DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No. 2012-0514** **Bruce Ryan, Hearing Officer** **Issued: October 10, 2012**

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed July 27, 2012, on behalf of a seven-year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends a non-public, special education day school ("Private School") located in the District pursuant to parental placement. Petitioners are the Student's parents.

Petitioners claim that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by: (1) failing to review and revise the Student's June 14, 2011 individualized education program ("IEP") as appropriate based on the findings of an independent neuropsychological evaluation; (2) failing to fully implement a compensatory physical therapy services awarded contained in a July 2011 Hearing Officer Determination ("July 2011 HOD");

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

(3) failing to provide Extended School Year ("ESY") services to the Student for the 2012 summer; (4) failing to reimburse the parents for DCPS-authorized related services obtained independently; and (5) failing to provide educational records to the parents. *See Administrative Due Process Complaint,* pp. 8-16; *Prehearing Order* (Sept. 4, 2012), pp. 1-3.

DCPS filed a late response to the complaint on August 22, 2012 (16 days after it was due), denying the allegations that it failed to provide a FAPE to the Student. DCPS asserts (*inter alia*) that the parents have not enrolled the Student at a DCPS school, that the parents withdrew the Student from DCPS and unilaterally placed him at Private School after being offered a FAPE by DCPS (as previously found by another hearing officer), and that the Student "is now considered to be a private and religious student." *Response,* pp. 1-2. As such, DCPS argues that the Student is entitled only to child find and an independent services plan ("ISP") from DCPS' Private & Religious Office ("PRO"), rather than an IEP, for the current school year. *Id.,* p. 2. DCPS' response also asserts the affirmative defense of *res judicata* and/or claim preclusion and contends that the IHO does not have jurisdiction over claims regarding failure to comply with a previous HOD, especially where the HOD has been appealed. *Id.*

On August 9, 2012, the parties held a resolution meeting, which did not resolve the complaint. The parties also did not agree to end the 30-day resolution period early. *See Resolution Period Disposition Form*, filed Aug. 13, 2012. Accordingly, the resolution period ended on August 26, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") ends on October 10, 2012.

On August 29, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for October 1 and 2, 2012. A Prehearing Order ("PHO") was issued on September 4, 2012. The parties then filed their five-day disclosures, as required, by September 28, 2012.

The Due Process Hearing was held in Hearing Room 2004 on October 1 and 2, 2012. Petitioners elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners' Exhibits: **P-1** through **P-22; P-24** through **P-26; P-28** through **P-32;** and **P-35** through **P-45.** [2]

Respondent's Exhibits: **DCPS-1 through DCPS-4.**

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

Petitioners' Witnesses: (1) Mother (direct & rebuttal); (2) Father; (3) Associate Head, Private School ("Priv. Sch."); and (4) [redacted], Compensatory Education Witness.

Respondent's Witnesses: (1) Physical Therapist ("PT"); (2) Registrar, Public School A ("Reg."); (3) [redacted], PRO Case Manager; and (4) [redacted], Compliance Representative.

Written post-hearing arguments were submitted on October 5, 2012.

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 October 10, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing are:

(1) Failure to Develop Appropriate IEP — Did DCPS deny the Student a FAPE by failing to review and revise the Student's June 2011 IEP as appropriate based on the findings of an independent neuropsychological assessment and/or to provide the Student with an IEP for the 2012-13 school year?

(2) Failure to Implement July 2011 HOD Comp Ed Award — Did DCPS deny the Student a FAPE by failing to fully implement the compensatory physical therapy services awarded in a July 2011 HOD?

[2] At hearing, Petitioners withdrew Exhibit P-23 (outdated website materials for Private School) and Exhibit P-46 (resume for a proposed expert witness who was not called to testify). The Hearing Officer sustained DCPS' objections to Exhibits P-27, P-33, and P-34, for the reasons stated on the record. In addition, Exhibit P-21 (notice of unilateral placement) and Exhibit P-44 (compensatory education proposal) were admitted for the limited purposes stated on the record, and not for the truth of the matters asserted therein.

(3) Failure to Provide ESY(Summer 2012) — Did DCPS deny the Student a FAPE by failing to provide Extended School Year ("ESY") services for the 2012 summer?

(4) Failure to Reimburse Authorized Related Services — Did DCPS deny the Student a FAPE by failing to reimburse the parents for 15 hours of occupational therapy ("OT") services they obtained independently pursuant to an October 2010 DCPS authorization letter?

(5) Failure to Provide Access to Educational Records — Did DCPS deny the Student a FAPE by failing to provide the parents access to records explaining the decision to discontinue the compensatory physical therapy services awarded in a July 2011 HOD?

Petitioners request that DCPS be ordered (a) to fund the Student's placement at Private School with transportation for the 2012-13 school year; (b) to convene an MDT/IEP Team meeting and develop an IEP consistent with the recommendations of the independent neuropsychological evaluation conducted in February 2012; (c) to provide 30 minutes of physical therapy services twice weekly until such time as the Student can master specified goals in four out of five trials and maintain mastery for not less than two weeks; (d) to provide a copy of all data and records related to the provision of compensatory physical therapy services; (e) to reimburse them for their out of pocket expenses of approximately $1600 incurred to provide 15 hours of independent OT services as authorized by DCPS; and (f) to provide compensatory education in the form of independent tutoring and related services for harm caused by DCPS' failure to provide ESY services in summer 2012. *See Complaint, pp. 16-17,* as clarified by Petitioners' counsel at the PHC; *Prehearing Order* (Sept. 4, 2012), p. 3.

As the party seeking relief, Petitioners were required to proceed first at the hearing and carried 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). Petitioners also had the burden of proposing a well-articulated plan for compensatory education in accordance with *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

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 is a resident of the District of Columbia. Petitioners are the Student's parents. *See Mother Test.*
2. The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA. *See P-4.* He has a medical history of seizures and a diagnosis of epilepsy. *Mother Test.*
3. The Student's neighborhood or "home" school, based on residence, is Public School A.
4. In October 2010, DCPS issued a Compensatory Education Authorization letter authorizing Petitioner to obtain 15 hours of individual occupational therapy ("OT") services by a qualified OT therapist of the parent's choice. *P-26.* Petitioners subsequently obtained these services for the Student and submitted a reimbursement request to DCPS in April 2012. *See Mother Test.;* [redacted].
5. On or about June 4, 2011, a Hearing Officer Determination ("June 2011 HOD") was issued in Case No. 2011-0286, which found that the Student's March 2011 IEP was not reasonably calculated to provide educational benefit. *P-42.* The June 2011 HOD found that the March 2011 IEP lacked necessary supplemental aids and services, as well as ESY services for speech therapy, needed to ensure the Student can reach the annual goals in his IEP and be involved in and progress in the general education curriculum. *P-42, p. 16.* The June 2011 HOD ordered the IEP to be revised in various respects, including to amend the present levels of academic performance, to add certain supplementary aids and supports, and to provide ESY services consisting of speech/language therapy over the 2011 summer. *Id.,* pp. 16-17.
6. On or about June 14, 2011, the Student's MDT/IEP Team met to amend the Student's IEP in compliance with the June 2011 HOD, at which time the Student was also placed at Public School B. *See P-4;*
7. On or about July 27, 2011, a further HOD ("July 2011 HOD") was issued following a court remand in Case No. 2009-1434, which awarded compensatory education for physical therapy ("PT") services missed from February to April 2009. *P-41.* The July 2011 HOD ordered that the Student be provided 30 minutes per week of PT services

designed to aid the Student in walking down stairs in a consistently alternating pattern. *Id., p. 8.* The services were to be provided twice per week, in addition to the PT services already part of the Student's IEP, "until this specified skill is mastered as measured by data collected over a period of two weeks in which the Student performs the skill in 4 out of 5 trials consistently during that period." *Id.*

8. On or about August 22, 2011, the Student was enrolled in and began attending Public School B.
9. On or about August 31, 2011, Petitioners requested that a neuropsychological and/or comprehensive psychological assessment be conducted for the Student.
10. On or about September 20, 2011, Petitioners through counsel notified DCPS of their intent to withdraw the Student from DCPS and enroll him at Private School.
11. On or about December 18, 2011, an HOD ("December 2011 HOD") was issued in Case 2011-1105. This HOD ordered an independent neuropsychological evaluation, but denied all other relief that Petitioners requested for alleged denials of FAPE during the 2011-12 school year, including placement and funding at Private School. *P-43.*
12. Petitioners then appealed the December 2011 HOD, and the appeal is currently pending in the U.S. District Court for the District of Columbia. *See* Civ. Action No. 12-411 (JEB) (DAR). In that appeal, Petitioners request the District Court to (1) reverse the December 2011 HOD and find that the Student was denied a FAPE, (2) award funding for placement at Private School, and (3) order DCPS to place the Student at Private School prospectively.[3]
13. On or about February 7, 2012, Petitioners submitted the results of an independent neuropsychological evaluation to DCPS. The evaluation reviewed the prior neuropsychological evaluation dated 1/7/2010 and the results of new testing to gain information about his present functioning and educational placement needs. The written report dated 2/6/2012 confirmed the previous diagnoses of Mixed Receptive-Expressive Language Disorder and Developmental Coordination Disorder, noting significant visual processing, phonological processing, and visual motor weaknesses.

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[3] *See Complaint for Declaratory Judgment & Injunctive and Other Relief,* filed March 16, 2012, Civ. Action No. 12-411 (JEB) (DAR), p. 10 (judicial notice taken by Hearing Officer). The District Court has ordered a briefing schedule on cross-motions that extends through January 2013. *Order,* filed May 23, 2012.

It also found that his weakest cognitive area was working memory, where his score fell within the Extremely Low Range. *P-2, pp. 11-13.* Overall, the Student was found to require "considerable supports to help address his complex combination of language, motor, and learning issues." *Id., p. 13.* A full-time special education program was strongly recommended. *Id.*

14. On or about May 2, 2012, while the Student was still parentally placed at Private School, Petitioner and her attorney met with the DCPS PRO staff to discuss development of an Individual Services Plan ("ISP") for the Student. DCPS PRO staff informed Petitioners that the Student is eligible for speech and language services based on the PRO guidelines for equitable services under the IDEA. An ISP was then developed that provided 240 minutes per month of speech and language services at Public School A. *See DCPS-1, p. DCPS-000004.* However, DCPS declined to develop an updated IEP for the Student because the Student was not enrolled in and attending a DCPS public school. *Id., p. DCPS-000003; Bryant Test.*
15. On that same date, Petitioners' counsel wrote to the DCPS compliance monitor to report on the PRO meeting and to request that DCPS review the evaluation, revise the IEP as appropriate, and make a suitable placement available for the 2012-13 school year. *See P-7.*
16. On or about May 7, 2012, the Student's mother signed the ISP document that had been developed on May 2, 2012. In doing so, she also checked the box indicating that "I accept DCPS' s offer of this ISP" and "I provide consent for equitable services to be initiated as indicated in this ISP document." *DCPS-1, p. DCPS-000006.*
17. On or about May 18, 2012, DCPS' School Psychologist conducted a review of the independent neuropsychological evaluation. *See P-3.* The review found, *inter alia*, that the Student's working memory impairments combined with his visual perceptual processing and visual motor processing weaknesses have negatively impacted his academic achievement. *Id., p. 7.* Overall, the Student was found to have "major weakness in basic decoding, phonemic awareness and reading comprehension, as well as difficulty with math problem solving and math fluency," which prevented him from accessing grade-level material. *Id., pp. 7-8.* Based on the findings of both his current and previous neuropsychological evaluations, the Student's "cognitive and memory

deficits, as well as visual motor impairments, were found to be most likely related to his medical condition, which is seizure disorder, and may also be affected by his medications." *Id., p. 8.*

18. On or about June 6, 2012, DCPS convened a meeting with Petitioners at the PRO to review the findings of the 2/6/2012 independent neuropsychological evaluation and the DCPS School Psychologist's 5/18/2012 review of that report. *DCPS-1; P-1.* The DCPS School Psychologist reported that her review was consistent with the 2/6/2012 independent neuropsychological evaluation findings and made the same recommendations. *P-1, p. 1.* She further stated that the Student meets the eligibility criteria for Specific Learning Disorder ("SLD") and Other Health Impairment ("OHI"), and that he would benefit from strong academic support with a low student/teacher ratio. *Id., pp. 5-6.*
19. At the June 6, 2012 meeting, Petitioners asked about ESY services. DCPS explained that an ISP had been accepted in May and that ESY is not offered through an ISP. *DCPS-1, p. DCPS-000002.* Petitioners also again "requested to have the Student's IEP updated." *Id., p. DCPS-000003.* DCPS also explained that the PRO "does not develop IEP's for students that are parentally placed in a private school placement," and that the Student "will need to enroll and attend a DCPS [school] in order [for] the IEP to be written for the student." *Id.*
20. At the June 6, 2012 meeting, DCPS refused to review or revise the Student's IEP, and refused to provide ESY services or a new placement, because the Student was not enrolled as an attending student at Public School A and had agreed to an ISP in May 2012. However, DCPS did determine that the Student's disability classification would change from Multiple Disabled ("MD") to Other Health Impairment ("OHI") based on the findings of the neuropsychological evaluation and DCPS' independent review of that evaluation. *DCPS-1, p. DCPS-000002.*
21. On or about June 8, 2012, Petitioners visited Public School A in an attempt to enroll the Student as a non-attending student and again requested that DCPS provide the Student with a revised IEP for the 2012-13 school year.
22. Shortly thereafter, DCPS scheduled a meeting of the Student's MDT/IEP Team to discuss Petitioners' June 6, 2012 requests. On or about July 5, 2012, Petitioners

appeared for the scheduled meeting, but the meeting did not go forward due to the unavailability of DCPS' representative. *See P-19.*

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioners carry the burden of proof. *See* 5-E DCMR §3030.3; *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.

A. Issues/Denials of FAPE

For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof in part on Issue 1, but have failed to meet their burden of proof on the remaining issues presented for hearing.

Issue 1: Failure to Develop Appropriate IEP

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1. 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.[4]

[4] "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

Under Issue 1, Petitioners allege that they submitted an independent neuropsychological assessment to DCPS in February 2012; that at a June 6, 2012 meeting, DCPS refused to review or revise the Student's IEP because he was not enrolled as an attending student at his neighborhood public school (Public School A); that they then enrolled (or attempted to enroll) the Student at Public School A on June 8, 2012; and that a meeting to develop an IEP was scheduled for July 5, 2012, but never went forward. *See Prehearing Order* (Sept. 4, 2012), p. 2; *Complaint, p. 8* (as clarified by Petitioners' counsel at PHC).

DCPS responds that once Petitioners withdrew the Student and parentally placed him in Private School in September 2011, DCPS was no longer obligated to develop an IEP for the Student. DCPS argues that it made FAPE available by offering an appropriate IEP for the Student prior to that date, as determined in the December 2011 HOD. According to DCPS, the Student is now considered to be a Private & Religious Office ("PRO") student who is entitled only to "child find" and an individual services plan ("ISP"), rather than an IEP, unless the Student chooses to return by enrolling and attending a DCPS public school.

As a general proposition, the ***residency*** – not ***enrollment*** – of a disabled child triggers an LEA's obligation to provide FAPE under the IDEA. Thus, LEAs generally 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. [5] An offer of FAPE 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. A "written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child." *Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006); *see also N.S. v. District of Columbia,* 709 F. Supp. 2d 57, 73 (D.D.C. 2010).

In this case, as DCPS correctly points out, it previously provided an IEP and placement to the Student for the 2011-12 school year, which has been found by a prior HOD to constitute a

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education school or program" in accordance with the IDEA); *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005).

[5] *See* 20 U.S.C. §1412 (a) (1) (A); *e.g., Woods v. Northport Public School,* 2012 WL 2612776 (6th Cir. July 5, 2012); *Doe v. East Lyme Board of Education,* 112 LRP 47179 (D. Conn. Sept. 21, 2012); *District of Columbia v. West,* 699 F. Supp. 2d 273, 280 (D.D.C. 2010); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007); *Moorestown Township Board of Education v. S.D.,* 811 F. Supp. 2d 1057 (D. N.J. 2011); other authorities cited in Petitioner's Opposition, at pp. 4-6.

valid offer of FAPE. *See P-43* (December 2011 HOD). However, the IDEA also requires each public agency to review and revise (as appropriate) a child's IEP "not less than annually," 34 C.F.R. 300.324 (b) (1), which in this case would have been sometime during the 2012 summer. In addition, each public agency is required "at the beginning of each school year," to have an IEP in effect "for each child with a disability within its jurisdiction." 34 C.F.R. 300.323 (a). The Student is a child with a disability residing within DCPS' jurisdiction and, as such, is subject to these rules.

Moreover, the requirement for periodic review may well have significant consequences in this case, given the intervening completion of the HOD-ordered independent neuropsychological evaluation. As noted in both the DCPS psychologist's review and the June 6, 2012 meeting notes, the purpose of the neuropsychological evaluation is to re-assess the Student's level of functioning and educational needs, which in turn may impact determination of programming and placement. In ordering DCPS to fund the evaluation that Petitioners requested, the December HOD recognized that "Student's educational needs needed to be re-assessed in view of the strong correlation between the results of the neuropsychological evaluation and the determination of the accommodations that Student needed, coupled with Student's young age and the fact that the prior neuropsychological evaluation did not contain a lot of academic skills testing." *P-43, p. 11.*

Accordingly, regardless of what DCPS' continuing responsibility to develop an IEP for parentally placed private school students may be in other cases,[6] the Hearing Officer concludes that, at least in this case – where there is a new assessment ordered by a prior HOD that may significantly impact the IEP and placement for the Student contained in a prior offer of FAPE (*see Findings,* ¶¶ 11, 13, 17-18) – DCPS is obligated to review and revise, as appropriate, the IEP that was previously rejected by the parents of a parentally placed student.[7]

At the same time, the Hearing Officer concludes that Petitioners did not clearly express their intent to consider a new offer of FAPE for the 2012-13 school year, as opposed to keeping the Student enrolled at Private School regardless of any revised offer by DCPS. [8] This is

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[6] *See* cases at note 5, *supra.*

[7] The HOD in Case No. 2012-1207, cited in DCPS' response and closing brief, is distinguishable in this respect.

[8] *Cf. 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, cited by DCPS.

apparent in light of Petitioners' agreement and acceptance of an ISP in May 2012, just a few days after Petitioners' counsel had sent an email requesting an IEP. Thus, under all the facts and the circumstances of this case, the Hearing Officer cannot conclude that DCPS' actions harmed the Student or amounted to a denial of FAPE. However, the Hearing Officer may still order DCPS to comply with the procedural requirements of the IDEA. [9]

Issue 2: Failure to Implement July 2011 HOD Comp Ed Award

Under Issue 2, Petitioners claim that DCPS denied the Student a FAPE by failing to fully implement the compensatory physical therapy services awarded in a July 2011 HOD. Based on the testimony and documentary evidence presented at hearing, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue. While the parent testified that she believed the Student had not mastered the required skill of walking down stairs in a consistently alternating pattern in accordance with the HOD (*Mother Test.*), the Hearing Officer found the detailed, first-hand testimony of DCPS' physical therapist to be more credible on this subject. She testified that she implemented the required compensatory services and that the Student demonstrated mastery of the specified skill in approximately four out of five trials consistently during September 2011 (prior to the Student's withdrawal from Public School B) and again in early November 2011 during a test/observation at Public School A. *See PT Test.* In her uncontroverted opinion, the Student no longer needs any PT services. *Id.*

Issue 3: Failure to Provide ESY (Summer 2012)

Under Issue 3, Petitioners allege that DCPS denied the Student a FAPE by failing to provide Extended School Year ("ESY") services for the 2012 summer. As Petitioners acknowledge in their closing brief, "[t]he decision as to whether ESY is required is a decision that is left to the discretion of the MDT or IEP team" pursuant to 34 C.F.R. Section 300.106. ESY services "must be provided only if a child's IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child." 34 C.F.R. §300.106(a)(2); *see also* DCMR 5-3017.2; 71 Fed. Reg. 46,582 (Aug. 14, 2006) ("The inclusion of the word 'only' is intended to be limiting."). The purpose of ESY services generally is to

[9] *See* 34 C.F.R. 300.513 (a) (3); 71 *Fed. Reg.* 46, 707 (Aug. 14, 2006) ("hearing officers continue to have the discretion ... to make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in 300.507 (a) (1)," relating to the identification, evaluation or educational placement of a child with a disability).

prevent substantial regression of skills over the summer break and a failure to recoup those lost skills within a reasonable period of time. *See also* 71 *Fed. Reg.* 46,582 (Aug. 14, 2006) (States "have considerable flexibility in determining eligibility for ESY services").

The Hearing Officer concludes that Petitioner has not met her burden of proving that ESY services were necessary to provide FAPE to the Student during the 2012 summer. The fact that ESY services for the 2011 summer were included in the Student's prior IEP (*see P-4, p. 15*) is not determinative since the need for services must be determined on an annual basis. Moreover, to the extent Petitioners are seeking such services as part of a new IEP, this claim is really an aspect of Petitioners' denial of FAPE claim under Issue 1 which has already been addressed above.

Issue 4: Failure to Reimburse Authorized Related Services

Under Issue 4, Petitioners claim that DCPS denied the Student a FAPE by failing to reimburse the parents for 15 hours of occupational therapy ("OT") services they obtained independently pursuant to an October 2010 DCPS authorization letter. The evidence shows that DCPS has requested copies of invoices and proof of payment, consistent with its customary reimbursement practices, and that Petitioners have not yet submitted all requested documentation to DCPS. *See* [redacted] *Test.; Mother Test.; DCPS-2;* Under these circumstances, the Hearing Officer concludes that Petitioners have not met their burden of proof on this issue.

Issue 5: Failure to Provide Access to Educational Records

Under Issue 5, Petitioners claim that DCPS denied the Student a FAPE by failing to provide the parents access to records explaining the decision to discontinue the compensatory physical therapy services awarded in a July 2011 HOD. Based on the testimony and documentary evidence presented at hearing, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue. While the parent testified that a DCPS staff person had indicated that such documents possibly could have been generated, Petitioners have not shown that DCPS failed to permit the parents to inspect and review the available education records for the Student. 34 C.F.R. 300.613 (a). The records access rights granted to parents under the IDEA do not ensure discovery of any particular category of documents.

B. Appropriate Relief

Since Petitioners have not proved a denial of FAPE by DCPS, Petitioners' requested relief in the form of private placement for the 2012-13 school year and in the form of compensatory education services are not justified or appropriate. Moreover, the same private school placement requested by Petitioners was previously denied in the December 2011 HOD, which concluded that the record in that case "does not support a finding that Student requires placement in a full-time separate special education school in order to receive educational benefit." *P-43, p. 12.* This determination is presently on appeal before the U.S. District Court for the District of Columbia and cannot be collaterally attacked in the instant due process complaint.

However, for the reasons discussed under Issue 1 above, the Hearing Officer grants Petitioners' request that DCPS be ordered to convene an MDT/IEP Team meeting to develop an IEP and proposed educational placement based upon review of the independent neuropsychological evaluation conducted in February 2012.

VI. ORDER

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

1. Within **30 days** of the date of this Order (*i.e.*, by no later than **November 9, 2012**), DCPS shall convene a meeting of the Student's MDT/IEP Team (including Petitioners). At such meeting, DCPS shall: (a) review the Neuropsychological Evaluation report dated February 6, 2012, and the Review of Independent Neuropsychological Evaluation dated May 18, 2012; (b) review the educational needs of the Student based on such updated information; (c) review and revise, as appropriate, the Student's current IEP to address the results of the independent Neuropsychological Evaluation, including any needed additions or modifications to the special education and related services in such IEP; and (d) determine the appropriate special education school or program in which to place the Student pursuant to D.C. Code §38-2561.02 (b) and the IDEA, and issue Prior Written Notice.

2. Petitioner's other requests for relief in her Due Process Complaint filed July 27, 2012, are hereby **DENIED;** and

3. The case shall be **CLOSED.**

Dated: October 10, 2012

Impartial Hearing Officer