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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 1st Street, N.E.
Washington, DC 20002

ADULT STUDENT,[1]	)	
Petitioners,	)	**Due Process Hearing: March 5, 2012**
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	**Hearing Officer: Jeffrey J. Milton**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Jurisdiction

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. Background

On January 10, 2012, Petitioner ("Student"), a year old student with a disability,[2] filed a due process complaint[3] ("Complaint") against District of Columbia Public Schools ("DCPS") alleging violations of the Individuals with Disabilities Education Act ("IDEA"). Respondent DCPS did not file a response to the Complaint.[4] The Student currently attends a Non-Public School in Springfield, Virginia.

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[1] Personal identification information is provided in Attachment A.
[2] At the time of the alleged violations, Student was eligible for special education services as a child with an emotional disturbance.
[3] On January 11, 2012, this Hearing Officer was assigned to preside over this case.
[4] During the prehearing conference, counsel for Petitioner did not assert that Petitioner was prejudiced by Respondent's failure to file a Response.

On February 10, 2012, at the request of the Hearing Officer, counsel for Respondent provided a copy of a prior written notice issued by Respondent on August 2, 2011. In her Complaint, Student asserts that on November 8, 2012, Respondent DCPS denied her a free, appropriate, public education ("FAPE") when it failed to develop an individualized educational program ("IEP") after her previous, IEP expired. Petitioner further asserts that Respondent denied her a FAPE by failing to determine her educational placement on an annual basis. Petitioner requests relief in the form of an order requiring Respondent to review and revise her IEP, reimburse her for the costs of attending the Non-Public School since August 28, 2011, and place her at the Non-Public School at public expense, including transportation, for the remainder of the 2011-2012 school year.

The parties participated in a resolution meeting on February 2, 2012, and agreed to continue to work to resolve the Complaint through the end of the thirty-day resolution session. The parties agreed that the forty-five day, due process hearing timeline began on February 9, 2012.

On January 27 2012, this Hearing Officer held a prehearing conference in which counsel for Petitioner, and counsel for Respondent, participated. On January 27, 2012 this Hearing Officer issued a prehearing conference order. On February 7, 2012, this Hearing Officer held a second prehearing conference in which both counsel participated. On February 16, 2012, this Hearing Officer issued a second prehearing conference summary and order.

In the February 16, 2012, Summary and Prehearing Order, this Hearing Officer certified two claims for adjudication at the due process hearing: (1) whether Respondent denied Petitioner a FAPE on November 8, 2011, by failing to develop an IEP after her previous IEP expired, and (2) whether Respondent denied Petitioner a FAPE by failing to determine the student's placement on an annual basis.[5]

On February 24, 2012, Respondent filed a motion to dismiss. In the motion to dismiss, Respondent asserted that Petitioner's claims and requested relief are barred by the doctrines of *res judicata* and collateral estoppel. Respondent also asserted that DCPS is no longer obligated to provide Petitioner a FAPE because she unilaterally enrolled in the Non Public School in August 2011, rejecting the FAPE DCPS had previously offered.[6] Finally, Respondent asserted that Petitioner is barred from bringing the claims in her Complaint because, since she is not enrolled in a DCPS school, DCPS is not the local education agency ("LEA") responsible for providing her a FAPE.

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[5] Petitioner, P-4

[6] In making this argument, DCPS relied on a previous HOD, issued on December 29, 2011, which found that DCPS had not denied Petitioner a FAPE. DCPS also notes that, in the December 29, 2011, HOD, the Hearing Officer denied Petitioner's request for an order requiring DCPS to reimburse her for the costs of attending the Non-Public School since August 28, 2011, and place her at the Non-Public School at public expense, including transportation, for the remainder of the 2011-2012 school year. Respondent's Motion to Dismiss dated February 24, 2012 at 5.

On March 4, 2012, this Hearing Officer issued an interim order denying Respondent's motion to dismiss on the grounds that the issues Petitioner raises in the Complaint are not barred either by *res judicata* or collateral estoppel.[7] At the outset of the due process hearing on March 5, 2012, this Hearing Officer denied Respondent's request for dismissal on the remaining grounds Respondent asserted in its motion to dismiss.[8]

On February 27, 2012, Petitioners provided their five-day disclosures to Respondent and this Hearing Officer. On February 27, 2012, Respondent provided its five-day disclosures to Petitioner and this Hearing Officer.

The due process hearing convened at 9:41 a.m. on March 5, 2012.[9] At the outset of the hearing, this Hearing Officer, without objection, entered into evidence all of Petitioners' proposed exhibits P-1 through P-22[10] and Respondent's single proposed exhibit (R-1), a curriculum vitae.

Petitioner testified and presented the testimony of two witnesses, the educational director (Director") of the Non-Public School and a clinical psychologist ("Psychologist") at the Non-Public School. After Petitioner rested her case, Respondent made an oral motion for a "directed verdict" ("Motion").

In order to consider the Motion, and to allow the parties an opportunity to file briefs in support of and in opposition to the Motion, this Hearing Officer recessed the due process hearing. This Hearing Officer ordered the parties to file their briefs by 5:00 pm on March 7, 2012. The briefs were filed timely.

On March 8, 2012, this Hearing Officer issued an Interim Scheduling Order informing the parties that the due process hearing would reconvene on March 21, 2012, to allow Respondent an opportunity to present its case. On March 9, 2012, Respondent

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[7] In essence, this Hearing Officer denied Respondent's Motion to Dismiss on the grounds that, in this case, Petitioner raises issues that have not previously been adjudicated. Additionally, Respondent cited no authority for its assertion that a party cannot request the same *relief* in successive litigation.

[8] At the outset of the due process hearing on March 5, 2012, Respondent requested a ruling on the other grounds for dismissal that it asserted in its Motion to Dismiss, i.e., that it is not responsible for providing Petitioner a FAPE because she rejected the FAPE DCPS offered and unilaterally enrolled in Non-Public School and because she is not enrolled in DCPS. The Hearing Officer orally denied the request for dismissal on these grounds.

[9] The hearing was set to begin promptly at 9:30 am. However, counsel for Respondent arrived late.

[10] Petitioner originally disclosed exhibits numbered P-1 through P-23. At the due process hearing, after Petitioner withdrew her proposed exhibit P-19, this Hearing Officer renumbered Petitioner's exhibits as P-1 through P-22.

notified this Hearing Officer and counsel for Petitioner that it would not be presenting witnesses and would rest on the record.[11]

Respondent presented no witnesses and waived closing argument.

This Hearing Officer closed the record on March 15, 2012 after Respondent filed a Motion for Directed Finding at the close of Petitioner's case and Petitioner filed Petitioner's Opposition to the respondent's Motion for Directed Verdict.

On March 22, 2012, this Hearing Officer issued an Order denying Respondent's motion for a directed verdict finding there was evidence upon which a reasonable person could conclude that the failure to provide an updated IEP by Respondent put FAPE at issue or that the Student had suffered a deprivation of educational benefit.

III. Issues Presented

In the second Prehearing Conference Summary and Order dated February 16, 2012,[12] this Hearing Officer certified the following issues for adjudication at the due process hearing:

(A) Whether Respondent has denied the Student a Free and Appropriate Public Education by failing to comply with 34 C.F.R. §300.324 (b) of the Individuals with Disabilities Education Improvement Act by failing to have a current IEP in effect for the student in order to determine the Student's academic and behavioral progress.

(B) Whether DCPS denied the student a FAPE by failing to determine the student's placement on an annual basis

IV. Findings of Fact

1. Petitioner is a year-old female ("Student"). Student resides in the District of Columbia with her mother.[13]

2. The Student was determined to be eligible as a child with a disability, specifically as having an emotional disturbance.[14] She has a history significant for inattention and hyperactivity, Anxiety Disorder, NOS and a history of attention deficit hyperactivity disorder ("ADHD"). She also has been diagnosed with Oppositional

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[11] Counsel did not request that the due process hearing reconvene for closing arguments. Counsel for Petitioner informed this Hearing Officer that it would file an opposition to Respondent's Motion for Directed Finding in lieu of presenting a closing argument.

[12] Petitioner, P-4

[13] Petitioner's Exhibit 15 at 1 (June 15, 2010, Social History Evaluation); Petitioner's Exhibit 16 (November 8, 2010, IEP).

[14] Petitioners Exhibit 6 at 15 (HOD, October 9, 2010).

Defiant Disorder, and Mood Disorder as well as r/o Reactive Attachment Disorder and Adjustment Disorder with Mixed Disturbance of Emotion and Conduct.[15]

3. The Student has a history of elevated concerns in the area of inattention, aggression, poor social skills, defiance, and slow motivational tendencies.[16] She frequently exhibited inappropriate behaviors (lack of focus, odd behavior, and/or slow rate of work) which are severe in intensity, occur frequently and are major in duration warranting formal behavioral intervention.[17]

4. The student also suffers from Disruptive Behavior Disorder and Dysthymic Disorder and has also received a provisional diagnosis of ADHD.[18]

5. The Student currently attends a non-public school ("Non-Public School) in Springfield, Virginia.[19] The Student unilaterally enrolled herself in the Non-Public School on or about September 6, 2011.[20]

6. The Non-Public School is a day school for students providing a private therapeutic day program for students aged 5-21 with emotional and learning disabilities.[21] The Non-Public School also provides a behavioral counseling center and provides group and individualized counseling for students.[22]

7. The Student's IEP was issued November 8, 2010 by DCPS and expired on November 8, 2011.[23] Since November 8, 2011, Respondent has not convened an IEP meeting to review and revise Student's IEP or to develop a new IEP for the 2011-2012 school year.[24] Respondent has not developed new goals for the Student since she mastered many of the goals in the November 8, 2010 IEP.

8. The November 8, 2010 IEP classified the Student with an Emotional Disturbance and prescribed 26 hours/week of specialized instruction from a special education teach and 1.5 hours/week of behavioral support services from a clinical therapist with all services to be provided outside of the general education setting for eleven months of the school year.[25]

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[15] Petitioners Exhibit 11 at 2, 4, 8. (Functional Behavior Assessment dated May 8, 2010).
[16] *Id* at 8.
[17] *Id.*
[18] Petitioner, P-10 (Clinical/Psycho-Educational Evaluation dated 6/1/2010).
[19] Petitioner's Exhibit 22; testimony of, Education Director at the Non-Public School.
[20] Testimony of Director at the Non-Public School.
[21] *Id*
[22] *Id.*
[23] Petitioner's Exhibit P-16 (DCPS Individualized Education Program dated November 8, 2010).
[24] Stipulation during the due process hearing March 5, 2012 by Respondent's counsel.
[25] Petitioner' Exhibit P-16. (DCPS Individualized Education Program dated November 8, 2010).

9. The Student's academic goals included demonstrating one year's progress in math and one year's progress in reading. Her behavioral goals included displaying verbal and physical self-control in the school setting.[26]

10. On August 17, 2011, Student's attorney gave written notice to DCPS of her intent to unilaterally enroll at the Non-Public School within ten (10) business days at public expense, on the basis that DCPS had failed to provide her with a FAPE by failing to provide her with an appropriate educational placement.[27]

11. By letter dated September 14, 2011, DCPS refused to fund the Student's costs of attending the Non-Public School.[28]

12. Another Hearing officer concluded on December 29, 2011[29] that "Petitioner failed to meet her burden of proof that DCPS changed Student's placement on August 2, 2011 or that was unable to implement Student's IEP or that was a lesser restrictive environment in which Student's IEP would be implemented.[30] The Hearing Officer determines that the decision to place Student at was a location of services decision that was within the sole discretion of DCPS and not a change of placement decision. DCPS did not violate the IDEA and DCPS' actions did not deny Student a FAPE."[31]

13. Since enrolling at the Non-Public School, the Student is performing at a higher level now, than where she was when her last IEP was developed over a year ago. The Student has been keeping up with her school work at the Non-Public School but needs to work on the emotional issues addressed the expired IEP and has been receiving individual and group counseling.[32]

14. The student is currently taking Algebra 2 and Probability and Statistics for her math subjects and English 12. The goals in the outdated IEP are not relevant to her current courses.[33]

15. The Director at the Non-Public School stated that the student needed to have her IEP reviewed in order to set forth goals for her to work on and to support her

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[26] *Id.*
[27] Petitioner's Exhibit P-9 (Letter dated August 17, 2011 to DCPS from Petitioner's counsel).
[28] Petitioner, P-22. (Letter dated September 14, 2011 from DCPS to School Administrator at the Non-Public School).
[29] *See* December 29, 2011, HOD at 8. Petitioner, P-8.
[30] During the 2010-2011 school year, the Student attended a DCPS funded private school which closed at the end of the school year and was placed by DCPS in the Academy program for the 2011-2012 school year. Petitioner, P-8 at 3, 5.
[31] *Id at 9*
[32] Testimony of Director at the Non-Public School.
[33] *Id*

transitional goal and objectives as the student was scheduled to graduate at the end of the school year and planned to attend college.[34]

16. The student's social emotional goals as reflected in the expired IEP are no longer appropriate as the student's emotional needs have changed and her problems with defiance and destruction of property are no longer an issue. The student is now dealing with interpersonal relationship issues.[35]

17. The Psychologist at the Non-Public School has developed his own clinical goals for the Student. [36]

18. The Student has progressed academically and her behavior has improved such that she expects to receive a diploma from the Non-Public School at the conclusion of the school year.[37]

19. The Student is no longer being destructive of school property and is desirous of improving interpersonal relationships.[38]

20. By all accounts, the Student's performance has improved academically and behaviorally since she began attending the Non-Public School in September 2011 and she continues to receive educational benefits there in the absence of a current IEP. The cost of the program is a day. Group counseling is including in the daily rate and individualized counseling is day.[39]

21. Once enrolled in the Non-Public School the Student never requested an updated or revised IEP from DCPS although the Student did make inquiry from the DCPS compliance monitor at the Non-Public School as to whether she would earn a diploma from DCPS. The Student was told by the compliance monitor from DCPS that she was "unfunded" and would not receive a diploma from DCPS.[40]

22. The Director at the Non-Public School did not request a new or updated IEP from DCPS because she was told by the DCPS monitor at the Non-Public School that he would not have any meetings with students not funded by DCPS.[41]

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[34] *Id*

[35] Testimony of the Non-Public School's Psychologist.

[36] *Id*

[37] Testimony of Petitioner.

[38] Testimony of the Non-Public School's Psychologist and testimony of Petitioner.

[39] Testimony of the Non-Public School's Director.

[40] Testimony of Petitioner.

[41] DCPS, through the compliance monitor at the Non-Public School, notified Petitioner that it would not participate in the MDT/IEP process because it does not serve as the LEA. Respondent's Motion for Directed Finding 3/7/2012 at 2.

V. Conclusions of Law / Discussion

The purpose of IDEA is "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."[42] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[43] FAPE is defined as:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)."[44]

In deciding whether Respondent provided a student a FAPE, the inquiry is limited to (a) whether Respondent complied with the procedures set forth in IDEA; and (b) whether the student's expired IEP could reasonably be calculated to enable the student to receive educational benefit.[45]

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.[46] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[47]

The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. [48] *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

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[42] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).
[43] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[44] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[45] *Rowley,* 458 U.S. at 206-207.
[46] 34 C.F.R. § 300.513 (a)(2).
[47] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[48] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as: Special education and related services that –

(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part;
(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

34 C.F.R. § 300.513(a) **Hearing decisions** provides that:

[a] determination of whether a child received FAPE must be based on substantive grounds.
(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a
FAPE only if the procedural inadequacies —
(i) Impeded the child's right to a FAPE;
(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
(iii) Caused a deprivation of educational benefit.

34 C.F.R§300.324(b) **Development, review, and revision of IEP** provides in pertinent part that:

"Each public agency must ensure . . . the IEP Team—(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address—(A) Any lack of expected progress toward the annual goals described in §300.320(a) (2), and in the general education curriculum, if appropriate . . ."

34 C.F.R§300.137 **Equitable services determined** provides in pertinent part that:

(a) No parentally-place private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. . . .

(c) If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA must-

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with §300.138(b)' and
(2) Ensure that a representative of the . . . private school attends each meeting. . .

34 C.F.R§300.148(c) **Placement of children by parents when FAPE is at issue**

provides in pertinent part that:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

A. Respondent failed to have a current IEP in effect for the Student in order to determine the Student's academic and behavioral progress following the expiration of the November 8, 2010 IEP.

The Student's residency in the District of Columbia is not at issue and courts have held that while a student may be attending school in a distant LEA it does not relieve DCPS of the obligation to provide the student with a FAPE where the student is a resident of the District of Columbia.[49] Respondent is correct that no claim has been made that DCPS failed to meet its obligation to locate, identify and evaluate[50] and Student correctly argues that Child Find is not an issue in this case. [51]

At issue is whether there has been a denial of FAPE to the student which is predicated on whether the expiration of an IEP, previously provided by DCPS, before the Student had unilaterally enrolled in a private school in Springfield, Virginia constitutes a denial of FAPE to Student and whether Respondent denied Petitioner a FAPE by failing to determine the student's placement on an annual basis.

The Student self remediated and unilaterally enrolled at a Non-Public School on September 6, 2011 at the start of the 2011-2012 school year[52] and subsequently argued a

[49] *District of Columbia v. Abramson,* 493 F. Supp. 2d 80 (D.D.C. 2007).
[50] Respondent's Motion for Directed Finding 3/7/2012 at 2.
[51] Petitioner's Memorandum of Points and Authorities submitted in Support of the Petitioner's Opposition to the Respondent's Motion for a Directed Verdict 3/7/2012 at 7.
[52] Testimony of Petitioner.

denial of FAPE.[53] The Student chose to remain at the Non-Public School following the HOD determination that FAPE was available with DCPS[54] and filed this due process complaint alleging a denial of FAPE stemming from the failure of DCPS to renew the expired IEP. During the hearing, Respondent stipulated that DCPS had not issued a new IEP following the expiration of the November 8, 2010 IEP.[55]

IDEA "ensure[s] that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" 20 U.S.C. § 1400(d) (1) (A). " '[T]he primary vehicle for implementing' " IDEA's goals 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) (second alteration in original) (quoting *Honig v. Doe,* 484 U.S. 305, 311, 108 S.Ct. 592, (1988). An IEP describes the nature of a child's disabilities, sets educational and functional goals for the child, and details the necessary steps a school must take to support the child's progress.[56] *D.S. v. District of Columbia,* 699 F.Supp.2d 229, 233–34 (D.D.C.2010) (citing 20 U.S.C. § 1414(d)(1) (A)). "Because the IEP must be 'tailored to the unique needs' of each child, it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities." *Id.* at 234 (internal citation omitted) (quoting *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

B. The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.[57] Respondent has not sustained the burden of persuasion that it is somehow relieved of the obligation to provide the Student a current IEP simply because the Student "has presented herself to another school and another school district. . . ." [58]

In the Motion to Dismiss,[59] Respondent asserted that, "DCPS has already been found to have made FAPE available with its previous written notice to Student for her

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[53] Student filed a due process complaint on October 5, 2011 alleging she had been denied FAPE and sought placement and funding at the Non-Public School that she unilaterally enrolled in for the 2011-2012 school year. December 29, 2011, HOD at 8. Petitioner, P-8.

[54] *Id at 10.*

[55] See note 23 above.

[56] "A student's IEP is developed by a team that includes the student's parents, a regular education teacher, a special education teacher, a representative of the school district, an individual who can interpret evaluation results, personnel with particular knowledge of the student if applicable, and sometimes the student [himself]." *T.T. v. District of Columbia,* Civil Action No. 06–207(JDB), 2007 WL 2111032, at *3 (D.D.C. July 23, 2007) (citing 20 U.S.C. § 1414(d)(1)(B)). *Smith v. Dist. of Columbia,* CIV.A. 08-2216 RWR, 2010 WL 4861757 (D.D.C. Nov. 30, 2010).

[57] *Schaffer v. Weast,* 546 U.S. 49,61 (2005),

[58] Respondent's Motion to Dismiss at 6

[59] *Id*

IEP to be implemented in DCPS . . . Student has chosen to reject that offer."[60] The Student's IEP expired during the course of the previous due process proceeding and was not raised as an issue before the Hearing Officer.[61] DCPS now seeks to excuse its failure to conduct an annual review of the Student's IEP which occurred during the pendency of the prior proceeding by relying on the HOD which found that FAPE was available to the Student in DCPS.[62] However, the HOD never addressed the expired IEP and the Student continued to pursue FAPE from DCPS albeit with a different due process complaint in the instant matter.

Respondent asserted that DCPS "is required and obligated to make FAPE *available* its resident student[s] with a disability, not propose programming or develop an IEP."[63] Respondent further asserted that Student "has presented herself to another school and another school district. If any LEA is responsible for providing FAPE to this student it would be a district in Virginia."[64]

DCPS's position is misplaced. Educational agencies are bound to adhere to provisions of the IDEA whether or not the child has been placed in a private or public facility. The IDEA requires special educators and administrators to encourage parental participation. 20 U.S.C. § 1415(b)(1)(A) and (D). Special educators and administrators must ensure compliance with the IDEA. Failure to follow the requirements of the statute constitutes a breach of their responsibilities.[65]

The IDEA does not relieve DCPS of its obligation to review a child annually as provided for §300.324 (b) (1) (i). The determination made by another Hearing Officer on December 29, 2011 that FAPE was made available to the Student by DCPS subsequent to the expiration of the Student's IEP on November 8, 2011, has no bearing on the decision of this Hearing Officer. The decision by another Hearing Officer to place the Student at Spectrum was a location of services decision that "was within the sole discretion of DCPS and not a change of placement decision. DCPS did not violate the IDEA and DCPS' actions did not deny Student a FAPE."[66]

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[60] Prior written notice was provided on August 2, 2011 changing the Petitioner's location of service to Spectrum Academy for the school year 2011-2012. On August 17, 2011 Petitioner gave written notice to DCPS of her intent to unilaterally enroll at the Non-Public School within ten (10) business days at public expense, on the basis that DCPS had failed to provide her with a FAPE by failing to provide her with an appropriate placement/location of services. By letter dated August 22, 2011, DCPS refused to fund the placement. On September 6, 2011 Petitioner began attending a Non-Public separate special education school.

[61] *See* December 29, 2011, HOD. Petitioner, P-8

[62] *Id*

[63] Respondent's Motion to Dismiss at 6 (emphasis in original).

[64] *Id.* at 13

[65] *Briere By & Through Brown v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1255 (D. Vt. 1996).

[66] *See* December 29, 2011, HOD at 8. Petitioner, P-8

This Hearing Officer does not question the findings of the December 29, 2011 HOD that FAPE was made available to the Student by DCPS. However, DCPS cannot rely on a subsequently issued favorable HOD decision to relieve it of its affirmative obligations under IDEA that accrued prior to the issuance of that HOD decision. The sole focus of this HOD is on the obligation of DCPS to provide a resident student with a minimum annual review and revision of the student's IEP. The pendency of a due process hearing where FAPE is at issue does not relieve DCPS of its obligation to revise and update the Student's IEP.[67] An annual IEP review allows the IEPT to measure the Student's progress, review any updated evaluations or other data presented to the Team and determine whether IEP goal are being achieved in order to determine appropriate educational placement.

IDEA also must be construed in light of the presumption of regularity that attaches to administrative decision-making. That presumption is particularly strong with respect to the judgments of state and local educators concerning the appropriate educational services for a child.[68] "("[I]t is entirely proper to presume that *** school officials will act in good faith."). Ultimately, the "local educational agency" - *i.e.*, the school district, *see* 20 U.S.C. § 1401(19) - is responsible for producing the IEP and periodically reviewing and revising it as appropriate. *See* 20 U.S.C. § 1414(d)(2), (d)(4)(A). The school district's judgment that an IEP is appropriate for a child is entitled to the same presumption of regularity as other federal or state administrative acts."[69]

DCPS has stipulated that it did not provide the Student with a current IEP which is necessary to determine the Student's academic and behavioral progress for the balance of the 2011-2012 school year. However, the Student did not pursue an updated IEP until two months after the IEP expired and only after a decision adverse to the Student was rendered by another Hearing Officer.[70] The Student had knowledge that the November 8, 2010 IEP had expired after filing its Due Process complaint on October 5, 2011 and did not raise it as an issue in the prior Due Process Hearing nor did Student seek to amend the Due Process Complaint. The Student did not ask DCPS to provide a new IEP on November 8, 2011 when the November 8, 2010 IEP expired and again did not ask DCPS to meet to revise the IEP after the issuance of the December 29, 2011 HOD. It was only in the Student's Due Process Complaint filed January 10, 2012 that the Student requested

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[67] Under 20 U.S.C. § 1414(a)(5), local educational agencies must conduct annual reviews of IEPs of disabled students. There is a concomitant obligation to review placement of children with disabilities annually. 34 C.F.R. § 300.552(a)(1). The fact that the parties were in litigation during the 1993–94 school year did not relieve the District of its obligation to comply with the IDEA. *Briere By & Through Brown v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1255 (D. Vt. 1996).
Delaware County Intermediate Unit No. 25 v. Martin K., 831 F.Supp. 1206, 1223 (E.D.Pa.1993).

[68] *See Goss v. Lopez*, 419 U.S. 565, 578 (1975) ("By and large, public education in our Nation is committed to the control of state and local authorities.") (quotation omitted); *Mitchell v. Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring)

[69] *Id*

[70] December 29, 2011, HOD at 8. Petitioner, P-8.

to reconvene the Student's MDT/IEP Meeting to review the Student's progress and revise and update the Student's IEP as necessary.

An expired IEP is not a per se denial of FAPE. Although procedural safeguards in the education forum should not be taken lightly, the D.C. Circuit has held that procedural violations are actionable only if they affect the student's substantive rights.[71] Standing alone for a short period of time, the failure of DCPS to revise and update an IEP may constitute a procedural violation absent a showing of harm to the Student.

However, that is not the case in this matter. This has not been a procedural lapse by DCPS. DCPS has taken the affirmative position that it does not serve as the Student's LEA and consequently is absolved from participating in the MDT/IEP process and not required to provide services such as revising and updating the Student's IEP.[72] DCPS's actions are not mere procedural violations but a clear intent to circumvent the requirements of IDEA that a child be reviewed annually. If DCPS had undertaken its affirmative responsibility to review and revise the Student's IEP prior to its expiration, the outcome of this proceeding may well have been different

The Student mastered many of the goals set forth in the November 8, 2010 IEP and appears to have benefited from attendance at the Non-Public School. She expects to graduate with a diploma from the Non-Public School at the end of the school year and go on to college.[73] The Student has progressed beyond the annual goals set forth in the expired IEP.[74] The Student's IEP goals and objectives as it relates to her social and emotional goals are no longer appropriate as the Student's emotional needs have changed and her problems with defiance and destruction of property are no longer an issue. However, the Student still needs special services. [75] The Student has been denied certain educational benefits namely academic and behavioral goals for the 2011-2012 school year. The procedural violations of IDEA have risen to the level of deprivation of educational benefits of the Student entitling her to a compensatory reimbursement payment.[76]

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[71] *Lesesne v. Dist. of Columbia,* 447 F.3d 828, 834 (D.C.Cir.2006); *Kingsmore ex rel. Lutz v. Dist. of Columbia,* 466 F.3d 118, 119 (D.C.Cir.2006); *Schoenbach v. Dist. of Columbia,* 309 F.Supp.2d 71, 79 (D.D.C.2004).

[72] DCPS, through the compliance monitor at the Non-Public School, notified Petitioner that it would not participate in the MDT/IEP process because it does not serve as the LEA. Respondent's Motion for Directed Finding 3/7/2012 at 2

[73] Testimony of Petitioner and testimony of the Non-Public School's Education Director.

[74] Testimony of the Education Director at the Non-Public School as to the Student's behavioral and academic progress.

[75] Testimony of the Clinical Psychologist at the Non-Public School.

[76] As to the remedial provision, the Supreme Court has emphasized that IDEA relief depends on "equitable considerations." *See Burlington, 471 U.S. at 374.* Accordingly, "compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting 'appropriate relief.' " *Parents of Student W.,* 31 F.3d at 1497. More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created

Indeed, courts have held expressly that tuition reimbursement is appropriate if DCPS has not made a free appropriate public education available to a child in a timely manner prior to a private school enrollment.[77]

Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion "appropriated" relief, e.g. 20 U.S.C. § 1415 (i) (2) (C) (iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the record developed at the hearing, this Hearing Officer has exercised his discretion to order appropriate relief, as set forth in the accompanying Order below. The remedy is not a prospective placement sought by the Student.[78] The relief provided is a onetime payment in the form of compensatory reimbursement payment for expenses, including all related services and transportation, incurred by the Student at the Non-Public School during the 2011-2012 school year commencing with the expiration date of the IEP on November 8, 2011 and continuing to such date as DCPS provides the Student with a new and revised IEP.[79] While a compensatory reimbursement payment is appropriate, this Hearing Officer cannot assess, based on the record, that a private placement for the Student would be appropriate since Petitioner did not present any substantial evidence as to her future needs other than to demonstrate that the expired IEP's academic goals and the objectives as it relates to her social and emotional goals are no longer appropriate.

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by an educational agency's failure over a given period of time to provide a FAPE to a student." *G. ex rel. RG,* 343 F.3d at 309. *Reid v. District of Columbia,* 401 F.3d 516

[77] *See Alfono v. District of Columbia,* 422 F.Supp.2d 1, 5 (D.D.C.2006); *Roca v. District of Columbia,* 2005 WL 681462, at *4 (D.D.C. March 14, 2005); *Goldstrom v. District of Columbia,* 319 F.Supp.2d 5, 8 (D.D.C.2004). *Dist. of Columbia v. Abramson*, 493 F. Supp. 2d 80, 86 (D.D.C. 2007)

[78] As the D.C. Circuit has noted, however, "parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if a federal court finds that the public agency violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.]"*Dist. of Columbia v. Abramson*, 493 F. Supp. 2d 80, 87 (D.D.C. 2007),
Holland v. District of Columbia, 71 F.3d at 425 (citing *Florence County School District Four v. Carter,* 510 U.S. at 15.

[79] In *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, (1985) the Supreme Court stated that" . . .Act authorizes such reimbursement. The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act."

VI. Decision

The Petitioner has met her burden of proof with respect to a denial of FAPE. The goals in the outdated IEP are not relevant to her current courses. The Petitioner established that the failure to review and revise her outdated IEP has denied her certain educational benefits namely academic and behavioral goals for the 2011-2012 school year. Petitioner prevails since the Student has suffered a deprivation of educational benefit. The Student has shown that the uncontroverted expiration of the IEP and the failure to determine the Student's placement on an annual basis denied the Student a FAPE. The Student is a resident of the District of Columbia and DCPS was obligated to provide FAPE to the Student and an IEP is an integral aspect of FAPE.[80]

Based on the record developed at the hearing, this Hearing Officer has exercised his discretion to order appropriate equitable relief for that period of time in which DCPS failed to provide Petitioner with a current IEP, as set forth in the accompanying Order below.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered this 25th day of March, 2012:

1. DCPS shall reimburse the Student's expenses, including all related services and transportation, incurred at the Non-Public School[81] effective from the date of the expiration of the IEP, November 8, 2011 until such date as DCPS provides the Student with a current IEP.

2. Within fifteen (15) calendar days of this Order (i.e., by April 9, 2012), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members (including the Student and appropriate representatives of DCPS and the Non-Public School) to revise and update an IEP to meet the Student's educational needs that result from the Student's disability, which IEP shall conform to all IDEA requirements. The IEP shall include, among other things, a full-time program of specialized instruction, at least one hour per week of counseling or other behavioral support services, a statement of measurable annual goals including those which are to support her transitional goals and objectives as the Student is scheduled to graduate at the end of the school year and plans to attend college.

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[80] "The *modus operandi* of the Act is the already mentioned "individualized educational program." The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. § 1401(19) . . . In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E) and 1415(b)(b)(2); 34 CFR § 300.345 (1984)." See *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, and (1985).

[81] The Non-Public School is identified by name in the Appendix to this HOD.

3. Petitioner's other requests for relief in her Due Process Complaint is DENIED.

4. This case shall be, and hereby is, CLOSED.

IT IS SO ORDERED.

Jeffrey J. Milton
Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).