

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Office of Dispute Resolution
September 15, 2014

<p>STUDENT¹, By and through PARENTS,</p> <p style="text-align: center;"><i>Petitioners,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:</p>
--	---

HEARING OFFICER DETERMINATION ON REMAND

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed April 1, 2011, on behalf of the Student, who resides in the District of Columbia, by Petitioners, the Student’s Parents, against Respondent, District of Columbia Public Schools (“DCPS”).

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

On April 26, 2013, Respondent filed its Response, stating, *inter alia*, that Respondent had not denied the Student a free appropriate public education (“FAPE”).

Impartial Hearing Officer (“IHO”) Bruce Ryan conducted a Due Process Hearing (“DPH”) on June 20, 23 and 27, 2011.

IHO Ryan issued a Hearing Officer Determination (“HOD”) on July 7, 2011, denying all relief and dismissing the DPC with prejudice. R-21-1² through -14.³

Petitioners appealed the July 7, 2011 HOD to the United States District Court for the District of Columbia, Civil Action No. 11-1695 (RBW).

On September 30, 2013, Hon. Reggie B. Walton, United States District Judge, issued a Memorandum Opinion and Order (R-21-21 through -36) (the “September 30, 2013 Opinion and Order”), vacating the July 7, 2011 HOD and remanding the case to the IHO “for further evaluation [of the evidence] and in particular to explain why certain evidence was credited in lieu of other conflicting evidence.” Judge Walton instructed the IHO to issue a new HOD within 90 days of September 30, 2013, *i.e.*, by December 29, 2013.

As of September 30, 2013, and continuing, Mr. Ryan no longer serves as an IHO.

On October 10, 2013, the District of Columbia Office of the State Superintendent of Education Student Hearing Office⁴ appointed the undersigned as the IHO for this case on remand.

² Petitioner’s exhibits are cited as P-x-y with the second range being the exhibit number and the third range being the page number. Respondent’s exhibits are cited as R-x-y. Thus, “R-21-1 through -14” refers to Respondent’s exhibit 21 at pages 1 through 14.

³ IHO Ryan found that the Individualized Education Program that Respondent developed for the Student was reasonably calculated to provide meaningful educational benefit to the Student and that the placement at the public school proposed by Respondent was appropriate for the Student. R-21-7.

⁴ The Student Hearing Office was renamed the Office of Dispute Resolution effective August 1, 2014.

On October 10, 2013, the undersigned emailed counsel for the parties noting the impossibility of his complying with Judge Walton's remand order, inasmuch as no one other than Mr. Ryan can explain why he credited some evidence in lieu of other evidence. The undersigned asked counsel whether the parties intended to ask Judge Walton to modify the September 30, 2013 Opinion and Order to direct the undersigned to conduct a new DPH, and if so, whether the parties intended to request rehearing of the entire case or just certain issues or sub-issues, or the testimony of certain witnesses, and whether they intended to ask Judge Walton to extend the time period for the remand if a new DPH were ordered. The undersigned also asked counsel if the parties intended instead to ask Judge Walton to take additional evidence in the court proceeding (or before the magistrate judge) and decide the appeal on the merits, inasmuch as Mr. Ryan could not clarify his HOD on remand. The undersigned advised counsel that there was no action he could take until Judge Walton's order was revised.

On October 24, 2013, Respondent, as Defendant in the Court action, filed with the Court a "Motion to Amend the Court's Final Order and Opinion," seeking the Court's decision on the merits of the DPC, or, in the alternative, a remand with specific instructions on what additional evidence would allow the Court to render a decision.

On October 25, 2013, Petitioners, as Plaintiffs in the Court action, filed with the Court a "Partial Opposition to Defendant's Motion to Alter or Amend the Court's Judgment and Plaintiffs' Cross-Motion to Alter or Amend the Court's Judgment," seeking the Court's final determination on the merits of the DPC.

On December 13, 2013, Judge Walton issued a minute order granting Defendant's Motion for Enlargement of Time to Comply with the Court's September 30, 2013 Order, extending the deadline for the HOD to a date to be determined upon the Court's resolution of the pending cross-motions to alter or amend the Court's September 30, 2013 Order.

On July 15, 2014, Judge Walton issued a Memorandum Opinion and Order (the “July 15, 2014 Order”) remanding this case for a new DPH, with the new HOD due no later than September 15, 2014. The July 15, 2014 Order directed the hearing officer assigned to the case “to include in his or her written determination reasoned and specific findings of fact, and to address any evidence presented by the plaintiffs that conflicts with the hearing officer’s findings.”

The undersigned held a Prehearing Conference (“PHC”) by telephone on August 8, 2014, at which the parties agreed that five-day disclosures would be filed by August 27, 2014 and that the DPH would be held on September 4 and 5, 2014.

On August 25, 2014 the undersigned issued an Order on Stipulated Facts listing the facts that counsel for the parties agree are not in dispute in this case on remand.

On August 26, 2014, Petitioners filed Parents’ Pre-Hearing Brief,⁵ asserting (a) that the undersigned should consider evidence of the Student’s educational progress occurring after the development of the Student’s Individualized Education Program (“IEP”) that is at issue in the instant matter⁶; (b) that the July 15, 2014 Order

⁵ The undersigned permitted, but did not require, the filing of pre-hearing briefs.

⁶ Petitioners cited as support for this argument the July 15, 2014 Order. While that Order requires the undersigned to address in this HOD “any evidence presented by the plaintiffs that conflicts with the hearing officer’s findings,” the Order does not state what evidence is admissible at the hearing. That determination remains within the discretion of the undersigned. Petitioners also cited *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009) (“*Schaffer v. Weast II*”) for the proposition that a hearing officer must admit “additional evidence,” *i.e.*, “evidence that occurs *after* a due process hearing.” Parents’ Pre-Hearing Brief at 3 n.2. However, that case involved the obligation of a federal district court, upon appeal of a hearing officer’s determination, to admit “additional evidence,” not the obligation of a hearing officer to admit evidence of a child’s academic performance subsequent to the events challenged in the DPC. Petitioners’ argument that the same standard should apply to evidence of a child’s academic performance subsequent to the school district’s alleged denial of FAPE is unpersuasive. Nevertheless, the undersigned did admit evidence of the Student’s academic performance subsequent to the development of the IEP that is challenged in this matter (*See*, Findings of Fact 179 - 197 in Section VIII, *infra*) and gave that evidence the weight it deserved (*See*, Conclusions of Law 12 - 16 in Section IX, *infra*).

“specifically directed” the undersigned to apply a specific legal standard to assess the testimony of Respondent’s witnesses⁷; (c) that a one-on-one classroom aide is not appropriate when there is a danger of fostering dependency;⁸ and (d) that the remedy sought by Petitioners is appropriate.⁹

No pre-hearing motions were filed by either party and the DPH was held on September 4, 2014 from 9:42 a.m. to 2:42 p.m. and on September 5, 2014 from 9:34 a.m. to 3:37 p.m. in Room 2006 at the Office of Dispute Resolution, 810 First Street, NE, Washington, DC 20002. Petitioners elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence: Petitioners’ Exhibits: P-1 through P-41¹⁰ and Respondent’s Exhibits: R-1 through R-21¹¹.

The following witnesses testified on behalf of Petitioners at the DPH:

- (a) Educational Consultant, who was admitted over Respondent’s objection, as an expert in programing for and instruction of, learning-disabled students;

⁷ Petitioners claim that the Court ordered the hearing officer to apply *McKenzie v. Smith*, 771 F.2d 1527, 1535 n.17 (D.C. Cir. 1985) (“*McKenzie*”) “to assess the testimony of school system witnesses, ‘[a]nd if, as the plaintiffs allege, “there is no indication that the school officials’ expertise has been brought to bear on the individual needs of the handicapped child[,]” . . . the deference [the hearing officer should] grant [] will be commensurately lower.’” However, there is no such direction in the July 15, 2014 Order. Nevertheless, the undersigned has followed *McKenzie* because it is controlling case law. See, Findings of Fact 124 and 125 in Section VIII, *infra*.

⁸ See, Findings of Fact 155 – 157 and 159 in Section VIII, *infra*.

⁹ See, Conclusions of Law 17 - 23 in Section IX, *infra*.

¹⁰ P-30 through P-38 were admitted over Respondent’s objection, as explained on the record at the DPH.

¹¹ R-20-1 through -14 were admitted over Petitioners’ objection, and R-21-15 through -20 and -40 through -53 were excluded on the grounds of relevance, all as explained on the record at the DPH. No objection was raised to R-20-21 through -39.

(b) Curriculum and Technology Coordinator, Non-Public School, who was admitted over Respondent's objection, as an expert in programming for and instruction of learning-disabled students; and

(c) Parent #2/Petitioner.

The following witnesses testified on behalf of Respondent at the DPH:

(a) Dedicated Aide, Public School;

(b) Speech-Language Pathologist C, who was admitted by stipulation as an expert in speech-language pathology; and

(c) Special Education Coordinator,¹² Public School, who was admitted by stipulation as an expert in special education programming and placement of students with learning disabilities.

At the conclusion of Petitioners' direct case, Respondent made an oral motion for a directed finding, which the undersigned denied due to the need to review the extensive documentary evidence and testimony.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

¹² Subsequent to the events at issue in the instant case, the title of this position changed to Special Needs Coordinator.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is female, Current Age. The Student has been determined to be eligible for special education and related services as a child with a disability, Specific Learning Disability (“SLD”) under the IDEA. The Student attends Current Grade at a non-public special education school (the “Non-Public School”) as the result of unilateral parental placement.

Petitioners claim that Respondent denied Student a FAPE by failing to develop an appropriate IEP for her with an appropriate placement for School Year (“SY”) 2010-2011, as set forth in Section IV, *infra*.

IV. ISSUES

The following issues were presented for determination at the DPH before IHO Ryan, and therefore remain the only issues for determination by the undersigned on remand from the U.S. District Court:

(1) **Inappropriate IEP.** – Did [Respondent] deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) on or about November 17, 2010, based on the hours of service and the setting in which the services were to be provided? Petitioner’s counsel stipulated at the PHC that there was no allegation that any IEP goals are inappropriate.

(2) **Inappropriate Placement.** – Did DCPS deny the Student a FAPE by failing to propose an appropriate placement for the Student for [the] 2010 – [20]11 S[chool] Y[ear]?

(3) **Parental Private Placement.** – [Was the Non-Public] School a proper placement for the Student [for School Year 2010-2011]?

V. RELIEF REQUESTED

Petitioners request reimbursement of the cost of enrolling the Student at Non-Public School for SY 2010-2011.¹³

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005) (“*Schaffer v. Weast I*”). Through documentary evidence and witness testimony, the party seeking relief must persuade the IHO by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008) (“*N.G.*”).

VII. CREDIBILITY

The undersigned found all of the witnesses to be honest.

However, two witnesses had such limited memory of the events of 2010-2011 that the undersigned has assigned no weight to their testimony when it conflicted with other evidence:

- (a) Speech-Language Pathologist C could not remember what documents she had reviewed or when, who attended the November 17, 2010 IEP Team meeting, or when observations occurred at Public School; and
- (b) SEC could not recall the details of her conversation with staff at Previous School.

¹³ Petitioners’ entitlement to tuition reimbursement for subsequent years is beyond the scope of the current proceeding.

VIII. FINDINGS OF FACT

Stipulated Facts

The following facts were stipulated by counsel, as set forth in the Order Regarding Stipulated Facts issued August 25, 2014 by the undersigned:

1. The Student is female, born on Date of Birth.
2. At all times relevant hereto, the Student has resided in the District of Columbia.
3. On or about June 16, 2010, the Student's mother submitted a student referral for special education services to Respondent's Private-Religious Office ("PRO").
4. On or about July 13, 2010, the Student's father wrote to the Special Education Coordinator ("SEC") of Public School, requesting that the Multi-Disciplinary Team ("MDT") meet to evaluate the Student for special education services.
5. On or about August 18, 2010, the SEC scheduled an MDT meeting for September 21, 2010, and requested an opportunity to observe the Student in her current educational setting.
6. On or about August 20, 2010, the SEC informed Petitioners that Respondent's members of the MDT had reviewed the evaluations submitted by Petitioners and agreed with the conclusions and recommendations therein, and anticipated that the Student would be found eligible for special education and an IEP would be developed for her.
7. On or about September 21, 2010, Respondent convened a meeting of the MDT at which a draft IEP was prepared but the meeting was continued to November 1, 2010 to allow the Student's former school to participate and for the MDT to obtain updated academic scores.

8. During October 2010, the SEC and Petitioners exchanged testing scores and draft IEPs, and Respondent's School Psychologist issued a report reviewing her observation of the Student and the Student's independent evaluation.

9. On November 1, 2010, Respondent reconvened the Student's MDT, and the MDT determined the Student to be eligible for special education as a student with learning disabilities.¹⁴

10. At the November 1, 2010 MDT meeting, Petitioners' counsel asked that the MDT reconvene on November 17, 2010 to develop the Student's IEP because the Non-Public School's educational staff was not available on November 1, 2010.

11. On November 17, 2010, Respondent reconvened the Student's MDT and the MDT developed an IEP for the Student, which provided for the following specialized instruction and related services: (a) 10 hours per week of specialized instruction in Reading, Math, and Written Expression in a "General Education" setting; (b) 10 hours per week of specialized instruction in Reading, Math and Written Expression in an Outside General Education setting; (c) 30 minutes per week of speech/language services in a General Education setting; (d) 60 minutes per week of speech/language services in an Outside General Education setting; (e) 30 minutes per week of behavioral support services in a General Education setting; (f) 60 minutes per week of Occupational Therapy

¹⁴ The Student was found eligible with a primary disability classification of SLD affecting her participation in the general education curriculum in the following areas: Academics-Mathematics; Communication/Speech and Language; Academic-Reading; Emotional, Social and Behavioral Development; Academic-Written Expression; and Motor Skills/Physical Development. R-13-1.

services in an Outside General Education setting; and (g) 30 minutes per week of speech-language pathology consultation services.¹⁵

12. On November 17, 2010, Respondent issued a Prior Written Notice (“PWN”) offering and proposing to place the Student at Public School, which was the Student’s neighborhood school.

13. At the November 17, 2010 MDT meeting, Petitioner objected to the hours of services in the IEP, asserting that the Student required a full time outside of general education placement.

14. The SEC responded that the Student did not require such a restrictive environment and that a full time outside of general education placement would be inconsistent with the Least Restrictive Environment (“LRE”) requirements of IDEA.

15. Petitioner maintained the Student’s enrollment at Non-Public School for the remainder of School Year 2010-2011.

16. The Student began attending Non-Public School in late August 2010.

17. Petitioners consented to the observation described in Finding of Fact 5, *supra*; however, Non-Public School requested that only one person observe, who was Respondent’s School Psychologist.

18. At the November 17, 2010 meeting, all members of the MDT agreed on the IEP goals, which were adopted from the initial Non-Public School IEP.

¹⁵ The parties are in disagreement, and therefore did not stipulate, as to whether the IEP also provided six hours per day of behavioral support services through the support of a full-time dedicated aide.

October-November 2009 Psychoeducational Evaluation

19. During October and November 2009, Psychologist conducted a psychoeducational evaluation of the Student, as a follow-up to a December 2008 evaluation. R-1.

20. Psychologist found that the Student had a full scale IQ (“FSIQ”) of 87, which is in the Low Average range. R-1-3.

21. The Student scored in the Average range on most of the intelligence subtests; however, her low score on processing speed brought her full scale IQ down to the Low Average range. R-1-3 and -4.

22. The Student demonstrated some weaknesses in sustaining attention, complex working memory, verbal memory, visual/spatial processing, and ability to process complex instructions. R-1-4 and -5.

23. The Student’s academic achievement scores were in the Average to Low Average range. R-1-7 and -8. Her academic skills were “progressing nicely and are in keeping with her cognitive abilities.” R-1-8. She was “functioning to her capacity in the classroom with the very good supports she is receiving at [Previous School].”¹⁶ R-1-10.

24. Those supports included “cueing, repetition of questions, repeated review of information and breaking down complex tasks.” *Id.*

25. Based upon teacher and parent ratings, the Student exhibited some deficiencies in executive functioning, specifically she was found to overreact to “small situations,” had difficulty initiating her work independently, had a short attention span and needed help from the teacher to stay on task. R-1-9.

¹⁶ Previous School is a private school that is not a special education school but is taught by teachers with experience in teaching children with “learning challenges.” R-15-28.

26. Based upon teacher and parent ratings, the Student exhibited behaviors associated with Attention Deficit Hyperactivity Disorder (“ADHD”) “with more inattentive type symptoms than hyperactive/impulse type symptoms.” *Id.* The Student’s attention and focus had improved since she had begun taking medication for ADHD; however, “her affect and bubbly personality has been much more subdued.” R-1-10.

27. Psychologist diagnosed the Student with Learning Disability NOS [Not Otherwise Specified] with weakness in language processing, verbal memory and visual processing; and with ADHD, primarily inattentive type with related executive functioning weaknesses. R-1-11.

28. Respondent introduced no evidence challenging any of Psychologist’s findings.

29. The undersigned accepts all of Psychologist’s findings.

30. Psychologist recommended a small group setting with a teacher to student ratio of two to 12, clear and consistent routines, appropriate teaching supports and additional time. R-1-11 and -12.

31. In her report, Psychologist did not explain why that particular teacher to student ratio was necessary. Accordingly, the undersigned discounts this recommendation.

32. In her report, Psychologist did not state that the Student required all of her instruction to be provided in the outside of general education setting. Accordingly, the undersigned does not read the report as requiring such a placement.

January 2010 Progress Summary

33. During SY 2009-2010, the Student attended Previous School. P-3.

34. In January 2010, Previous School issued a Mid-Year Progress Summary. *Id.*

35. Many strengths were noted. P-3-1 through -17.

36. The following concerns were noted: maintaining attention in small-group activities when her own needs were not directly supported; maintaining attention in large-group academic activities; developing strategies to stay on task in the presence of competing thoughts or external distractions; completing multi-step tasks and projects independently; maintaining attention and engagement to the conclusion of an activity; using active listening skills and focused attention as others read aloud; maintaining joint attention, visual contact and appropriate body orientation while listening to others read; waiting for a turn to read, respond, question or comment; focusing on targeted activities in the presence of everyday competing stimuli; identifying place value for each digit in numbers to 100; [illegible] and counting collections of objects; demonstrating proficiency with addition and subtraction facts; identifying two more than a given number (to 100); estimating sums and differences; identifying missing addends and minuends to total 10; checking subtraction computations using addition; making recognizable, detailed drawings; and cutting with accuracy. *Id.*

37. The Student sometimes needed cueing and repeated/broken-down directions (P-3-2), needed encouragement to maintain her pace and attention (P-3-3), needed reminders to stay on task (*Id.*), needed teacher support to organize her materials and workspace (*Id.*), needed cueing and support to participate in group discussions and waiting for a turn (P-3-3, -7), needed help starting assignments and staying on task as she

worked (P-3-10), sometimes was unable to sustain her attention and effort while writing in the classroom setting (P-3-11), had motor planning deficits that affected her organization skills and body awareness (P-3-13), sometimes missed cues in the classroom regarding novel directions and transitions (*Id.*); and often required adult support to keep conversational exchanges going on and to organize her thoughts and ideas (P-3-14).

38. Respondent introduced no evidence challenging any of the findings in Previous School's Mid-Year Progress Summary.

39. The undersigned accepts all of the findings in Previous School's Mid-Year Progress Summary.

February 2010 Psychiatric Evaluation

40. On February 8, 2010, Psychiatrist conducted a psychiatric evaluation of the Student. R-2.

41. Psychiatrist reviewed the Student's medical and educational history. R-2-1 and -2.

42. Psychiatrist observed the Student at Previous School. R-2-3. He found that she lacked flexibility and had difficulty with any change in expectations or routines, that she "could be compulsive about how she needed to do a task," that she "was seen at times as moody or anxious," and that she picked at her fingers and nails. R-2-3.

43. Psychiatrist did not render a formal diagnosis of the Student but he identified the following "Clinical Impressions":

1. Specific Learning Disabilities (based on test data and school reports)
2. Receptive/Expressive Language Disability (based on test data and school reports)
3. Sensory Processing Disorder (based on test data and school reports)

4. Attention-Deficit Hyperactivity Disorder, Combined Type
5. Generalized Anxiety Disorder
6. Obsessive Compulsive Disorder

R-2-3.

44. Respondent introduced no evidence challenging any of Psychiatrist's findings.
45. The undersigned accepts all of Psychiatrist's findings.
46. Psychiatrist recommended that the Student continue in an intensive special education program "that can address her learning, language and motor disabilities."

R-2-4.

47. In his report, Psychiatrist did not state whether the Student's disabilities could be addressed through specialized instruction part of the day in the general education classroom and/or through the use of a dedicated aide. Accordingly, the undersigned does not read his report as requiring the Student to receive all of her instruction in the outside of general education setting or as precluding the use of a dedicated aide.

January – February 2010 Speech and Language Re-Assessment

48. In January and February 2010, Speech-Language Pathologist A, who had been providing speech and language therapy services to the Student, conducted a speech and language re-assessment of the Student, issuing a report dated March 2, 2010. R-3.

49. Speech-Language Pathologist A noted that the Student had made substantial progress in many domains but continued to struggle with following complex directions, syntax and verbal problem solving. R-3-2.

50. Speech-Language Pathologist A concluded that the Student had Dyspraxia Syndrome and Hypotonicity and should continue to receive speech and language therapy weekly to address language weaknesses. *Id.*

51. Respondent introduced no evidence challenging the findings or conclusions of Speech-Language Pathologist A.

52. The undersigned accepts Speech-Language Pathologist A's findings and conclusion that the Student required speech and language therapy.

March – April 2010 Occupational Therapy Evaluation

53. In March and April 2010, Occupational Therapist, who had been providing the Student with occupational therapy services at Previous School, conducted an occupational therapy evaluation of the Student. R-4.

54. During testing, the Student had difficulty staying focused on tasks, particularly those that were challenging for her, although she was able to be redirected. R-4-1.

55. Occupational Therapist noted the following “main areas of need”: sensory processing/modulation, tactile discrimination, balance/postural control, body awareness, motor planning, visual-motor praxis, crossing her body's midline, copying pictures and block designs and forming letters correctly. R-4-8.

56. Occupational Therapist recommended, *inter alia*, that the Student continue to receive occupational therapy services one or two times per week for an hour, by a therapist trained and certified in sensory integration therapy. *Id.*

57. Respondent introduced no evidence challenging the findings or recommendation of Occupational Therapist.

58. The undersigned accepts Occupational Therapist's findings and recommendation that the Student required occupational therapy services.

June 2010 Speech and Language Evaluation

59. In June 2010, Speech-Language Pathologist B, at Previous School, conducted a speech and language evaluation of the Student. R-9-1, R-8-2.

60. Strengths were noted in some areas. R-8-3.

61. Weaknesses were noted in the following areas: pragmatic judgment, receptive language, story comprehension, ability to retell stories using grammatical structure and sequence, sentence completion, auditory reasoning, and auditory comprehension.

Id., R-9-19 and -20.

62. The Student scored especially low on the following auditory processing skills: Sentence Memory (fifth percentile), Auditory Comprehension (second percentile) and Auditory Reasoning (second percentile). P-7-1.

63. The Student scored especially low on the following spoken language skills: Sentence Completion (first percentile), Syntax Construction (sixth percentile), Paragraph Comprehension (second percentile), Nonliteral Language (seventh percentile), Inference (10th percentile) and Pragmatic Judgment (second percentile). P-7-2.

64. The Student's listening comprehension score was in the eighth percentile. P-7-3.

65. The Student's abilities to answer questions about stories, retell stories and create her own stories were in the third percentile and below. P-7-4.

66. The Student's silent reading comprehension ability was in the seventh percentile. *Id.*

67. The Student's contextual reading comprehension ability was in the fifth percentile. P-7-5.

68. Speech-Language Pathologist B diagnosed the Student with Mixed Receptive-Expressive Language Disorder, Phonological Disorder, and Reading Disorder Unspecified. R-9-20.

69. Respondent introduced no evidence challenging Speech-Language Pathologist B's findings or diagnoses.

70. The undersigned accepts Speech-Language Pathologist B's findings and diagnoses.

71. Speech-Language Pathologist B recommended a "full-time LD [Learning Disability] placement" including a low teacher to student ratio, specialized teachers and instruction methods, and speech-language therapy and other related services. *Id.*

72. In her report, Speech-Language Pathologist B did not state why the Student required such a placement rather than a mixed placement with some specialized instruction provided in the general education classroom and/or with a dedicated aide. Nevertheless, because of Speech-Language Pathologist B's familiarity with the Student at Previous School, the undersigned accepts her recommendation that the Student's speech and language disorders required all of her instruction to be provided in the outside of general education setting.

73. In her report, Speech-Language Pathologist B did not specify the teacher to student ratio that she considered “low.”

Previous School Program Specialist’s June 2010 Input to Referral for Special Education Services

74. On June 4, 2010, Previous School Program Specialist observed the Student in the classroom for 40 minutes. P-9-11.

75. Previous School Program Specialist observed the Student in a reading group of four children. P-9-10. The Student was observed to yawn, fidget, look around the room and swing her legs, and to correct others with annoying voice and countenance. *Id.*

76. The Student responded to teacher questions with cues, prompts and reminders. *Id.*

77. The Student read aloud fluently, with good expression, and decoded unfamiliar words. *Id.*

78. The Student answered only half of comprehension questions, which Previous School Program Specialist attributed to her poor attention. *Id.*

79. Previous School Program Specialist stated that the Student’s attention, visual attention to task, auditory processing and need for one-on-one attention even in a group of four students were significant problems that impacted her learning and the “flow” of the group. *Id.*

80. Previous School Program Specialist opined that the Student’s self-esteem seemed fragile. *Id.*

81. Previous School Program Specialist summarized her observation with the following comments:

[The Student] demonstrated challenges in the classroom that relate directly to her diagnosed anxiety/obsessive compulsive disorder and her very significant language processing problems. [Her] inability to sustain attention in group settings and to complete assignments independently are also issues that affect her ability to access the curriculum and benefit from classroom instruction.

[The Student] is most successful when academic tasks are broken into small, manageable parts. Multisensory, hands-on activities make learning both meaningful and reinforcing. Visual supports, decreased visual information presentation, repetition and simplification of directions are also needed. Encouragement throughout the day is a necessity.

Attention Deficit Disorder, anxiety and obsessive compulsive disorders are diagnosed problems that interfere with her performance, motivation and self-esteem. Her language process challenges [her] in every school setting and social interaction. [The Student's] vulnerabilities place her at risk for poor academic performance and emotional defeat in a large general ed classroom. [Her] many strengths and competencies, however, [illegible] placement with other students who are functioning at or above grade level.

[The Student] is a friendly, pleasant, well-behaved child who has thrived at [Previous School]. She is capable of continuing school success if placed in an appropriate supportive program. We will miss her.

P-9-11.

82. On a form submitted to Respondent's Private-Religious Office in support of the Student's special education eligibility, Previous School Program Specialist stated, *inter alia*, that the Student required special services and supports related to anxiety, attention and language processing/language-based learning disabilities. P-9-9.

83. Previous School Program Specialist stated that the Student had been receiving preferential seating, scaffolding (individualized), ongoing reassurance, use of manipulatives, task analysis, repeated directions, small work groups, individual support and attention, limited visual field presentation, visual cues and models, integrated speech therapy, and small group services four hours per week out of school. *Id.*

84. Previous School Program Specialist concluded that the Student was a well-behaved, cooperative student with significant language-processing, retrieval and organizational problems, attentional issues and anxiety/obsessive compulsive disorder and that she required small-group learning settings with ongoing support to maintain attention, complete assignments, maintain availability for learning, understand directions, break down and organize tasks, etc. *Id.*

85. Respondent introduced no evidence challenging the observations, findings, conclusions or recommendations of Previous School Program Specialist.

86. The undersigned accepts the observations, findings, conclusions and recommendations of Previous School Program Specialist.

Educational Consultant's Advice

87. In June 2010 Petitioners retained Educational Consultant to advise them on where they should enroll the Student. Testimony of Educational Consultant.

88. Educational Consultant reviewed the Student's evaluations to date. *Id.*

89. Educational Consultant assisted Petitioners with the special education referral form that they were preparing to submit to Respondent. *Id.*

90. Educational Consultant observed the Student at Previous School, where she was in a class with 12 students and two teachers (sometimes joined by a speech-language pathologist). *Id.*

91. Educational Consultant observed that the Student required repetition, adult redirection, coaching and encouragement—including physical hugs. *Id.*

92. Educational Consultant opined that the Student had a difficult time functioning in the Previous School setting due to her needs for prompting and attention. *Id.*

93. Educational Consultant spoke with the Student's teacher and with Previous School Program Specialist. *Id.*

94. Educational Consultant interviewed Parent #2/Petitioner. *Id.*

95. At the beginning of September 2010, a few weeks after the Student had matriculated at Non-Public School, Educational Consultant observed the Student at Non-Public School, in a classroom with seven students and three adults, and also in an art class with one adult. *Id.*

96. At Non-Public School, Educational Consultant observed that the Student had difficulty processing information and following directions, requiring a lot of repetition and reassurance. *Id.*

97. Educational Consultant, who was familiar with Public School, opined that the Student would not be appropriately placed there because she would get lost in a large classroom general education setting, would have difficulty with transitions, would not take appropriate academic risks in such a setting, and needed more adult support than Public School could provide. *Id.*

98. Respondent introduced no evidence challenging the observations or opinions of Educational Consultant; rather, Respondent implied that Educational Consultant is biased because she also acts as an advocate for parents in special education matters. Cross-Examination of Educational Consultant.

99. The undersigned questioned Educational Consultant to determine whether she always recommends separate private special education schools. Educational Consultant testified credibly that she recommends public schooling in approximately half of her cases, and she recommends general education or combination settings in approximately half of those cases. Testimony of Educational Consultant.

100. Based upon the entire record, the undersigned accepts Educational Consultant's conclusion that Public School would not have been an appropriate setting for the Student in SY 2010-2011 because the Student could not access the general education curriculum in a larger classroom with a higher student-teacher ratio than she had at Previous School and Non-Public School.

September 2010 Achievement Testing

101. On September 15, 2010, Non-Public School administered achievement tests to the Student.¹⁷ P-14-1 and -2.

102. The Student scored more than a grade level below her then-current grade in broad math, brief math, math calculation, math fluency, and applied problems. *Id.*

September 2010 Review of June 2010 Speech and Language Evaluation

103. On September 20, 2010, Speech-Language Pathologist C, employed by Respondent, conducted a review of Speech-Language Pathologist B's evaluation. R-8-2.

¹⁷ At the DPH, Respondent's counsel elicited testimony that Respondent's request to conduct this assessment had been refused. In view of the prompt completion of the testing by Non-Public School, the validity of which has not been challenged, the undersigned finds who did the testing to be irrelevant to determination of the issues in the instant case.

104. Speech-Language Pathologist C found Pathologist B's evaluation to be valid and reliable. R-8-4.

September – November 2010 Reviews of Independent Educational Evaluations

105. On October 25, 2010 DCPS School Psychologist issued a report reviewing the evaluations by Psychologist and Psychiatrist, as well as the Student's achievement and speech-language testing at Non-Public School. R-16-1.

106. DCPS School Psychologist noted that at both Previous School and Non-Public School, the Student had received instruction in small group settings, *i.e.*, under 10 students in the classroom. R-16-3.

107. DCPS School Psychologist noted that although the Student had made significant progress "in many areas, her academic skills in math are lagging behind expectations." R-16-4.

108. DCPS School Psychologist observed the Student in the classroom at Non-Public School.¹⁸ *Id.*

109. There were three adults and eight children in the classroom. *Id.*

110. DCPS School Psychologist noted that the Student sometimes pouted, fidgeted and was inattentive, but she generally followed instructions and completed assignments. R-16-4 and -5.

¹⁸ At the DPH, Respondent's counsel elicited testimony that Respondent had been denied the opportunity to have two other Public School staff observe the Student at Non-Public School. However, Respondent introduced no evidence that the single observer was unable to gather all the information needed and report the same to Respondent's members of the Student's IEP Team. Accordingly, the undersigned finds that the inability of additional Public School staff to observe the Student did not prejudice Respondent in developing an IEP for the Student.

111. DCPS School Psychologist reached the following conclusions:

[The Student] presents a pattern of strengths and weaknesses that are common in diagnosed learning disabilities. These weaknesses contribute to her needs to have specialized instruction, accommodations and modifications. [Her] learning profile seems in alignment with eligibility for these services as a student with a specific learning disability.

R-16-6.

112. DCPS School Psychologist recommended that the Student continue to receive specialized instruction in all academic areas. *Id.*

113. DCPS School Psychologist did not specify whether such specialized instruction should be provided in the general education setting or outside of general education. *Id.*

114. DCPS School Psychologist also recommended that the Student be allowed to give oral responses to tests, that she receive counseling, and that her visual perceptual skills be tested. *Id.*

115. On November 17, 2010 DCPS School Psychologist issued an updated report.

R-16-7.

116. DCPS School Psychologist concluded that the Student required “specialized instruction in math and language support and accommodations within the classroom setting to support her continued academic progress.” R-16-10.

117. DCPS School Psychologist did not specify whether such specialized instruction should be provided in the general education setting or outside of general education. *Id.*

118. DCPS School Psychologist reached the following conclusions:

[The Student] shows weaknesses in language processing, memory, fine motor skills, visual spatial skills and sensorimotor processing and

executive functioning compared to her same-aged peers. These weaknesses seem to be contributing to a slowing of her skill development in mathematics. . . . Further, [her] spelling and reading fluency scores are relative weaknesses within her academic skills profile.

R-16-12.

119. DCPS School Psychologist's recommendations remained the same as in her October 25, 2010 report. *Compare* R-16-6 with R-16-12 and-13.

The November 17, 2010 IEP Team Meeting

120. The Student's IEP Team¹⁹ met on November 17, 2010 to develop her initial IEP. R-15-1.

121. The Team adopted the IEP goals and present levels of performance ("PLOPs") from the Student's then-current IEP at Non-Public School. *Id.*

122. Petitioners' counsel asserted that the Student required a full time [outside of general education] placement "because her executive functioning and emotional needs are pervasive and impact her through the day." *Id.*

123. However, Respondent's representatives on the Team concluded that the Student did not require such a restrictive setting, and should instead receive "inclusions support, pullout for reading/writing/math, and the services of a dedicated aide to maximize the availability of small group instruction." *Id.*, R-19-1.

124. Respondent's representatives on the Team based their conclusion that the Student would benefit from the less-restrictive setting described in the preceding

¹⁹ The parties sometimes use the terms IEP Team and Multi-disciplinary Team ("MDT") interchangeably. The distinction is not material to deciding the issues in the instant case.

paragraph upon the fact that other children with “similar profiles” had done very well in that setting. Testimony of SEC.

125. The undersigned finds that Respondent’s development of educational programming for the Student based upon the similarity of her diagnosed disabilities to other children’s diagnosed disabilities, rather than upon the experience of teachers and staff at Previous School and Non-Public School, failed to treat the Student as an individual—the “I” in IDEA.

126. The dedicated aide would assist the Student “with organizing her environment and teaching/re-teaching information in small group format.” R-14, R-19-1.

127. At the meeting, there was “limited” discussion of the aide. Testimony of SEC.

128. At the meeting, Petitioners did not object to the aide. *Id.*

129. The IEP developed by Respondent’s representatives on the Team provided that the Student would receive “prompting for executive prompting (sic functioning) and cuing, small group instruction for re-teaching and reinforcement and review, manipulatives for math and other subject areas as well as graphic organizers and concrete items for instruction. Supports in executive functioning will be provided in all subject areas as needed.” R-17-15.

The Settings That Would Have Been Provided to the Student by Public School

130. The Student would have received 30 minutes per week of speech-language services in the general education setting, 60 minutes per week of speech-language services in the outside of general education setting, 60 minutes per week of occupational

therapy services in the outside of general education setting and 30 minutes per week of speech-language pathology consultation services. Finding of Fact 11, *supra*.

131. The general education classroom that the Student would have attended for part of the day had 23 children and one teacher. P-31-1.

132. Based upon an observation on December 13, 2010 by Educational Consultant, the teacher in the general education classroom had limited ability to provide individualized instruction. P-31-3.

133. Curriculum and Technology Coordinator, who had experience teaching children with learning disabilities in the general education setting in another school district, opined that a classroom of 22 or more students would be problematic for the Student to maneuver due to her difficulties with expressive and receptive language, rendering it difficult for her to access the content of the curriculum. Testimony of Curriculum and Technology Coordinator.

134. Educational Consultant opined that the distractions in the classroom would be too great for the Student even if she had an aide. Testimony of Educational Consultant.

135. SEC testified that Public School had a very “fluid” approach, allowing students to sit or lie wherever they were comfortable in the classroom (*e.g.*, in the coat room or in tents under tables), and that there was constant motion of students, teachers and aides into and out of the classroom to attend various small group activities. Testimony of SEC.

136. There were students in the halls all the time, sometimes sitting on beanbags. *Id.*

137. SEC testified that, without observing the Student, she could not tell how the Student would have responded to being taken into the hall individually or in a small group with a teacher or aide while other students were nearby. *Id.*

138. Parent #2 credibly testified that the Student would have reacted badly to being taken to the hallway for instruction due to her attention/distractibility issues, her sensory issues (*i.e.*, noise would have been a problem) and anxiety. Testimony of Parent #2.

139. Educational Consultant observed that the classroom was loud and that transitions between activities were noisy and chaotic, and she opined that activities assigned for transition and independent work “were inappropriate for [the Student] due to her anxiety, tracking and reading deficits.” P-31-3.

140. To “eliminate stigma,” Public School operated its special education program using an “inclusion” model that did not include any separated classrooms for students with disabilities. Testimony of SEC.

141. SEC opined that Non-Public School was too restrictive for the Student because she would not have any non-disabled peers to model appropriate behaviors, so her “norms” would not be with “typical” children. *Id.*

142. Based upon SEC’s testimony, the undersigned finds that she failed to give sufficient weight to the recommendations of the Student’s evaluators and her teachers and staff at Previous School and Non-Public School that the Student required a more restrictive setting than Public School; rather, SEC’s testimony exhibited a bias against specialized instruction outside of general education—using the word “stigma.”

143. Educational Consultant opined that the Student would not have received any educational benefit from specialized instruction in core academic subjects in the general education setting. Testimony of Educational Consultant.

144. Based upon the entire record, the undersigned accepts the opinions of Curriculum and Technology Coordinator and Educational Consultant that the Student's anxiety, distractibility, tracking, language and processing deficits could not be addressed successfully in the general education setting at Non-Public School, even with "push-in" assistance of a special education teacher and a dedicated aide.

145. The hours of specialized instruction that the Student would have received in the outside of general education setting initially would have been provided in a small self-contained room (of which there was one on each floor of the school building); however, depending upon where Public School teachers and staff believed the Student could best learn, that instruction might have been provided in an alcove in a hallway²⁰ that was not segregated from non-disabled peers and was not free of distractions.

Testimony of SEC.

146. Based upon the entire record, the undersigned finds that, during SY 2010-2011, Public School was not adequately equipped to provide specialized instruction in the outside of general education setting.

²⁰ Dedicated Aide testified that all "pull-out" instruction occurred in the hallway. SEC testified that Dedicated Aide may have preferred that the students she supported have their "pull-out" instruction in the hallway, but Public School had private rooms available for such instruction. The undersigned found both witnesses to be credible, and accepts SEC's explanation of the discrepancy. In any event, the availability of private rooms for "pull-out" instruction is not material to determination of the issues in this case.

147. Based upon the entire record, the undersigned finds that, during SY 2010-2011, the Student would have been unable successfully to make transitions between settings (general education and outside of general education).

148. Speech-Language Pathologist C, employed by Respondent, opined that the Student's speech and language skills would benefit from placement in a general education classroom. Testimony of Speech-Language Pathologist C.

149. Speech-Language Pathologist C initially testified that she had reviewed the Student's prior evaluations and had discussed them with other DCPS members of the IEP Team before the November 17, 2010 meeting. *Id.*

150. On cross-examination, when confronted with the transcript of her testimony in the prior DPH in this case, Speech-Language Pathologist C stated that she did not recall what evaluations she had reviewed, the participants in the November 17, 2010 meeting, or when Educational Consultant observed classrooms at Public School. *Id.*

151. Similarly, Speech-Language Pathologist C testified inconsistently as to whether she thought a dedicated aide would benefit the Student from a speech-language perspective. *Id.* Accordingly, the undersigned has given no weight to Speech-Language Pathologist C's testimony.

152. Educational Consultant testified that the Student would have received some benefit from the speech-language pathology services, behavioral support services, and occupational therapy services that would have been provided at Public School. Testimony of Educational Consultant.

153. The undersigned finds that the benefit the Student would have received from these "related services" would not have been sufficient to confer educational benefit upon

her in view of the lack of educational benefit that would have been provided by the academic instruction.

154. Based upon the entire record, the undersigned finds that the IEP developed on November 17, 2010 was not reasonably calculated to provide the Student educational benefit.

Dedicated Aide

155. After the November 17, 2010 IEP Team meeting at which Respondent proposed to provide the Student a dedicated aide, and after an observation of other students at Public School, Educational Consultant opined in a report dated March 1, 2011 that a dedicated aide “would increase [the Student’s] anxiety and she could possibly become over reliant on this individual due to her need for adult reassurance.” P-31-4.

156. At the DPH, Educational Consultant testified that a dedicated aide would make the Student become more dependent even if the aide were trying to make her less dependent, because the Student would have to split her attention between the aide and the teacher. Testimony of Educational Consultant.

157. Educational Consultant opined that because the Student has weak processing skills, having “inputs” from a teacher and an aide would be difficult for her, and having an aide remove her to the back of the classroom would result in the Student missing instruction and being unable to reintegrate into the classroom. *Id.*

158. The undersigned gives no weight to Educational Consultant’s opinion regarding a dedicated aide for the Student because Educational Consultant acknowledged that she had no specifics about how such an aide would work with the Student. *Id.*

159. For the same reason, the undersigned discounts the testimony of Curriculum and Technology Coordinator that an aide necessarily would be “hovering” and preventing the Student from self-advocating.

160. At the DPH, Dedicated Aide described an approach toward supporting a student with disabilities like the Student’s that is different from the approach assumed by Educational Consultant and Curriculum and Technology Coordinator.

161. Specifically, Dedicated Aide, who has 11 years of experience at Public School²¹ testified that she is assigned to work with one or two students at a time (*i.e.*, “dedicated” does not mean one-on-one); that she has worked with students who have problems with distractibility and executive function deficits by removing distractible objects, moving desks, and using visual aids; that she assists the students she supports with transitions from activity to activity; that she works with the students she supports in groups with non-disabled peers; that she does not always sit next to the students she supports; that she encourages the students she supports to work with peers and independently; that she gradually “fades” the amount of support she provides to those students who are able to develop independence; and that some of the students she has supported no longer require an aide. Testimony of Dedicated Aide.

162. SEC testified that students who require a dedicated aide usually start with an aide full time, then go part time. Testimony of SEC.

²¹ The undersigned does not discount Dedicated Aide’s testimony because she lacks post-secondary education or substantial training in special education, inasmuch as she testified as a fact witness rather than an expert.

163. SEC testified that students with dedicated aides often need support initially at recess and lunch to assist with pragmatic language and that once they gain those skills, the aide “backs off.” *Id.*

164. Most students who had aides at Public School did not need an aide when they went on to middle school. *Id.*

165. SEC was “hopeful” that approach would have worked for the Student. *Id.*

166. The undersigned finds that the approach described by Dedicated Aide, who was entirely credible and described her actual experience, would have reduced or eliminated the Student’s dependence upon an aide over time.

167. Although the undersigned finds that a dedicated aide would not have caused the Student to become unduly dependent upon adults, the availability of a dedicated aide would not have rendered Public School an appropriate setting for the Student in SY 2010-2011 because it would not have solved the problems discussed in Findings of Fact 132 – 147, *supra*.

The Setting Provided to the Student by Non-Public School

168. Non-Public School is a private day school that enrolls only students with educational disabilities (Testimony of Curriculum and Technology Coordinator), *i.e.*, all instruction and activities are provided in the outside of general education setting.

169. From the beginning of SY 2010-2011 until October 5, 2010 the Student did not have an IEP at Non-Public School. Testimony of Educational Consultant; P-18.

170. During the time that the Student did not have an IEP, she was being assessed and was observed in class. Testimony of Curriculum and Technology Coordinator.

171. Although Educational Consultant testified that it is not appropriate to instruct a student with disabilities without an IEP, and Curriculum and Technology Coordinator testified that an IEP is required to develop a student's goals, the undersigned concludes that it was reasonable for Non-Public School to wait until there was sufficient information to develop an IEP for the Student.

172. In any event, a private school is not a public agency subject to IDEA with an obligation to provide a FAPE. Accordingly, the undersigned finds that the lack of an IEP for the Student for her first month or so at Non-Public School is not material to determining whether Non-Public School was a proper placement for the Student.

173. Similarly, the fact that the Student's teachers in two non-core subjects—Physical Education and Art—did not have special education certification (Testimony of Curriculum and Technology Coordinator) is not material to determining whether Non-Public School was a proper placement.

174. At Non-Public School during SY 2010-2011, the Student received 33.5 hours per week of specialized instruction with “integrated” speech-language and occupational therapy, 45 minutes per week of individual speech-language therapy and 45 minutes per week of group speech-language therapy. P-18-1.

175. The Student was in a classroom of 13 children with three adults, broken into smaller groups for math, reading and vocabulary. P-31-1, testimony of Curriculum and Technology Coordinator.

176. When there was more than one adult in a classroom, the adults did not “split” the students' attention; rather, the adults each would work with small groups of the students. Testimony of Educational Consultant.

177. The classroom was quiet, not chaotic, with few transitions. *Id.*

178. When there were transitions, the entire class participated. *Id.*

The Student's Progress at Non-Public School During SY 2010-2011

179. During the first quarter of SY 2010-2011, the Student mastered five of her IEP objectives, mastered nine of her objectives with cues, made no progress on five objectives (including all four of her occupational therapy objectives), and was “developing skill, inconsistent responses” on the remaining 95 objectives. P-30.

180. During the first couple of months of SY 2010-2011, the Student was struggling with the demands of language; when given too much to do, she would turn or walk away. Testimony of Curriculum and Technology Coordinator.

181. Giving the Student repeated instructions, using a multisensory approach, and a small group setting were beneficial. *Id.*

182. At the end of SY 2010-2011, the Student was reading slightly below her then-current grade level (P-34-1), which was an increase of almost a grade level in reading ability from her achievement test scores in September 2010 (P-14-1).

183. The Student was making steady progress in reaching her reading goals (P-34-3) although she confused some vowel sounds and did not read for meaning (*Id.*); she required prodding, encouragement and frequent praise to slow down and make corrections while reading aloud (*Id.*); she needed consistent teacher modeling and practice to strengthen her reading and listening comprehension (P-34-4); and it was difficult for her to “maintain attention and develop the ‘mental picture’ long enough to

significantly strengthen her reading comprehension skills at a more complex level” (P-34-4).

184. At the end of SY 2010-2011, the Student’s written language skills were almost a year below her then-current grade level (P-34-4) although this was an improvement of almost a grade level from her achievement test score on brief writing on September 15, 2010 (P-14-1),

185. The Student had difficulty with the mechanics of writing, capitalization and punctuation (P-34-6); and she required significant one-on-one teacher support to sustain attention (*Id.*).

186. At the end of SY 2010-2011, the Student’s mathematics and problem solving skills were a year and a half below her then-current grade level (P-34-7) although this was an improvement of approximately half a grade level from her achievement test scores on September 15, 2010 (P-14-1).

187. The Student made steady progress solving single digit addition and subtraction problems using manipulative materials (P-34-10); however, she had difficulty recalling one-digit addition and subtraction facts through 9, she needed reminders to use “strategies” without answering problems haphazardly, she needed reminders to slow down and look at operational signs carefully when solving problems, and she profited from individual attention and support from adults. *Id.*

188. The Student “worked best when she had an established and written routine to which she could refer to (sic) when she was cued that she was off-task.” P-34-11.

189. When the Student resisted working, “consistent prodding and concrete rewards provided during tutoring encouraged her to complete tasks.” *Id.*

190. Toward the end of SY 2010-2011, the Student called her peers' names repeatedly, had difficulty staying in her own space, touched others in line, overreacted to being bumped, had difficulty seeing the impact of her behavior on others, had "notable difficulty letting go of frustration and disappointment," was "rigid in her thinking, and had difficulty taking the perspective of others [or compromising] with peers and teachers." *Id.*

191. The Student "needed coaching from an adult on how to get the attention of others appropriately and how to interpret their intentions." *Id.*

192. The Student continued to struggle with social pragmatics, standing too close to others, doing things they found annoying. Testimony of Curriculum and Technology Coordinator.

193. The Student remained tentative, reluctant to take (appropriate) risks, and did not initiate activities. Testimony of Educational Consultant.

194. Based upon the entire record, the undersigned finds that, even though the Student did not progress substantially on her social-emotional goals, she did progress substantially on her academic goals; accordingly, the undersigned finds that Non-Public School conferred meaningful educational benefit upon the Student during SY 2010-2011.

The Student's Progress at Non-Public School During the Summer of 2011

195. The Student attended a summer program ("camp") at Non-Public School where she received instruction in reading, writing and math. P-35.

196. From time to time she found it difficult to follow directions because of simple distractions “but she always pulled herself together when prompted in one-on-one situations.” P-35-2.

197. The evidence in the record is insufficient for the undersigned to determine whether the Student received educational benefit during the 2011 summer program.

Petitioners’ Conduct

198. In early March 2010, Petitioners met with SEC at Public School for about an hour. Testimony of Parent #2.

199. SEC provided some information about the program that would be available to the Student at Public School and referred Parent #2 to one of Respondent’s math specialists for more information about a specific math program. *Id.*

200. SEC also informed Petitioners of Public School’s summer program. *Id.*

201. Parent #2 contacted the math specialist, who said she was unaware of a specific math program appropriate for the Student and did not have time to test the Student until the end of SY 2009-2010. *Id.*

202. Uncertain whether they would enroll the Student at Public School, on March 19, 2010, Petitioners paid a Two Thousand Dollar (\$2,000.00) enrollment fee to Non-Public School to hold a place for the Student there for SY 2010-2011. P-38-1; testimony of Parent #2.

203. On June 5, 2010, Petitioners paid Twenty-One Thousand Twenty-Seven Dollars and Fifty Cents (\$21,027.50) to Non-Public School as the initial tuition installment for SY 2010-2011. P-38-1.

204. The undersigned does not infer from the payment of this tuition installment that Petitioners had decided they would not consider a public school placement for the Student.

205. On June 16, 2010, with the assistance of Educational Consultant (Testimony of Parent #2), Petitioners submitted a referral for special education services to Respondent's Private-Religious Office on that office's form (P-9).

206. On July 13, 2010, Petitioners provided SEC copies of the following documents²²:

1. DC Annual Student Enrollment Form, 6-16-10;
2. DCPS Private-Religious Student Referral for Special Education Services, 6-16-10;
3. DCPS Eligibility Screening Parent Interview/Questionnaire, 6-16-10;
4. DCPS Education History;
5. DCPS Speech/Language Screening Summary, 6-4-10;
6. DCPS Classroom Observation, 6-4-10;
7. DCPS Teacher Referral/Report, 6-4-10;
8. Leaps and Bounds Occupational Therapy Evaluation, 4-1-10;
9. Stepping Stones Therapy, 3-2-10;
10. Psychiatric Evaluation, 2-8-10;
11. Psychoeducational Evaluation, 11-16-09; and
12. [Previous School SY 2009-2010] Progress Summary, 1-10.

P-10-1.

207. As of July 2010 when Petitioners submitted these documents to Respondent, Petitioners had determined that the Student would attend Non-Public School during SY 2010-2011. Testimony of Parent #2.

208. Petitioners authorized Respondent to obtain educational information from Previous School and Non-Public School, and to observe the Student at Non-Public School. P-12-1 and -2, P-13-1 and -2.

²² The documents designated as "DCPS" are Respondent's forms, even if the content relates to the Student's education at Previous School.

209. Petitioners provided Respondent the Student's September 15, 2010 achievement test results a month after the testing. P-14, P-20.

210. Petitioners provided Respondent the Student's IEP at Non-Public School. P-22.

211. Petitioners attended and participated in the September 21, 2010 MDT meeting (P-17), the November 1, 2010 MDT meeting (P-24, P-25) and the November 17, 2010 IEP Team Meeting (P-28).

212. On December 13, 2010, Parent #2 and Educational Consultant observed classrooms at Public School. P-31; testimony of Educational Consultant; testimony of Parent #2.

213. Parent #2 would not have taken the Student out of Non-Public School during SY 2010-2011; however, if she had observed conditions at Public School that she thought the Student could "handle," she would have considered sending the Student to Public School for SY 2011-2012. Testimony of Parent #2.

The Cost of Non-Public School for SY 2010-2011

214. The Student's tuition and fees for SY 2010-2011 at Non-Public School totaled Forty-One Thousand Dollars (\$41,000.00)²³, comprising Thirty-Two Thousand Three Hundred and Fifty Dollars (\$32,350.00) for tuition, Eight Hundred Dollars (\$800.00) for a Speech Language Pathology Intermediate Assessment, Forty-Two

²³ In view of the fact that Respondent pays for some children to attend Non-Public School, which has a Certificate of Approval from the District of Columbia Office of the State Superintendent of Education (Testimony of Curriculum and Technology Director), the undersigned finds that Non-Public School's tuition and fees are reasonable for children like the Student who require that restrictive and intensive a program.

Hundred Dollars (\$4,200.00) for Speech Language Contracted Therapy, One Thousand One Hundred Fifty Dollars (\$1,150.00) for Occupational Therapy Comprehensive Evaluation, and Twenty-Five Hundred Dollars (\$2,500.00) for Occupational Therapy Sessions. P-38-1.

215. Petitioners paid all of the Student's tuition and fees for SY 2010-2011. *Id.*

The Cost of Non-Public School for the Summer of 2011

216. The Student's tuition and fees for the 2011 summer program at Non-Public School totaled Three Thousand Nine Hundred and Sixty Dollars (\$3,960.00), comprising tuition of Two Thousand Five Hundred and Fifty Dollars (\$2,250.00), Afternoon Program Fee of Six Hundred Forty Dollars (\$640.00) and Speech/Language Program Tuition of Five Hundred Dollars (\$500.00), all of which Petitioners paid.

P-38-2.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C.

§1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the individualized education program (“IEP”) which the IDEA “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)). The IDEA defines IEP as follows:

(i) In general The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the

disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92

(D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist.*,

Westchester Cty. v. Rowley, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

5. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, "[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute." *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the "appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so"; thus, "the court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation." Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) ("Academic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.'") (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student's progress, courts should defer to the administrative agency's expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) ("Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP's substantive adequacy."). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) ("Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.") (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of*

Educ., Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while "sympathetic" to parents' frustration that child had not progressed in public school "as much as they wanted her to," court noted that "the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available"); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) ("[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.").

K.S. v. District of Columbia, ___ F. Supp. 2d ___, 113 LRP 34725 (2013).

6. The public agency "has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE." *Schoenbach v. District of Columbia*, 46 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather, "[i]f the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing." *Id.*, citing 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999).

7. The public agency is required to give serious consideration to a child's individual needs. *McKenzie* at 1535 n.17:

In considering the evidence, the reviewing court must give "due weight" to the expertise of the school officials responsible for providing the child's education. *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051. Where there is no indication that the school officials' expertise has been brought to bear on the individual needs of the handicapped child, however, the deference granted will be commensurately lower. See *Davis v. District of Columbia Board of Education*, 522 F.Supp. 1102, 1109 (D.D.C.1981).

8. The fact that a child makes progress in an appropriate program with supports is not evidence that the child would attain the same educational performance without the supports. *N.G.*, 556 F. Supp. 2d at 35.

9. The IEP Team must consider

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C. §1414(d)(3)(A); *accord*, 34 C.F.R. §300.324(a); *District of Columbia v. Bryant-James*, 675 F. Supp. 2d 115 (D.D.C. 2009) (IEP Team must consider the concerns of a child’s evaluators).

10. Although the issues in this case do not include the alleged failure by Respondent to consider “the totality of the information and evaluations provided to the IEP [T]eam by [Petitioners]”²⁴ (R-21-31), the undersigned, in reviewing the adequacy of the IEP developed by the Team, must take into account—and has taken into account—all of the information provided by Petitioners (*Id.* n.2).

11. Because the IEP developed on November 17, 2010 was not reasonably calculated to confer educational benefit on the Student (Finding of Fact 154), that IEP did not offer the Student a FAPE.

²⁴ In any event, Petitioners introduced no evidence challenging the testimony of SEC that Respondent did consider all of the information provided by Petitioners, including all of the evaluations of the Student.

Significance of the Student's Academic Performance at Non-Public School Subsequent to November 17, 2010

12. In determining that the IEP developed on November 17, 2010 was not reasonably calculated to provide the Student educational benefit, the undersigned has not relied upon the Student's academic performance at Non-Public School after November 17, 2010 because doing so would "promote a hindsight-based review that would [conflict] with the structure and purpose of the IDEA." *Schaffer v. Weast II*. The undersigned declines to engage in such "Monday-morning quarterbacking" of the school system. *Id.*

13. As noted by the U.S. Court of Appeals for the Fourth Circuit in *Schaffer v. Weast II*:

Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034; *Burlington*, 736 F.2d at 788; *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir.1999). But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP were created. *Cf. Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 161 (3d Cir.1994) (affirming the district court's conclusion that evidence of a later IEP was "irrelevant to the issue of the appropriateness of" prior IEPs). Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight "based on later assessments of a student's needs at [a] later point in time." *Brief for Appellees* at 28; *see also Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir.1995).

14. To the extent that earlier cases in this jurisdiction, such as *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71 (D.D.C. 2004), cited by Petitioners in Parents' Pre-Hearing Brief at 5, hold or suggest that IEPs are to be judged in hindsight, those cases are no longer good law.

15. While evidence of a child's progress *under an IEP* is evidence that the IEP was appropriate and provided the child a FAPE (*see, Rowley; accord, MM v. Sch. Dist.*,

303 F.3d 523 (4th Cir. 2002) and *M.S. v. Fairfax County School*, 553 F.3d 315 (4th Cir. 2009)), it does not follow that a child’s progress in a unilateral parental placement is evidence that the school and program chosen unilaterally by the parent were *required* to provide the child a FAPE. That would be tantamount to judging an IEP in hindsight.²⁵

16. However, the Student’s academic performance at Non-Public School after November 17, 2010 *is* probative of whether Non-Public School was a proper placement for her, which *only* can be judged in hindsight.

Authority of Hearing Officer to Order Tuition Reimbursement

17. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). That relief may include compensatory award of tuition reimbursement. *Id.* In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (“*Branham*”).

18. The IDEA provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child and the parents elected to place the child in such private school or facility. 20 U.S.C. §1412(a)(10)(C)(i); *accord*, DCMR §5-E3018.1.

19. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an

²⁵ The undersigned declines to follow decisions of courts in other jurisdictions cited by Petitioners in Parents’ Pre-Hearing Brief at 6-8 that are inconsistent with controlling case law in the District of Columbia.

“appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991)(internal citations omitted); *see also, Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act”).

20. On the other hand, “a court or a hearing officer may require the agency to reimburse the parents for the cost of . . . enrollment [in a private school] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. § 300.148(c); *see also*, DCMR § 5-E3018.3 and *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985).

21. The word “may” is significant because it endows the hearing officer with discretion to order reimbursement, or to deny reimbursement, based upon the balance of equities. *Id.* at 374 (“equitable considerations are relevant in fashioning relief”).

22. A private placement “need not be the least restrictive environment” to be “proper” under the IDEA. *N.T. v. District of Columbia*, 839 F.Supp.2d 29 (D.D.C. 2012), *citing, Warren G. v. Cumberland Count Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001).

23. However, a hearing officer may consider whether the private placement is the least restrictive environment in evaluating whether private placement is the proper

remedy. *N.T. v. District of Columbia*, *supra*, citing *Branham* and *Kerkham v. Superintendent, D.C. Public Schools*, 931 F.3d 84, 87 (D.C. Cir. 1991).

Whether Non-Public School Was a Proper Placement for the Student

24. Because Non-Public School conferred educational benefit upon the Student during SY 2010-2011 (Finding of Fact 194), and there was no competent evidence introduced that the Student was harmed in any way by the restrictive environment of Non-Public School, the undersigned concludes that Non-Public School was a proper placement for the Student for SY 2010-2011.

Appropriateness of Tuition Reimbursement

25. In this case, there is no allegation that Respondent was untimely in evaluating the Student, determining her eligibility for special education, developing and offering an IEP, or identifying a location of services to implement the IEP for SY 2010-2011.²⁶

26. Accordingly, case precedents²⁷ holding that parents are entitled to tuition reimbursement if they enroll their children in private schools when the public agency has failed timely to evaluate, determine eligibility, develop and offer an IEP, and/or identify a location of services for the child are inapposite.

27. To receive reimbursement of tuition, parents who enroll a child at a private school while a public agency is developing an IEP need not “have a truly open mind,” but

²⁶ Untimeliness is not an issue in this case on remand. Similarly, IDEA’s “child find” requirements are not an issue in this case on remand.

²⁷ See, e.g., *Eley v. District of Columbia* (D.D.C. Civ. No 11-309 (BAH/JMF), August 24, 2012), *District of Columbia v. Vinyard* (D.D.C. Civ. No. 12-1604 (CKK), September 22, 2013) and *Kitchelt v. Weast*, 341 F. Supp. 2d 553 (D. Md. 2004).

they must “make a bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements.” *Sarah M. v. Weast*, 111 F. Supp. 2d 695 (D. Md. 2000). *See also, K.G. ex rel. C.G. v. Sheehan*, 56 IDELR 17 (D.R.I. 2010) (“It is significant that there is no evidence that MM’s parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE.”).

28. In the instant case, although Petitioners followed all appropriate procedural requirements, they were unwilling to accept any offer of FAPE other than Non-Public School for SY 2010-2011 (Finding of Fact 207, *supra*) and they would not have moved the Student from Non-Public School during SY 2010-2011 (Finding of Fact 213, *supra*).

29. The undersigned concludes that it would be inequitable in these circumstances to order Respondent to reimburse Petitioners for the Student’s attendance at Non-Public School during SY 2010-2011.²⁸

Summary

30. The Student’s IEP developed on or about November 17, 2010 provided insufficient hours of specialized instruction in the outside of general education setting because she required all of her instruction to be provided in the outside of general education setting.

²⁸ Whether Respondent’s failure to offer a FAPE in November 2010 entitles Petitioners to tuition reimbursement for all or some portion of Non-Public School’s tuition and fees for SY 2011-2012 or subsequent years is beyond the scope of this case.

31. The placement proposed by Respondent for the Student for SY 2010-2011 was not appropriate because it was not reasonably calculated to provide her with educational benefit.

32. Non-Public School was a proper placement for the Student for SY 2010-2011.

33. Petitioners did not make a bona fide effort to develop an IEP for the Student for SY 2010-2011 because they would not have accepted an offer of FAPE from Respondent for SY 2010-2011 unless Respondent agreed to place and fund the Student's attendance at a specific school (Non-Public School) and they would not have moved the Student from Non-Public School no matter what other placement were offered. Accordingly, it would not equitable to order Respondent to reimburse the Student's tuition and fees for SY 2010-2011, which is the only relief sought in this case.

X. ORDER

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

Petitioners' DPC dated April 1, 2011, is *dismissed* in its entirety, with prejudice.

Dated this 14th day of September, 2014.



Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).