any additional dates were needed to complete the hearing, the parties agreed that it would be necessary to request a continuance of the HOD timeline. *Prehearing Order* (Nov. 23, 2012), p. 2, ¶ 3. Petitioners elected for the hearing to be closed. Petitioners' counsel also stated that she intended to file a motion for summary decision. DCPS' counsel stated that DCPS would oppose summary decision because it believed the Hearing Officer needed to develop a factual record at hearing to resolve the issues. The Hearing Officer ordered that any motions be filed by November 30, 2012.

On or about November 30, 2012, Petitioners filed a motion for partial summary decision, along with a supporting memorandum, statement of undisputed facts, affidavits, and documentary exhibits. DCPS filed a response in opposition on December 10, 2012, and Petitioners filed a reply.

The Due Process Hearing was convened as scheduled on December 14, 2012. At the outset of the hearing, the Hearing Officer issued a verbal Order on the record denying the motion for partial summary decision. Having reviewed the motion, opposition and reply, together with supporting documentation, the Hearing Officer decided to exercise his discretion not to grant the motion for partial summary decision at that time. *See Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”), §401.C (7)*. The Hearing Officer noted the following reasons (*Tr.* 1:8-10):²

- (1) There is no strict legal entitlement to summary judgment in this administrative due process proceeding, as the Federal Rules of Civil Procedure are not directly applicable.
- (2) The legal issues are important and may well be the subject of judicial review, and would benefit from being considered on the basis of a full factual record.
- (3) There was a considerable amount of factual material filed in support of the parties’ submissions, which the Hearing Officer had not had sufficient opportunity to review prior to hearing as briefing had just been completed.
- (4) It appeared that there may be material issues of fact relating to at least some of Petitioners’ claims and requested relief, as reflected in the partial nature of the motion, as well as other aspects of the case – For example, facts concerning (a) the substantive effects of any procedural violations relating to the [REDACTED] of the initial evaluation and prior written notice issues; (b) whether the parents made a bona fide, good faith effort to develop an IEP for their child and otherwise followed appropriate procedural requirements (*i.e.*, did they cooperate with and not impede or obstruct the IEP process); (c) whether the parents acted reasonably in connection with their parental placement of the Student; (d) other equitable considerations, as such may bear on full or partial reimbursement; and (e) the [REDACTED] of Private School as a prospective placement.
- (5) It would not be efficient or expeditious to try to sort through the issues in an effort to resolve some on the papers legally and others on the basis of the hearing record.

² Citations to the hearing transcript will be made herein in the following manner: “*Mother Test., Tr.* 1:100,” for Mother’s testimony on Day 1, p. 100.

The Hearing Officer also reviewed Parents' Statement of Facts Not in Dispute with both parties on the record as a basis for proposed stipulations, but that effort did not succeed in obtaining any stipulations of fact. The Hearing Officer then stated that he would treat and consider the legal memoranda filed by both parties on the motion as pre-hearing briefs on the issues presented.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners' Exhibits: HG-1 through HG-22; HG-24 through HG-39; and HG-41 through HG-43.³

Respondent's Exhibits: DCPS-1 through DCPS-3.⁴

Hearing Officer Exhibit: HO-1.⁵

In addition, the following [REDACTED] testified on behalf of each party:

Petitioners' [REDACTED] (1) Father; (2) Mother; (3) [REDACTED], PhD, Cognitive Solutions LLC (neuropsychological expert); (4) Assistant Head of Junior High Program ("JHP"), Private School; (5) Private School Speech/Language Pathologist ("SLP"), (6) Private School Occupational Therapist; and (7) [REDACTED] Ed.D, Special Education Services, Inc.

Respondent's [REDACTED] (1) [REDACTED] Program Manager, DCPS PRO; and (2) Special Education Coordinator ("SEC"), DCPS Middle School.

The hearing could not be completed in the three days originally scheduled (December 14, 17, and 18, 2012). Thus, on December 21, 2012, DCPS filed an unopposed motion for continuance to extend the HOD timeline from December 25, 2012, to January 26, 2013, in order to permit the scheduling of an additional (fourth) hearing date for January 11, 2013, and written closings by January 16, 2013. This motion was granted by the Chief Hearing Officer on December 22, 2012. *See Interim Order on Continuance Motion* (Dec. 22, 2012).

³ Petitioners withdrew Exhibit HG-23 of their disclosures, which was a DCPS report card from SY 2008-09; and the Hearing Officer sustained DCPS' objection to Exhibit HG-40, which was information from Private School's website.

⁴ The Hearing Officer sustained Petitioners' objections to Exhibits DCPS-4 and DCPS-5, consisting of regulatory and case authorities that the Hearing Officer indicated could be cited and/or re-submitted with DCPS' closing legal arguments.

⁵ Exhibit HO-1 is a one-page copy of Observation Notes by the Middle School SEC, which were produced during his testimony at hearing on January 15, 2013.

The additional hearing date was later rescheduled to January 15, 2013; and on January 16, 2013, this Hearing Officer granted Petitioners' further consent motion to continue the date for written closings to January 23, 2013, and to extend the HOD timeline to February 2, 2013, consistent with the parties' agreement as stated orally on the record at the conclusion of the final hearing session. *See Interim Order on Continuance Motion* (Jan. 16, 2013). Both parties then filed written closing arguments by January 23, 2013.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The statutory HOD deadline is February 2, 2013.

III. ISSUES AND REQUESTED RELIEF

As specified in the November 23, 2012, Prehearing Order, the issues presented for determination are:

(1) Child Find/Failure to Evaluate — Did DCPS deny the Student a FAPE by failing timely to locate, identify, and evaluate her as a child with a disability in need of special education services? *Specifically:*

- Petitioners allege that DCPS should have evaluated and determined the Student to be eligible for special education within 120 days of Petitioners' referral on March 3, 2011. By the time DCPS determined eligibility in November 2011, Petitioner alleges that approximately 240 days had elapsed.
- Under this issue, the Hearing Officer must first determine whether DCPS has violated procedural requirements under the IDEA and D.C. Code §38-2561.02(a), and then determine whether any such procedural violation has had one or more of the substantive effects specified in 34 C.F.R. § 300.513 (a) (2).

(2) Failure to Develop and/or Propose an IEP — Did DCPS deny the Student a FAPE and/or commit procedural violations by failing to develop or propose an IEP for the Student after Petitioners' March 2011 referral? *Specifically:*

- Petitioners allege that DCPS failed to meet its statutory obligations to prepare and offer an IEP for the Student on the following grounds (*see* Complaint, pp. 7-8, Issues 2-7):

- (a) DCPS did not have an IEP in effect for Student at the start of the 2012-13 school year, in violation of 34 CFR 300.323(a);
- (b) DCPS did not complete an IEP for Student within 30 days of her eligibility determination, in violation of 34 CFR 300.323(c);
- (c) DCPS violated Student’s right to have services that would address all of her identified special education and related services needs, based upon her unique needs and not her disability classification as mandated by 5-E DCMR 3002.1(f) by failing to consider her attention problems;
- (d) DCPS refused to provide a statement of the quantity, frequency or duration of special education and related services to be provided to Student as required by 34 CFR 300.320 (a) (4) & (7) and 5-E DCMR 3009.1 (h);
- (e) DCPS failed to provide a complete and accurate statement of Student’s executive functioning deficits and social emotional needs and current levels, even after the parent supplied the completed neuropsychological evaluation in which those needs were identified, in violation of 5-E DCMR 3009.1 (c);
- (f) DCPS refused to provide an explanation of the extent, if any, to which Student will not participate with non-disabled children in regular classes and in other school activities, *i.e.*, it did not specify whether Student would be taught in inclusion classes or in self-contained classes and did not specify whether her related services would be provided in the general education setting or outside of it, as required by 34 CFR 300.323(a)(5) and 5-E DCMR 3009(d)(3) and (e);
- (g) DCPS refused to offer Student, as a resident of the District of Columbia, any special education unless or until she was physically in attendance at her neighborhood school, and refused to specify how much specialized instruction and related services it would provide at her neighborhood school if she were to attend there during SY 2011-12 and SY 2012-13, in violation of the IDEA and 5-E DCMR 3002.1 (a).
- (3) Least Restrictive Environment (“LRE”)** — As alleged in the Complaint, is the LRE for Student a “full-time special education program out of general education in a non-public school with SLP services, occupational therapy, and counseling, small classes for all instruction, and accommodations pursuant to an IEP that contains goals in the areas of math, written language, reading, executive functioning, social emotional and motor planning areas due to the severity of her needs and the nature of the specialized instruction, supports, accommodations and coordination between the classroom staff and related service providers required to provide her with FAPE?” *Complaint*, p. 8, Issue 8.
- (4) Procedural/Prior Written Notice** — Did DCPS fail to issue a timely Prior Written Notice (“PWN”) regarding the November 2011 determination of eligibility and the December 2011 denial of an IEP and placement, in violation of IDEA and DCMR requirements? *See Complaint*, p. 8, Issue 9.
- (5) Propriety of Parental Placement** — If DCPS has denied the Student a FAPE, is the Private School a proper educational placement?

Petitioners seek: (a) reimbursement for the costs of tuition and related services paid by the parents at Private School for SY 2011-12 in the amount of \$45,241.27; (b) reimbursement for the costs of tuition and related services paid by the parents at Private School for SY 2012-13 in an amount to be determined at hearing;⁶ (c) an appropriate IEP prepared for Student by DCPS with full parent participation that addresses all of her needs and contains all required components; (d) prospective placement at Private School for the remainder of the 2012-13 school year; and (e) an order requiring DCPS to comply with relevant IDEA procedural requirements. Petitioners do not seek any compensatory education. *See Complaint, pp.8-9; Prehearing Order* (Nov. 23, 2012), p. 4, ¶ 7.

IV. FINDINGS OF FACT

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

1. The Student is a [REDACTED] student who resides in the District of Columbia with her parents, who are the Petitioners. *See Father's Test.; Mother's Test.; HG-30-2.*
2. The Student began her education at her neighborhood DCPS elementary school ([REDACTED]) which she attended beginning with pre-Kindergarten. *Mother's Test.; HG-1.*
3. In September 2007, when Student was in 2nd grade, DCPS determined her to be eligible for special education and related services as a child with a disability under the IDEA. DCPS found that the Student met the eligibility criteria for a Speech and Language Impairment ("SLI") and proceeded to develop an initial IEP for her. *See HG-15.*
4. The Student's initial IEP dated September 4, 2007, provided 7.5 hours per week of specialized instruction (approximately evenly split between the general education and special education settings) and one hour per week of speech/language pathology ("SLP")

⁶ The Prehearing Order identified this element of requested relief as reimbursement "for SY 2012-13 to date." *Prehearing Order* (Nov. 23, 2012), p. 4, ¶ 7. Petitioners' counsel subsequently requested clarification that parents were seeking reimbursement for SY 2012-13 "until such time as DCPS prepares the IEP that is compliant with the statute, with parent participation, and identifies a specific school where that IEP will be implemented to provide [Student] with FAPE." *Pets' Request for Changes to the Pre-Hearing Order*, p. 1. At the outset of the hearing on 12/14/2012, the Hearing Officer addressed this request, questioning whether reimbursement relief could be awarded in this fashion subject to a condition subsequent. The Hearing Officer ruled that any proper awarding of reimbursement and/or prospective placement relief in this case is an issue to be determined based on the facts presented at hearing. *Tr. 1:12-14. See also Parents' Closing Argument, p. 36.*

services in an outside general education setting. *HG-15*. Subsequent IEPs were developed in April 2008 and April 2009, which continued the same types, amounts, and settings of services. *HG-16; HG-17. See also Mother's Test.; HG-1.*

5. At the end of the 2008-09 school year, Petitioners removed the Student from [REDACTED] and enrolled her at Private School, which she has continued to attend since that date. Private School is a non-public day school located in the District of Columbia that provides full-time specialized instruction and related services to students with disabilities. Private School is approved by the Office of the State Superintendent of Education ("OSSE") to provide special education services in the District of Columbia. The Student is currently enrolled in the Junior High Program at Private School for the 2012-13 school year. *Mother's Test.; JHP Test.*
6. In early March 2011, the Student's Mother contacted the Special Education Coordinator ("SEC") at [REDACTED] regarding the availability of special education services at DCPS. Because the Student was still attending Private School, the [REDACTED] SEC told the Mother to obtain and complete registration materials with the DCPS Private & Religious School Office ("PRO"). *See Mother's Test.*⁷
7. On or about March 3, 2011, the Mother submitted the necessary documentation to the PRO, thereby completing her referral. She requested special education services for the Student to determine whether she might be able to return to DCPS, and was informed that the [REDACTED] would follow up with her. *See HG-30; Mother Test., e.g., Tr. 2:340-43.* The initial documentation she submitted to the PRO included a student referral form, parent interview questionnaire, educational history, DCPS health certificate, neuropsychological report, and speech/language evaluation. *HG-30-1.*
8. Several months passed following the March 2011 PRO contact without the [REDACTED] contacting Petitioners. By July 1, 2011, approximately 120 calendar days had elapsed since the March 3, 2011 registration with the PRO.

⁷ At hearing, [REDACTED] DCPS' PRO Program Manager, acknowledged that Petitioners were correct in referring Student through the PRO in March 2011. He specifically testified that students attending private schools who would like to return to DCPS to obtain an IEP must initiate the referral process through the PRO, which would then commence any appropriate evaluation process. *See Adon Test., Tr. 3:247-48.* The PRO is an office within DCPS. *Id.*, at 3:244; 3:252.

9. In August 2011, the Mother again contacted the PRO and was informed by PRO staff that she should register the Student as a “non-attending” student at Middle School, which by then had become her neighborhood DCPS school. *See Mother’s Test.*
10. On or about September 7, 2011, the Mother visited Middle School to complete the Student’s registration as a non-attending student. At that time, she also met with the Middle School SEC, who informed her that he would schedule a meeting with her after she completed the registration process. *See Mother’s Test.; HG-31-1.*
11. On or about September 14, 2011, the Mother provided the Middle School SEC with a copy of the following documents from Private School: Student’s April 2011 written educational program; March 2011 annual speech/language progress report; June 2011 final report; July 2011 speech/language progress report; and August 2011 summer tutoring program report. *See HG-31-1.*
12. On or about September 21, 2011, the Mother provided the Middle School SEC with a copy of the following additional documents: May 2007 psycho-educational evaluation; and September 2007 DCPS IEP. The Mother also met with the SEC and principal of Middle School. *HG-31-2.*
13. Also on September 21, 2011, DCPS issued an acknowledgment of the Student’s referral for a determination of special education eligibility. *HG-20-1.* DCPS also issued a Letter of Invitation to an MDT/IEP team meeting at Middle School on November 16, 2011, to discuss the educational needs of the Student. The purposes of the meeting were (a) to review the results of the Student’s evaluation to determine whether she has or continues to have a disability and whether she needs special education and related services; and (b) to develop and/or review an IEP. *See HG-21-2; Mother Test.; SEC Test.*
14. On or about November 10, 2011, the Middle School SEC sent the Mother draft language for the Student’s IEP “[i]n preparation for our meeting next week.” *HG-21-1.* The language consisted of draft present levels of performance (“PLOPs”) and goals for Math, Reading, and Written Expression, which the SEC prepared based on the information the Mother supplied to him and his observations of the Student at Private School. *Id.* The SEC informed the Mother that, at this time, the language “is not presented in the IEP document format because we have not finalized the eligibility process. At the meeting, we will finalize an eligibility decision, and if time permits begin work on the IEP.” *Id.*

15. On or about November 16, 2011, DCPS convened an MDT/IEP team meeting at Middle School. Team members included the Mother, SEC, Special Education Teacher, General Education Teacher, School Psychologist, Speech/Language Pathologist, and Social Worker. At this meeting, DCPS determined the Student to be eligible for special education and related services as a child with a disability under the IDEA. DCPS found that she met the eligibility criteria for Specific Learning Disability (“SLD”) as set forth in IDEA and its implementing regulations, 34 C.F.R. § 300.8 (c) (10). *See DCPS-1*. DCPS scheduled a further MDT/IEP team meeting for December 9, 2011, to complete the IEP.
16. On or about November 17, 2011, the Middle School SEC emailed the Mother a “draft IEP based on our discussions yesterday [at the 11/16/2011 meeting].” *HG-32-1*. The draft IEP contained goals in the academic areas (math, reading, and written expression), as well as communication/SLP and emotional/social/behavioral development. *HG-32-3 through HG-32-7*. The draft IEP also included proposed lists of other classroom aids and services and classroom accommodations. *HG-32-8, HG-32-10*. In sending this draft to the Mother, the SEC specifically noted that “there are no hours of service listed in the IEP at this time because that will be determined by the team at the IEP meeting.” *HG-32-1; see HG-32-8* (listing no hours of service). The draft IEP did provide under the LRE section that “[t]his student has no services prescribed in a setting outside of general education,” *HG-32-9*, and listed the setting of services as “General Education.” *HG-32-8*.
17. Prior to the next scheduled IEP meeting, the Mother was afforded the opportunity to observe and did so observe several 6th grade classes at Middle School, within both inclusion and self-contained settings. *See HG-22; Mother Test.; SEC Test*.
18. On December 8, 2011, the day before the next scheduled MDT meeting, the Middle School SEC telephoned the Mother and informed her that the MDT/IEP team would not be able to complete the IEP for the Student because DCPS policy did not allow IEPs to be written for any child who was not currently enrolled in and attending a DCPS public school. The SEC stated that, pursuant to this policy, DCPS would be able to offer the Student only an individual service plan or “ISP” to provide equitable services under the IDEA. The SEC told the Mother that this DCPS policy guidance was new to him. *See DCPS-1, p. DCPS-000011; SEC Test.; Mother Test., Tr. 3:46-47*. The new policy guidance was reported to be “retroactive to November 1, 2011.” *HG-33* (Letter from

Mother to DCPS). The SEC informed the Mother that he was therefore cancelling the MDT/IEP meeting scheduled for December 9, 2013. *See HG-35-3.*

19. At the Mother's request, the SEC nevertheless agreed to meet with her on December 9, 2011. A PRO representative attended the meeting by telephone. At this meeting, the Mother was again informed by DCPS that an IEP could only be developed for the Student after she started attending Middle School. DCPS then explained the ISP option, which would provide the Student with four hours of SLP services per week at the DCPS middle school located closest to Private School and at such times that the school could fit her in during normal school hours. The Mother declined DCPS' offer of an ISP. *See DCPS-1, p. DCPS-000002, 11; HG-35-3; Mother's Test.*
20. On or about December 9, 2011, the Mother also provided the SEC with a copy of a 12/7/2011 letter from the psychiatrist who had been treating the Student since 2007 for Attention Deficit Hyperactivity Disorder ("ADHD"), Predominately Inattentive Type, primarily to manage her medication. *HG-35.*
21. On or about February 28, 2012, Petitioners provided DCPS with a copy of an independent neuropsychological evaluation of the Student that had recently been completed by Dr. [REDACTED] in order to assess her current cognitive and behavioral functioning. *See HG-37; HG-10.* The results of the neuropsychological evaluation revealed deficits in multiple cognitive domains, including perceptual reasoning, new verbal learning, working memory, and cognitive flexibility. Analysis of her academic achievement performance showed significant deficits for oral language skills, mathematical concepts, and reading comprehension. *HG-10-6.* The report found that many of her deficits appeared to be associated with executive functions including her inability to focus, initiate, monitor and plan that are associated with higher order cognitive processes, and that the severity of such deficits required targeted and intensive academic instruction. *HG-10-6, HG-10-7.* The report also included other specific educational recommendations, including that the Student should remain in a structured classroom environment with a smaller student/teacher ratio and opportunity for one on one instruction throughout the school day. *HG-10-8.*
22. In response to the neuropsychological evaluation and recommendations, DCPS did not schedule any further meetings to review the report or the Student's educational needs.

23. Shortly after the beginning of the 2012-13 school year, on or about September 21, 2012, Petitioners re-registered the Student at the PRO and reiterated their request for an offer of an IEP and special education services. *See HG-38; Father Test., Tr. 1:185-86.* Petitioners submitted further documentation, including a comprehensive OT evaluation, and intermediate speech/language assessment, proof of D.C. residency, and a completed DCPS student enrollment form. *HG-38-1.*⁸ The Father also spoke with [REDACTED] of the PRO on or about October 24, 2012. Petitioners informed DCPS that it wanted to complete the IEP process in order to find out what services DCPS could provide in the public schools to meet their daughter's educational needs so that they could make a decision whether to move her back to DCPS. At that time, Petitioners were again informed that DCPS would only provide the Student with an ISP and that it would not write her an IEP unless and until she enrolled in and attended a DCPS school. *See HG-39; Father Test., Tr. 1:185-88.*
24. The Student has been evaluated and diagnosed as having ADHD, an Auditory Processing Disorder, a Mixed Receptive and Expressive Language Disorder, Executive Dysfunction, and multiple learning disabilities. The Student's educational needs and deficits include slow processing, significant retrieval problems, working memory deficits, and difficulties using multiple sources of information and processing modalities to solve problems and answer questions. These deficits impact her educational performance in the classroom. *See HG-10* (Feb. 2012 neuropsychological evaluation); *HG-11* (June 2012 diagnostic educational evaluation); *HG-35-2; Johnson, Tr.1:80-110; Mother, Tr. 2:304-05.*
25. Private School is a non-public day school located in the District of Columbia that provides full-time special education and related services to students with disabilities, including learning disabilities, communications disorders, ADHD, and other types of OHI. Private School is approved by the Office of the State Superintendent of Education ("OSSE") to provide special education services in the District of Columbia.
26. The parental placement at Private School is proper under the IDEA, and the Student is receiving significant educational benefit from the program. She is making academic and

⁸ The submitted documents do not appear to have included the Diagnostic Educational Evaluation completed by [REDACTED] Ed. D. on June 29, 2012. *HG-11.*

social/emotional progress in the program and is expected to continue to make progress there during the present school year.

27. The November 2011 draft IEP indicated that DCPS believed that the Student's least restrictive environment ("LRE") was a general education setting at that time. The evaluators and educational professionals who currently work with the Student are of the opinion that Private School's full-time special education setting is the LRE that can meet her present educational needs. Because DCPS has not completed the IEP process for the Student, it has not gathered the necessary data and made a determination regarding her current LRE.

V. DISCUSSION AND CONCLUSIONS OF LAW

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

For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof on Issues 1, 2, 4 and 5, to the extent described herein. Petitioners did not prove Issue 3 by a preponderance of the evidence on the current record.⁹

A. DCPS' Failure to Evaluate and Complete IEP Process Within Required Timelines (Issues 1 and 2 (a) and (b))

As demonstrated in Parents' Closing Argument (pp. 2-9), the evidence shows that DCPS failed to evaluate or complete an IEP for the Student within the required timelines. Apart from its

⁹ For convenience of analysis, the Discussion and Conclusions of Law generally groups the issues in the manner they are addressed in Parents' Closing Argument.

overall argument that parentally-placed private school students have no right to receive an offer of an IEP, DCPS provides no response to Petitioners' proof on this issue.

D.C. Code § 38-2561.02 (a) provides 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" (emphasis added). As § 38-2561.02 (a) 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); 5-E DCMR §3005.2. This means that DCPS ordinarily 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); 5-E DCMR §§3002, 3013.

The statute does not define what it means to be "referred" for evaluation or assessment. However, OSSE regulations specify that a child with a suspected disability who may need special education "shall be ***referred, in writing***, to an IEP team." 5-E DCMR §3004.1 (a) (emphasis added). OSSE regulations provide that a "referral ... shall state why it is thought that the child may have a disability," and that it may be made ***by a parent***, a professional staff employee of the LEA, or a staff member of a public agency who has direct knowledge of the child. *Id.*, §3004.1 (b) (emphasis added). In the case of a child who does not attend a D.C. public school, OSSE regulations further provide as follows:

"If the child to be referred ***does not attend a D.C. public school and the parent does not register the child to attend a D.C. public school at the time the referral is made***, this referral shall be submitted by the parent to a site designated by the Superintendent on a form to be supplied to the parent by that site at the time of the parent's request." 5-E DCMR §3004.1 (d) (emphasis added).

As of the date of this referral, the site designated by DCPS was the PRO.

In this case, Petitioners have proved by a preponderance of the evidence that the Student was "referred" for an initial evaluation for special education eligibility within the meaning of D.C. Code §38-2561.02 (a) on or about March 3, 2011. It is undisputed that Petitioners requested that the Student be evaluated for special education eligibility and submitted the

required forms to the PRO at that time. This meant that DCPS had until **July 1, 2011** – well before the start of the 2011-12 school year – to conduct a full and individual initial evaluation, determine eligibility, and develop an IEP. Instead, DCPS waited until September 2011 to even acknowledge the referral and initiate the process, and it did not determine eligibility until November 17, 2011. As a result, more than **250 calendar days** elapsed between the initial referral date and the eligibility determination. Moreover, DCPS still has not prepared and offered an IEP or placement.

The Hearing Officer concludes that the statutory 120-day timeline began to run on March 3, 2011, and expired on or about July 1, 2011. By failing to determine eligibility until November 17, 2011, and failing to develop an IEP even now, DCPS has violated the above requirements of D.C. Code §38-2561.02 (a) and the IDEA.

In addition, the IDEA provides that DCPS must have an IEP in effect at the beginning of each school year, and it must ensure that a meeting to develop an IEP is conducted within 30 days of any eligibility determination. *See* 34 C.F.R. § 300.323 (a), (c) (1); *DCMR* § 5-E3007.1. DCPS has violated the requirements of 34 C.F.R. §§ 300.323 (a) and (c) by failing to complete an IEP by the start of either the 2011-12 or 2012-13 school year and within 30 days of her eligibility determination.

An LEA's failure to conclude the initial evaluation process within 120 days is generally viewed as a procedural violation, as are violations of the timing requirements of 34 C.F.R. §§ 300.323 (a) and (c). Such procedural delays give rise to viable IDEA claims only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006); *Kruvant v. District of Columbia*, 99 Fed. Appx. 232 (failure to show harm resulting from error under 120-day requirement). IDEA regulations provide that "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 34 C.F.R. §300.513 (a) (2).

The Hearing Officer concludes that Petitioners have proved that DCPS' procedural violations – both of D.C. Code § 38-2561.02 (a)'s 120-day timeline and of the IEP timing

requirements in 34 C.F.R. § 300.323 – affected the Student’s and parents’ substantive rights under IDEA so as to make such violations actionable. The timeline violations impeded the Student’s right to FAPE because the failure to determine eligibility and develop an IEP by July 2011 deprived the Student of receiving a timely offer of FAPE for the 2011-12 school year, thus forcing her parents to continue her education at Private School at their expense. The violations also significantly impeded the parents’ opportunity to participate in the IEP process, as the delays in creating the IEP (which have continued to this day) have prevented her parents from participating in the development of the IEP as the cornerstone of FAPE for the Student. DCPS’s ongoing timeline violations have thereby also deprived the Student of educational benefit. *Cf. Roland M. v. Concord Sch. Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc); *Blackman v. District of Columbia*, 39 IDELR 241 (D.D.C. 2003) (“harm is denial by DCPS of a free appropriate education, and this harm is not dependent on the financial resources of an individual plaintiff’s family”); *Student v. DCPS*, Case No. 2012-0280 (Hearing Officer Leff June 30, 2012).

B. DCPS’ Refusal to Develop and Offer an IEP to Non-Attending Student (Issue 2)

As is also shown in Parents’ Closing Argument (pp. 9-15), DCPS may not lawfully condition its development and offering of an IEP to the Student on her enrollment and attendance at a DCPS public school.

FAPE is defined by the IDEA to mean “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA ... include an appropriate preschool, elementary school, or secondary school education in the State involved; and are *provided in conformity with the individualized education program (IEP)*...” 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1. Courts have repeatedly stressed that the “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1.

"The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982); *see also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). “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 (b) (“DCPS shall place a student with a disability in an appropriate special education school or program” in accordance with the IDEA); *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005).

Under the IDEA, the **residency**, not **enrollment**, of a disabled child triggers an LEA’s obligation to provide FAPE. The IDEA expressly requires States to make a FAPE “available to all children with disabilities **residing in the State** between the ages of 3 and 21,” 20 U.S.C. §1412 (a) (1) (A) (emphasis added), and requires States to have in effect an IEP at the beginning of each school year “for each child with a disability **within its jurisdiction.**” 20 U.S.C. §1412 (d) (2) (A) (emphasis added); 34 C.F.R. § 300.323 (a).¹⁰ Courts have consistently construed this plain statutory language to mean that LEAs must evaluate and offer a FAPE to eligible children who reside in its district, regardless of whether they are presently enrolled in a public or private school.¹¹ Because the Student resides within the District of Columbia and has been found by DCPS to be a child with a disability under the IDEA, she is entitled to the benefit of these statutory and regulatory provisions.

An “offer of FAPE,” moreover, requires the LEA to develop an IEP that specifically prescribes **what services** the child would be provided, and in **what setting**. *See* 20 U.S.C. § 1414 (d); 34 C.F.R. § 300.320. “One of the purposes of the IEP is to ensure that the services [to be] provided are formalized in a written document that can be assessed by parents and challenged if necessary.” *N.S. v. District of Columbia*, 709 F. Supp. 2d 57, 73 (D.D.C. 2010); *see also Alfonso v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006) (“written, complete IEP is important to serve a parent’s interest in receiving full appraisal of the educational plan for her child”).

In this case, the evidence shows that: (a) the Student resides in the District of Columbia; (b) Petitioners requested DCPS to evaluate and determine the Student to be eligible for special

¹⁰ *See also* 34 C.F.R. §§ 300.148, 300.507-08, 300.511 (implementing regulations providing that due process procedures are available for disputes as to whether a school system has made FAPE available to a student enrolled in a private school).

¹¹ *See, e.g., Woods v. Northport Public School*, 2012 WL 2612776 (6th Cir. July 5, 2012); *Doe v. East Lyme Bd. of Ed.*, 112 LRP 47179 (D. Conn. Sept. 21, 2012); *Moorestown Township Board of Education v. S.D.*, 811 F. Supp. 2d 1057 (D. N.J. 2011); *District of Columbia v. West*, 699 F. Supp. 2d 273 (D.D.C. 2010); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007).

education and related services under the IDEA; (c) Petitioners specifically requested an offer of FAPE, rather than equitable services; (d) DCPS treated the case as a new referral, and determined that the Student is eligible as a child with a Specific Learning Disability; and (e) DCPS began to develop an IEP, but then refused to complete and offer it to the Student unless she first enrolled in and attended a DCPS school.¹²

DCPS argues that it was not required to develop an IEP for the Student, despite finding her eligible as a resident disabled child under the IDEA. Under the policy of its Private & Religious Office (“PRO”), “DCPS maintain[s] that it is only required to develop an IEP or placement for a student who *enrolls in and attends a DCPS school.*” *DCPS’ Post Hearing Brief*, p. 18 (emphasis added); *see also id.*, pp. 5-14. DCPS asserts that this PRO policy is consistent with the IDEA regulation at 34 C.F.R. § 300.137 (a) and commentary by the U.S. Department of Education in responding to certain regulatory questions in April 2011. However, neither authority supports DCPS’ position in this case.

Section 300.137 (a) provides that “[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.” 34 C.F.R. §300.137 (a). However, this provision applies only to unilateral parental placements *where FAPE is not at issue*, as federal judicial interpretations illustrate.¹³

As other sections of IDEA and OSSE regulations make clear, agencies are “not required to pay for the cost of education, including special education and related services, of a child with a disability *if the LEA has made FAPE available to the child* and the parents elected to place

¹² At hearing, DCPS counsel spent considerable time cross examining the Mother regarding the appropriateness of the goals contained in the “draft IEP” distributed to her in November 2011. *See Mother Test*. However, without any information on the amounts and types of services proposed, and in what settings, the draft IEP was clearly insufficient to constitute an offer of FAPE. In any event, DCPS expressly withdrew any offer of an IEP in early December, before it could be finalized.

¹³ *See, e.g., Bd. of Educ. v. Johnson*, 543 F. Supp. 2d 351, 357 (D. Del. 2008) (citing 20 U.S.C. § 1412(a)(10)(C)(i)); *Nieuwenhuis v. Delavan- Darien Sch. Dist.*, 996 F. Supp. 855, 866 (E.D. Wisc. 1998). DCPS cites no contrary case authorities construing Section 300.137(a). *See also District of Columbia v. Vinyard*, 2012 WL 5378122 (D.D.C. Nov. 2, 2012), slip op. at 8 (“although the District presents its position as necessarily following from a straight read of the federal regulations [34 C.F.R. § 300.137], its interpretation has been rejected by several federal courts as being inconsistent with the IDEA’s mandate that states make a FAPE ‘available to all children with disabilities *residing* in the state between the ages of 3 and 21’”) (emphasis added).

the child in a private placement.” DCMR § 5-E3018.1 (emphasis added); *see* 20 U.S.C. § 1412 (a) (10) (C) (“Payment for Education of Children Enrolled in Private School Without Consent of or Referral by the Public Agency”) (same); 34 C.F.R. § 300.148(a). “Taken as a whole, the regulatory scheme reflects the fact that under the IDEA, when the parent of an eligible child *opts out of a public school where a FAPE could be provided*, that parent is opting for a lesser entitlement,” *i.e.*, equitable services.¹⁴ Then, and only then, does the child forego his or her “individual right to receive special education services” from the residence LEA.

Nor does the Department of Education commentary quoted by DCPS support its analysis. When read in full, the commentary does not contradict the established proposition that school systems must evaluate and offer FAPE to eligible children who reside in their districts, regardless of whether they attend a private school. To the contrary, it specifically recognizes the distinction between a resident LEA’s responsibilities (a) to make an “offer of FAPE,” as determined by the child’s IEP team, and (b) to “make FAPE available” prospectively by actually delivering services only where “parents choose to accept the offer of FAPE and enroll the child in a public school.” *Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, 111 LRP 32532 (April 1, 2011), Questions B-4, B-5, E-3.

DCPS also tries out a couple of new arguments in support of its position, neither of which bears scrutiny. First, DCPS appears to suggest that a parentally placed private school student has no right to “FAPE,” because such term is “narrowly define[d]” as limited to “special education and related services.” *DCPS’ Post Hearing Brief*, pp. 8-9. This argument directly contradicts the following admission in DCPS’ Response: “Pursuant to the IDEA, DCPS’ obligation is to *make FAPE available to all students* with disabilities *residing* in the LEA.” *Response*, p. 2 (emphasis added).

Second, DCPS asserts that “the school system’s obligation to develop an IEP is only triggered when parents consent to the public school system providing special education and related services.” *DCPS’ Post Hearing Brief*, p. 15. DCPS claims that Petitioners withheld or refused to consent, thus undermining their request for an IEP. *Id.*, pp. 14-15. This argument has no merit, since (a) DCPS’ own witness testified that consent to services is not requested until *after* an IEP is developed and offered, and (b) in any event, DCPS never sought to obtain

¹⁴ *Nieuwenhuis v. Delavan- Darien Sch. Dist.*, 996 F. Supp. at 866 (emphasis added).

Petitioners' consent in this case. *See SEC Test.; Adon Test.; Mother Test.* Whatever the proper interpretation may be of the IDEA consent provisions, *see* 20 U.S.C. § 1414 (a) (1) (D) (ii) (III), the absence of consent cannot be used by DCPS as a shield in this case, where it never asked for parental consent and the parents never refused to consent to the receipt of any services.

DCPS' position is fundamentally inconsistent with public agencies' obligations under the IDEA, since "a school district's *failure to propose an IEP of any kind* is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." *Forest Grove*, 129 S. Ct. at 2491 (emphasis added).¹⁵ "Surely Congress did not intend to turn special education into a game of poker, where a school district does not have to show its cards until after the parents have taken the gamble of enrolling their child, and the child bears the risk of losing an appropriate education." *Moorestown Township Board of Education v. S.D.*, *supra*, 811 F. Supp. 2d at 1070. .

Accordingly, the Hearing Officer concludes that DCPS has denied the Student a FAPE by refusing to develop an IEP upon finding her eligible for special education and related services as a child with a disability under the IDEA. As discussed above, Petitioners clearly requested an offer of FAPE, rather than merely equitable services, when they asked DCPS to propose a program and placement for both the 2011-12 and 2012-13 school years.

C. DCPS' Failure to Provide Prior Written Notice (Issue 4)

The Hearing Officer also agrees with Petitioners that DCPS failed to provide them with the prior written notice required by 34 C.F.R. § 300.503 regarding its refusal to complete and offer an IEP to the Student in December 2011. *See Parents' Closing Argument*, pp. 15-16.

The IDEA mandates prior written notice to parents of a child with a disability whenever the public agency proposes to or refuses to change the evaluation, educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). Such notice must include:

"a description of the action proposed or refused by the agency, an explanation of why the agency proposed or refused to take that action and a description of each evaluation,

¹⁵ *See also School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369 (1985) (holding that § 1415(i)(2)(C)(iii)'s grant of authority to order "appropriate" relief includes "the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately [redacted] that such placement, *rather than a proposed IEP*, is proper under the Act") (emphasis added).

procedure, assessment, record or report the agency used as basis for the proposed or §refused action.”

34 C.F.R. § 300.503 (b) (1) - (3). Here, there is no evidence (nor does DCPS claim otherwise) that DCPS ever provided a prior written notice of (1) its refusal to write an IEP for Student; (2) the reasons why it refused to write an IEP for her; or (3) the parents’ objections to the ISP that DCPS offered. The parents had made known that they wanted an IEP repeatedly, and were informed orally, the afternoon before the IEP meeting was to occur on December 9, 2011, that there would be no IEP meeting and no IEP would be written.

Written documentation regarding the offer of an ISP at an ISP meeting, in the ISP minutes, is not equivalent to or a substitute for prior written notice that an IEP is being denied and the reasons for that denial. There was no list of procedures, records or reports on which DCPS based its refusal. A reference to an explanation of the difference between an ISP and an IEP is also not an explanation of why an IEP is not being written for the Student. Accordingly, appropriate relief will be granted pursuant to 34 C.F.R. § 300.513 (a) (3).

D. Petitioners’ Entitlement to Reimbursement Relief (Issue 5)

“IDEA authorizes reimbursement for the cost of private special education services when [1] a school district fails to provide a FAPE and [2] the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.” *Forest Grove School District v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2496 (2009). *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).

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner when (*inter alia*) DCPS refused to develop an IEP or propose an educational placement for either the 2011-12 or 2012-13 school years. DCPS thereby defaulted on its obligations under the IDEA.

“When a public school system has defaulted on its obligations under the Act, a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits’.” *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 163 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993) (quoting *Rowley*, 458 U.S. at 207). The Supreme Court’s decisions only require the parental placement to

be “proper;” they do not require it to meet all the standards required for an “appropriate” placement by the school system. Courts have explicitly ruled that a parental placement need not comply with “the whole panoply of duties that the Act imposes on the state,” *Carter*, 950 F.2d at 163, including that it be the least restrictive environment (“LRE”). *E.g., N.T. v. District of Columbia*, 839 F. Supp. 2d 29, n. 3 (D.D.C. 2012). *See also* 34 C.F.R. 300.148 (c).

1. The Parental Placement is Proper Under the IDEA

In this case, the Hearing Officer concludes that the parental placement at Private School is proper under the IDEA, as the Student is receiving significant educational benefit from the program. Private School is a non-public special education school serving students with learning disabilities and learning differences for grades K-12, offering a high school diploma. *JHP Test., Tr. 2:180; 2:240; HG-11-1*. Private School has a Certificate of Approval from OSSE as a special education day school that addresses the needs of learning disabled students. *HG-41; JHP Test., Tr. 2:185*.

Private School offers a full-time program of specialized instruction across the school day, small class size, and a range of intensive individualized accommodations to support students in their academics, as well as related services of counseling, speech-language services, and occupational therapy services. That program is appropriate to meet the Student’s needs, and aligns very well with the recommendations made by the Student’s evaluators. *See JHP Test., Tr. 2:191; SLP Test., OT Test., Tr. 1:129-30; SLP Test., Tr. 1:201-223; Solomon Test., Tr. 2:93-94; HG-10 (Neuropsychological Evaluation); HG-11 (Educational Evaluation); HG-12 (Speech Language Evaluation); HG-13 (Occupational Therapy Evaluation)*.

Specifically, during the 2011-12 and 2012-2013 school years, the Student has benefited from full-time specialized instruction outside of general education in all academics and electives, which are taught in small classes with low student/teacher ratios. She receives numerous accommodations, supports and instructional strategies, including individualized instruction, one-to-one or small group instruction as needed, graphic organizers, checklists, scaffolding, extra time on tests and assignments, and hands-on manipulatives. *HG-18-9—HG-18-17 (2011-12 Lab School Education Plan); HG-19-6—HG-19-17 (2012-13 Lab School Educational Plan); JHP Test., Tr. 2:192; Solomon Test., Tr. 2:93-94*.

Private School is meeting Student's needs and providing her with educational benefit; while Student continues to require extensive support, she has made significant progress in many areas at Private School during the 2011-12 and 2012-13 school years. *JHP Test., Tr. 2:201-02; Solomon Test., Tr. 2:89-91; Mother Test., Tr. 3:102-105; OT Test., Tr. 1:155-59; SLP Test., Tr. 1:222; HG-18 (2011-12 Educational Plan); HG-19 (2012-13 Educational Plan)*. The Student is receiving related services of speech therapy, occupational therapy and counseling, which are addressing her documented needs in those areas. *HG-18 (2011-12 [REDACTED] Education Plan); HG-19 (2012-13 [REDACTED] Educational Plan); HG-12 (2012 Speech Language Report); HG-11 (Educational Evaluation); HG-13 (Occupational Therapy evaluation); HG-9 (2007 Speech language evaluation); Solomon Test., Tr. 2:93-94*. The Student's progress reports and report cards for 2011-12 and 2012-13 school years also attest to her progress at Private School. *See, e.g., HG-25; HG-27; HG-28; HG-29. See also JHP Test., Tr. 2:201-02 (Private School providing Student with intensive level of one-to-one instruction)*.

2. Appropriate and Reasonable Level of Reimbursement

The only remaining question is "the appropriate and reasonable level of reimbursement that should be required" based on all relevant factors and equitable considerations. *Carter*, 510 U.S. at 16; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009). "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." *Id.* A "key consideration is that parents pursue in good faith the development of the IEP and the possibility of public school placement." *Kitchelt v. Weast* (D. Md. 2004), 341 F. Supp. 2d 553, 558, n. 1. *See also Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 n. 6 (D. Md. 2000) (parents should make "bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements"); *N.S. v. District of Columbia*, 709 F. Supp. 2d 57, (D.D.C. 2010)

Considering all relevant circumstances, including the conduct of the parties and DCPS' opportunity to evaluate the Student, the Hearing Officer concludes that DCPS should reimburse Petitioners for their full cost of the tuition and related services provided in the Private School program from the beginning of the 2011-12 school year, as discussed further below. The facts

show that Petitioners made a bona fide effort to develop an IEP for the Student in good faith, and otherwise followed appropriate procedural requirements, so that they could assess DCPS' educational plan for their child. They also initiated the process early in 2011, which should have allowed ample time for DCPS to evaluate the Student, determine her eligibility, and develop an IEP for the parents to consider before having to make a decision regarding the Student's education for the 2011-12 school year. Petitioners then acted reasonably in enrolling the Student at their own cost for the 2011-12 school year (in the absence of any action by DCPS) and again for the 2012-13 school year (in the absence of an IEP offer).

For the remainder of the 2012-13 school year, the Hearing Officer concludes that full and appropriate equitable relief may be ordered in the form of reimbursement along the lines requested by Petitioners and described below. *See Parents' Closing Argument*, p. 36 & n. 18, citing *Claims of N.P.-R.* (D.D.C. 2013) (Master's report and corresponding Order attached as Exhibit B to Argument).

Specifically, DCPS shall be ordered to reimburse Petitioners as follows:

For the 2011-12 School Year: All costs of tuition and related services in the amount of \$45, 247.27. *See HG-42; Mother Test., Tr. 3:109-27.*

For the 2012-13 School Year: (a) Costs of tuition and related services paid through November 9, 2012, in the amount of \$17,604.28. *See HG-43; Mother Test.*; and (b) any additional documented payments for tuition and related services from November 10, 2012, through the date on which DCPS completes its development and offer of an appropriate IEP and placement for the Student, or the end of the 2012-13 school year, whichever occurs earlier.

E. Least Restrictive Environment/Prospective Placement (Issues 3 and 5)

Prospectively, the Private School placement appears to be appropriately tailored to meet the needs of the Student, considering the nature and severity of her disabilities, her specialized needs, and the link between those needs and the services offered at Private School. *See Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005). The Hearing Officer also concludes that the Student's LRE is not General Education, as had apparently been indicated in the November 2011 draft IEP (*HG-32-9*). However, the Hearing Officer does not believe Petitioners have shown at this point, by a preponderance of the evidence, that the Student's LRE is necessarily a full-time out of general education program in a special non-public school, as alleged under Issue 3. It may or may not be, depending on the goals, services, and other contents of an appropriate

IEP designed to meet the educational needs of the Student, which has not yet been developed. *See generally* 34 C.F.R. §§ 300.114 through 300.118; *N.T., supra.*

DCPS should convene an MDT/IEP meeting to review existing evaluative data, including the independent evaluations completed since the last MDT meeting in November 2011, gather and review all pertinent updated information, develop an appropriate IEP, and determine the Student's LRE. If DCPS can complete this process within the next several months, it may be able to propose an appropriate educational placement prior to the beginning of the 2013-14 school year, which would then govern subject to Petitioners' right to bring another due process complaint challenging such proposed placement. On the other hand, if DCPS again defaults in its responsibilities under the IDEA, then Petitioners may choose to exercise their rights to parentally place the Student and seek reimbursement from DCPS for another school year.

* * * * *

In the end, this case – like several others that DCPS appears to be currently litigating before hearing officers and the District Court – again boils down to a basic proposition, with potentially broad consequences. DCPS wants to require parentally placed private school children who reside in the District to enroll and physically attend public school in order to receive an offer of an IEP. But this position is at odds with both the language and structure of the IDEA, as it is has been construed by the Supreme Court and federal courts in this Circuit. When a resident disabled child's parents request a FAPE, rather than merely seeking equitable services, DCPS must respond with an offer of FAPE for the parents to consider. And DCPS cannot "offer a FAPE" without first developing the IEP and proposed placement that comprise such offer. Because DCPS defaulted in that responsibility in this case, Petitioners are entitled to appropriate relief.

VI. ORDER

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

1. Within **thirty (30) days** of the date of this Order, DCPS shall reimburse Petitioners for their costs of tuition and related services for the Student at **Private School**¹⁶ for the 2011-12 school year in the amount of \$45,247.27.
2. Within **thirty (30) days** of the date of this Order, DCPS shall reimburse Petitioners for their costs of tuition and related services for the Student at **Private School** for the 2012-13 school year through November 9, 2012, in the amount of \$17,604.28.
3. Within **thirty (30) days** of the date of DCPS' receipt of necessary and appropriate documentation from Petitioners, DCPS shall reimburse Petitioners for all additional costs of tuition and related services for the Student at **Private School** for the 2012-13 school year from November 10, 2012, through the date on which DCPS completes its development and offer of an appropriate IEP and placement for the Student, or the end of the 2012-13 school year, whichever occurs earlier.
4. Within **ninety (90) days** of the date of this Order, DCPS shall convene a meeting of the Student's MDT/IEP team to (a) review the results of all evaluations and other updated information provided by the Student's parents and teachers regarding the educational needs of the Student, and (b) develop an IEP for the Student with full parent participation that addresses all of her needs and contains all required components.
5. DCPS shall comply with all procedural requirements under 34 C.F.R. § 300.503 with respect to the Student.
6. Petitioners' other requests for relief in their Due Process Complaint filed October 11, 2012, including prospective placement at Private School, are hereby **DENIED**.



Impartial Hearing Officer

Dated: February 2, 2013

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).

¹⁶ **Private School** is identified in the Appendix to this HOD.