

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE**

STUDENT,¹)
By and through PARENT,)
)
 Petitioner,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
 Respondent.)

Bruce Ryan, Hearing Officer

2011 SEP -2 AM 9:00
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed May 25, 2011, on behalf of a year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's father.

Petitioner claims that DCPS denied the Student a free appropriate public education ("FAPE") by: (a) failing to monitor her placement at the non-public school ("Private School") where she had been placed by DCPS and she attended at the beginning of the 2010-11 school year; (b) failing to propose a new appropriate individualized education program ("IEP") and educational placement during the 2010-11 school year; and (c) "predetermining" placement for the Student. As the sole remedy for these alleged denials of FAPE, Petitioner seeks reimbursement for all costs associated with the Student's parental placement and attendance at two residential programs located outside the District of Columbia between October 18, 2010, and August 25, 2011.

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

DCPS held a resolution meeting on or about June 10, 2011, which did not resolve the Complaint, and the parties agreed to end the resolution period early as of that date.

DCPS then filed its Response on June 15, 2011, which denied the allegations. DCPS asserted (*inter alia*) that (a) Petitioner unilaterally removed the Student from the DCPS-funded Private School placement without justification or agreement by DCPS; (b) the IEP and prior placement were appropriate for the Student; and (c) the parental placements in the residential programs were not proper.

An initial Prehearing Conference ("PHC") was also held on June 15, 2011, at which the parties discussed and clarified the issues and requested relief. DCPS agreed to comply with Petitioner's request to inspect and review further educational records without unreasonable delay, and the parties agreed to schedule a further PHC for June 27, 2011. The parties also agreed to schedule the due process hearing for July 19, 20, and 21, 2011, with disclosures due July 12, 2011. A further PHC was then held on 06/27/2011, at which the issues, claims, and defenses were discussed in greater detail, and the agreed hearing dates were confirmed.

On July 18, 2011, the parties agreed to continue the due process hearing that was originally scheduled to begin on 07/19/2011. The parties agreed to continue the hearing until August 18, 19, and 22 due to: (a) Petitioner's late receipt of disclosures as result of unanticipated email server rejection of DCPS' transmission on the due date; (b) DCPS' offer of an agreed continuance to remedy any harm from delayed receipt of the disclosures; (c) witness availability issues on both sides; and (d) the parties' mutual desire to discuss a possible resolution of the complaint without litigation. These were the earliest dates that all parties and witnesses could be available for the multi-day hearing. The parties further agreed to file any supplemental disclosures updating the facts by August 11, 2011. Finally, the parties agreed to extend the HOD timeline from July 25 to September 1, 2011, to accommodate the rescheduled hearing.

On July 19, 2011, a motion for continuance was filed in accordance with the above agreement, and was granted by the Chief Hearing Officer based on good cause shown. On July 30, 2011, the Hearing Officer issued a Prehearing Order for the purpose of memorializing the above events and confirming the matters discussed, agreed and/or ordered at or as a result of the PHCs

Disclosures and supplemental disclosures were filed, and the Due Process Hearing was held in Room 2006 on August 18, 19, and 22, 2011. Petitioner elected for the hearing to be

closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-26.

Respondent's Exhibits: DCPS-1 through DCPS-10.²

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

Petitioner's Witnesses: (1) Parent-Petitioner (for summary of expenses only); (2) Clinical Psychologist; (3) Social Worker #1; (4) Social Worker #2; (5) Learning Specialist; and (6) Educational Consultant.

Respondent's Witnesses: (1) _____ Program Manager, DCPS Non-Public Schools Unit; and (2) Ms. Norma Villanueva, Program Director, DCPS Office of Special Education.

At the close of the hearing, the parties agreed to submit written closing statements by August 25, 2011. Both parties submitted written closing statements on or before that date.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is September 1, 2011.

III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing (*see Prehearing Order*, issued July 30, 2011, ¶¶ 5-6):

² DCPS Exhibits 11 and 12 were excluded upon Petitioner's objection because they were filed in a supplemental disclosure that was untimely filed on August 12, 2011.

(1) **Failure to Monitor Private School Placement.** — Did DCPS deny the Student a FAPE by failing to monitor her placement at Private School?

(2) **Inappropriate IEP and Placement (2010-11 SY).** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to provide educational benefit) and an appropriate educational placement for the 2010-11 school year?

Petitioner alleges that once DCPS learned of the Student's self-injurious behavior and knew that Private School was no longer appropriate to meet her needs, DCPS was required to propose another placement in a residential program. *See Addendum to Complaint*, p. 1. Petitioner confirmed at the PHCs that he does not challenge any of the IEP goals.

(3) **Predetermined Placement.** — Did DCPS deny the Student a FAPE and/or commit procedural error by predetermining a placement for the Student?

(4) **Parental Placement.** — Whether the private residential placements selected by Petitioner are proper for the Student?

The sole remedy requested by Petitioner is reimbursement for all costs associated with the Student's attendance at the residential programs where she was parentally placed between October 18, 2010 and August 25, 2011. As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. DCMR 5-E3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005).

IV. FINDINGS OF FACT

1. The Student is a -year old student who has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. *See DCPS-8* (03/07/2011 IEP). Her disabilities include Other Health Impairment ("OHI"), based on her diagnosed ADHD condition, and Emotional Disturbance ("ED"). *See P-22*.
2. During the 2008-09 school year, DCPS placed the Student at a non-public special education day school located in the District of Columbia (the "Private School"). Private School had referred the Student to DCPS as a child with a suspected Specific Learning Disability ("SLD"). *See DCPS-1; DCPS-2*. Petitioner agreed with this placement, and the Student attended Private School for the remainder of the 2008-09 school year, the entire 2009-10 school year, and the beginning of the 2010-11 school year.

3. During the 2010 summer, Petitioner discovered that the Student was having an inappropriate relationship with an adult (21-year old) male with a history of felony offenses. At this point, the Student's behaviors toward Petitioner became increasingly oppositional and problematic. *See P-7, p. 2.*
4. At or about this same time, Petitioner learned that the Student had engaged in certain self-injurious behavior (*i.e.*, self-inflicted cutting) on one or more occasions dating back to February 2010. *P-7; P-20; Ed. Consult. Test.* The Student was not self-cutting at school, and thus no measures were apparently taken at school regarding such behavior. *P-20, p. 4.*
5. In September 2010, as a result of another self-cutting incident, the Student was hospitalized for seven days at the *P-7, p. 2.*
6. On or about October 18, 2010, Petitioner removed the Student from Private School and placed her into a _____ program for troubled teens and their families" located outside the District of Columbia
See P-10; P-18; DCPS-7. _____ "is based on a positive growth model driven by the natural consequences of removing children from their environment, placing them in nature, providing therapeutic experiences and allowing a natural process of change to unfold." *P-10, p. 3.* The program helps troubled adolescents overcome psychological problems and change destructive behavioral patterns. *Id., p. 5.* The average length of stay in this type of program is 60-90 days. *P-18.*
7. It is undisputed that Petitioner did not notify DCPS prior to removing the Student from Private School, and DCPS did not participate in the decision-making process with respect to such action. Shortly thereafter, Petitioner informed DCPS of her removal and placement into the _____ Petitioner did not specifically request DCPS to fund this program at this time.
8. When DCPS learned of the move, it promptly scheduled an IEP team meeting, which it held at Private School on November 4, 2010. *P-18; Hunter Test.* At this meeting, Petitioner reported that the Student had been "out of control at home" and "was beginning to be school resistant," and that he had sought psychiatric help for her "behavior issues at home" on three occasions. *P-18, p. 1.* The Associate Head of Private School indicated "that there were never issues regarding behavior at school but during the last few days at

school she seemed a little off.” *Id.* He added “that nobody from [Private School] recommended a placement at _____ and “that at that point they were not seeing any behaviors at school that were reported at home.” *Id.* The IEP team decided that the Student would remain enrolled at Private School until her return or discharge from _____ and DCPS asked that Petitioner be in contact with DCPS about her status going forward. *Id.*, p. 2.

9. On or about December 29, 2010, the Student was discharged from _____ *See P-8; P-21; Social Worker #1 Test.* The Discharge Summary prepared by her primary therapist reports that the Student experienced a significant amount of success in the program and that her “negative thoughts, beliefs, and depressive symptoms ha[d] decreased significantly” by that time. *P-8, p. 3.* The report recommended that the Student “continue her success in a therapeutic type of boarding school geared towards students with significant learning disabilities that will also continue to address depressive symptoms, focus on identity development, and provide opportunities to practice developing positive peer relationships.” *Id.* The report expressed the view that “[a]t this time, her emotional and psychological needs cannot be separated from her academic abilities and performance,” and that “[o]utside of such a structure, [Student] is at significant risk for emotional, psychological, and academic decline.” *Id.*
10. On or about December 31, 2010, Petitioner enrolled the Student at a private boarding school for girls located outside the District of Columbia (“Residential Program A”). The school provides therapy and counseling, along with an educational program, designed to address the needs of adolescent girls who are struggling socially, emotionally, and/or academically. *See P-11; P-21; Social Worker #2 Test.*
11. It is undisputed that Petitioner did not notify DCPS prior to removing the Student from _____ or enrolling the Student in Residential Program A, and DCPS did not participate in the decision-making process with respect to these actions. Sometime shortly thereafter, Petitioner informed DCPS of these actions, but Petitioner did not specifically request DCPS to fund Residential Program A at this time.
12. At or about this same time, Petitioner provided DCPS with a copy of a Report of Psychological Evaluation prepared December 10, 2010, by a licensed psychologist

retained by P-7; see P-21; *Psych. Test.*; *Educ. Consult. Test.* The report diagnosed the Student as having Major Depressive Disorder (Recurrent, Moderate), ADHD (Predominately Inattentive Type), Reading Disorder, Mixed Receptive-Expressive Language Disorder, and Disruptive Behavior Disorder Not Otherwise Specified. P-7, p. 15. See also *Psych. Test.* (noting “very significant depression symptoms” and “very dangerous peer relations”). The report recommended that following her placement at the Student “would likely benefit most from continued placement in a structured academic environment such as a therapeutic boarding school” – with small class sizes, a “structured and supportive milieu,” and opportunities for individual and group therapy – along with other appropriate interventions. P-7, p. 15.

13. On or about January 6, 2011, DCPS convened an IEP team meeting at Private School to review the submitted 12/10/2010 psychological evaluation and to discuss her educational needs. See P-21. Petitioner also submitted a copy of the 12/29/2010 Discharge Summary from and informed the team that the Student had been moved to Residential Program A. *Id.*, p. 1. Following a brief and unproductive telephone discussion with an assigned DCPS psychologist, the parties agreed to reconvene the meeting so that DCPS could have a different psychologist review the evaluation. *Id.*, p. 3.
14. On or about January 10, 2011, DCPS convened another IEP team meeting at Private School for the same purpose. See P-20. With respect to the 12/10/2010 psychological evaluation, the DCPS psychologist indicated that the testing was consistent with a diagnosis of ADHD in that (*inter alia*) the Student’s executive functioning was shown to be a deficient area, and her working memory, planning and organization were major areas impacting her abilities. *Id.*, pp. 1-2. The DCPS psychologist concluded that “OHI of ADHD would be the major classification impacting her disability according to the psychological evaluation.” *Id.*, p. 3. The DCPS psychologist did not believe that the Student qualified as ED. *Id.*, p. 3. However, DCPS ultimately issued a Prior Written Notice that same date proposing to identify the Student as having Multiple Disabilities (MD) with OHI and ED included therein. P-22, p. 2.
15. With respect to the Student’s educational needs as of 01/10/2011, the Educational Consultant told the IEP team that the 12/10/2010 report confirmed “[t]he degree to which

her social emotional issues have *emerged as* a significant factor.” *P-20, p. 2* (emphasis added). The Associate Head of Private School told the team that the social worker who had counseled the Student “did not realize the extent of what was going on emotionally” because the school “did not have an idea about the relationship, about what is going on with this guy at home.” *Id.* He further “stated that she was doing homework and had a good year last year.” *Id., p. 4.*³ It also appears that Petitioner was unaware of the full extent of the self-injurious behaviors until after the Student had engaged in counseling at *Id.*⁴

16. The 01/10/2011 IEP team then addressed whether Private School could meet the Student’s needs or whether she needed a different full-time special education program with “integrated therapy.” *P-20, pp. 4-5.* The Private School Academic Director stated that her present needs as revealed in the discharge summary and evaluation were “beyond [Private] School’s ability,” that “she needs more than [Private School] can offer,” and that it “would not take [Student] today due to her intense emotional needs.” *Id., pp. 3-5.* DCPS then proposed other private day-school options that it believed could provide integrated therapy to address the Student’s social/emotional needs. *Id., p. 5.* However, the Educational Consultant felt that she required a full-time, 24-hour residential program, consistent with the recommendations. *Id.* At the conclusion of the discussion, the IEP team “recommended a *more restrictive environment* than [Private] School,” and DCPS stated that it would “refer to the LRE Team to determine if a more restrictive environment is needed for [Student].” *Id.* (emphasis added). The notes then indicate that the DCPS Progress Monitor “will be in touch with [Petitioner] about the LRE process.” *Id.*

³ The Hearing Officer recognizes that these statements are reflected only in the meeting notes taken by DCPS team members attributing such statements to Private School officials, rather than actual quotes from such officials directly, and should be accorded appropriate weight as such. However, Petitioner did not seek to present any testimony from any Private School staff – or, for that matter, from Petitioner himself – to vary or contradict such statements in the meeting notes. Nor did the Educational Consultant do so in his testimony.

⁴ See also *id., p. 3* (“Her social emotional needs in the classroom were not an issue when [Student] was at [Private School]. [Educational Consultant] stated that they *could have become* a safety issue.”) (emphasis added); *id., p. 4* (“Behaviors did not manifest at [Private School] but when she went to she described behaviors and thoughts and feelings.”).

17. About six weeks later, in late February 2011, the DCPS Progress Monitor mailed Petitioner a letter of invitation for another IEP team meeting to discuss the Student's educational needs and the request for a more restrictive environment. *See P-21* (02/22/2010 letter).
18. On or about March 7, 2011, DCPS convened another IEP team meeting for the purpose of updating the IEP and determining an appropriate location of services for the Student. *See DCPS-7*. Representatives of Residential Program A attended this meeting and reported that they were still in the process of assessing the Student's needs since her placement on 12/31/2010, and that she was "on the verge of making progress." *Id.*, p. 2. They further stated "that her social emotional goals in the classroom are significant and without consistent support and consistency there would be disengagement." *Id.* At this meeting, Petitioner requested DCPS to fund both Residential Program A and the placement beginning October 2010. *Id.*, p. 4. DCPS reiterated that it could make referrals to the _____ and indicated that it needed to "explore the options at the Least Restrictive Environment that can meet [Student's] needs." *Id.*, pp. 4-5.
19. At the March 7, 2011 meeting, DCPS also developed a revised IEP. *See DCPS-8; P-23*. The 03/07/2011 IEP provides for 30.75 hours per week of specialized instruction, 90 minutes per week of speech-language pathology services, and 90 minutes per week of behavioral support services, all in an Outside General Education setting. *DCPS-8, p. DCPS-000089*. The IEP also provides for Extended School Year ("ESY") services. *Id.*, p. *DCPS-000093*. In the LRE justification statement, DCPS states that "Student has been receiving education benefit from being parentally placed out of General Ed and the team agreed to continue in parentally placed setting and review at the end of the school year." *Id.*, p. *DCPS-000090*.
20. On or about March 11, 2011, Petitioner consented to the non-public school referrals identified by DCPS at the 03/07/2010 meeting. *See DCPS-9, p. DCPS-000120*. Shortly thereafter, _____ (DCPS Progress Monitor) sent referrals and information packets to all three schools. *See DCPS-9; Hunter Test*. Petitioner visited at least one of the schools (Kellar), *DCPS-000115*, and appears to have attempted to visit all three schools. *See DCPS-9; Educ. Consult. Test*.

21. On or about March 29, 2011, before any proposed DCPS placement and/or location of services could be finalized, [redacted] left DCPS for another position. *See P-16.* [redacted] indicated that [redacted] would be the new Progress Monitor stepping into her position, and that Petitioner should be in contact with [redacted] or their supervisor, [redacted]. *Id.* However, following this correspondence, it appears that neither [redacted] nor [redacted] ever contacted Petitioner further concerning any alternative placement and/or location of services for the Student. DCPS also never issued any Prior Written Notice proposing any placement and/or location of services other than Private School. *See, e.g., Hunter Test.*
22. From January through the end of March 2011, the Student generally refused to attend any academic classes or instruction at Residential Program A. *See Testimony of Social Worker #2 and Learning Specialist.* As a result, the Student failed to earn any academic credits during the first quarter of 2011 and failed to avail herself of significant educational benefits during this portion of the parental placement.
23. On or about May 25, 2011, Petitioner filed a due process complaint alleging that DCPS had denied the Student a FAPE and seeking reimbursement of the costs of the parental placements to date.
24. On or about June 27, 2011, while this case was pending, the Student was discharged from Residential Program A due to its closing and was transitioned to another therapeutic boarding school program owned and operated by the same firm (“Residential Program B”). *See P-26.* Many of the same staff, including the Student’s therapist, also transferred to Residential Program B. *Id., p. 4.* Residential Program B operates a program that is very similar to Residential Program A, although it includes both male and female students. *See P-14; Social Worker #2 Test.*
25. Since being discharged from the [redacted] both Residential Program A and Residential Program B have been able to address the Student’s unique therapeutic needs and provide educational benefit to the Student. She has made significant academic and emotional progress with the support of these programs. Petitioner has paid approximately [redacted] per month plus psychological services for each of these programs. *See P-24; Parent Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

This is a case for retroactive reimbursement of the costs of parental private placements. As both parties recognize, the governing legal principles are well established, as set out in the statute and controlling Supreme Court decisions:

“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 [private school] enrollment if the court or hearing officer finds [1] that the agency had not made FAPE available to the child in a timely manner prior to that enrollment *and* [2] that the private placement is appropriate.” 34 C.F.R. § 300.148 (c) (emphasis added). This is the same basic two-prong test recognized by the Supreme Court under general equitable authority prior to the 2004 IDEA amendments. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *see also Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006).

Moreover, “equitable considerations are relevant in fashioning relief,” *Burlington*, 471 U.S. at 374, and courts and hearing officers have “broad discretion” in the matter. *Id.* at 369. The Hearing Officer therefore “must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” *Carter*, 510 U.S. at 16. *See also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009), slip op. at 16-17 (“When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted”).

IDEA further provides that the cost of reimbursement may be reduced or denied if: (1) “at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team ... [of] their intent to enroll their child in a private school at public expense”; or (2) at least 10 business days prior to removal, the parents did not give written notice of their intent to the public agency; or (3) “upon a judicial

finding of unreasonableness with respect to the actions taken by the parents.” 34 C.F.R. §300.148 (d).⁵

In this case, the Student previously received special education and related services under the authority of DCPS at Private School, and she was enrolled by Petitioner in different private schools without the consent of or referral by DCPS. In order for Petitioner to obtain tuition reimbursement, he must first prove that DCPS failed to make FAPE available to the Student in a timely manner prior to the private school enrollment for which he seeks to be reimbursed. Then Petitioner must prove that the private placements are proper under the Act, which is a lesser standard than FAPE. *See Burlington*, 471 U.S. at 370; *accord DCPS’ Closing Brief*, p. 5. Petitioner carries the burden of proof on both points. *See DCMR 5-E3030.3; Schaffer v. Weast*, 546 U.S. 49 (2005).

Relevant FAPE Requirements

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[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 SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). 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

⁵ Petitioner argues that the statutory notice provision does not apply here because the Student was not removed from a “public school.” *Parent’s Closing Memorandum*, p. 9. The parties have not cited any judicial decisions on point. However, in adopting §300.148, the U.S. Dept. of Education seemed to recognize that the tuition reimbursement standards reflected in the statute should apply not only to public agencies’ own programs for educating children with disabilities, but also to “public agency placements of children with disabilities in private schools...” 71 Fed. Reg. 46,599 (2006) (*citing Carter*). *See also* 34 C.F.R. 300.148 (c) (applying to children “who previously received special education and related services ***under the authority of a public agency***”) (emphasis added). Even if the statutory notice provision is inapplicable, similar notice principles may still be considered as a relevant factor under *Forest Grove*.

with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982).⁶ In addition, “[b]ecause the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. 1414 (b)-(d).” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6.

“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). In determining educational placement, DCPS must place a student with a disability in “an appropriate special education school or program” in accordance with the IDEA. D.C. Code 38-2561.02. See also *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), citing *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (“Once developed, the IEP is then implemented through an appropriate placement in an educational setting suited to the student’s needs”). Among other things, DCPS must ensure (*inter alia*) that the placement decision is “based on the child’s IEP,” and that it is in conformity with Least Restrictive Environment (LRE) provisions. 34 C.F.R. § 300.116.

“If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school.” *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991). “If placement in a public or private residential program is necessary ..., the program, including non-medical care and room and board, must be at no cost to the parents of the child.” 34 C.F.R. 300.104. To determine whether a residential placement is appropriate, courts and hearing officers must analyze “whether full-time placement may be considered necessary for *educational purposes*, or whether the residential placement is a response to *medical, social or emotional problems that are segregable from the learning process.*” *McKenzie v. Smith*, 771

⁶ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. “).

F.2d 1527 (D.C. Cir. 1985), quoting *Kruelle v. New Castle Country School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981). Generally speaking, DCPS is not responsible for the costs of removing and placing a student in a residential facility due to behavioral difficulties in the home and community rather than school, non-academic reasons, or other problems unrelated to school and not impacting educational performance (e.g., substance abuse, family conflict, inappropriate relationships).⁷

Whether DCPS Failed to Make FAPE Available to the Student in Timely Manner

In this case, Petitioner has not proved by a preponderance of the evidence that DCPS failed to make FAPE available to the Student prior to Petitioner's removal of the Student from Private School and his enrollment of the Student at the _____ in October 2010. The evidence fails to establish that the Student's IEP and placement at Private School were not reasonably calculated to confer meaningful educational benefit on the Student at that time of the Student's removal. According to statements made by Private School staff at the November 2010 and January 2011 MDT meetings and other evidence of record, the Student was making academic progress, attending school regularly, achieving passing grades, and not exhibiting serious behavioral problems in school. See, e.g., *Findings*, ¶¶ 8-9, 13-15; *P-18*; *P-21*. It appears that the extent of the Student's emotional and behavioral concerns may not have been fully revealed and recognized until after she was placed into the _____ See, e.g., *P-7*; *P-8*; *Educ. Consult. Test.*; *Social Worker #1 Test.*

Moreover, Petitioner presented no testimony from anyone at Private School to contradict the statements attributed to them in the meeting notes; neither Petitioner nor the Student testified concerning the Student's experiences at Private School or the reasons for leaving Private School; and Petitioner failed to introduce any evidence of the IEP developed and implemented at Private

⁷ See, e.g., *Forest Grove School Dist. v. T.A.*, 638 F.3d 1234 (9th Cir. 2011) (on remand from Supreme Court; parent held not entitled to reimbursement for placement of student into wilderness therapy program where enrollment was found to be solely for non-academic reasons); *Ashland School Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9th Cir. 2009) (residential placement for high school student with ADHD held not necessary for student to receive a FAPE where record showed that she did not engage in disruptive behaviors in class, was well-regarded by her teachers, was able to learn in general education environment, and received good grades; parents enrolled student in residential facility because of her "risky" and "defiant" behaviors at home, including "sneaking out" of the house at night); *Linda E. v. Bristol Warren Regional School Dist.*, 55 IDELR 218 (D.R.I. 2010) (student with increasingly disturbing behavior at home and in school that impacted performance; "while the record reflects that there are particular difficulties in the relationship and interaction S.E. had with her mother, S.E.'s difficulties and troubling conduct were not limited to the home setting.").

School. In addition, Petitioner chose not to present the application materials he submitted to which might have contained relevant contemporaneous information concerning the subjective reasons for the parental placement (*see Forest Grove School Dist. v. T.A.*, 638 F.3d 1234 (9th Cir. 2011)).

By the time the IEP team met in January 2011 to review the Student's progress, however, it appears that everyone – including DCPS and the rest of the IEP team – agreed that Private School could not meet the Student's needs and was no longer an appropriate educational placement for her. *See Findings*, ¶¶ 15-16. At this time, it was incumbent on DCPS to take steps to place the Student in an appropriate alternative special education school or program in a reasonably timely manner, or to bear the costs of the continuing parental placement. At the conclusion of the 01/10/2011 meeting, the IEP team “recommended a *more restrictive environment* than [Private] School,” and DCPS stated that it would “refer to the LRE Team to determine if a more restrictive environment is needed for [Student].” *P-20*, p. 5 (emphasis added). The meeting notes then indicate that the DCPS Progress Monitor would “be in touch with [Petitioner] about the LRE process.” *Id.* Yet the evidence shows that the Progress Monitor waited six weeks before mailing out a letter of invitation for another IEP team meeting to discuss the Student's educational needs and the request for a more restrictive environment. *See P-21* (02/22/2010 letter); *Findings*, ¶ 17. Although a 01/12/2011 email from states that she had “referred the request for a more restrictive environment to the LRE review team (*P-19*), DCPS presented no evidence concerning any steps taken to advance this process between the January 10 and March 7, 2011 IEP meetings; and the testimony it did present suggested that the LRE team may not even have been deployed in this case. *See Villaneuva Test.* (cross examination).⁸

When another IEP team meeting was finally convened on March 7, DCPS developed a revised IEP and identified several alternative private day schools for possible referrals. While this process was moving forward, the uncontroverted evidence shows that DCPS and the IEP team had agreed by this time that (a) DCPS' only previous placement (Private School) could not

⁸ DCPS presented only two witnesses and neither of whom had any first-hand knowledge of the Student or involvement in the Student's IEP process during this time period. Their testimony is not entitled to substantial weight, as their expertise has not been brought to bear in assessing the individual needs of the Student. *Cf. McKenzie v. Smith*, 771 F.2d 1527, n. 17.

meet the Student's needs, and (b) Residential Program A was providing educational benefit to the Student. The LRE justification statement of the 03/07/2011 IEP makes this quite clear: "Student has been receiving education benefit from being parentally placed out of General Ed and *the team agreed to continue in parentally placed setting and review at the end of the school year.*" DCPS-8, p. DCPS-000090. This decision was consistent with the only evaluations and recommendations then before the team. Cf. *District of Columbia v. Bryant-James*, 675 F. Supp. 2d 115, 120-21 (D.D.C. 2009) (cited in *Parent's Closing Argument*).

The evidence shows that following that meeting, Petitioner consented to the referrals, and DCPS and Petitioner began to explore these possible placement options (at least until the departure of _____ in late March). In the interim, the Student remained in the parental placement, presumably pursuant to the IEP team's decision. See *Findings*, ¶¶ 18-21. While DCPS appears to argue that it never agreed to continue the Student in the parentally placed setting, the documentary evidence is to the contrary. Moreover, DCPS never issued any Prior Written Notice proposing any other placement and/or location of services during the remainder of the 2010-11 school year. In so doing, DCPS failed to act in a reasonably timely manner under the circumstances.

Accordingly, for the reasons discussed above, the Hearing Officer concludes that Petitioner has met his burden of proving by a preponderance of the evidence that DCPS failed to make FAPE available to the Student within a reasonable period of time after the January 10, 2011 IEP team meeting.

Whether the Parental Private Placements Were Proper Under the Act

In this case, the Hearing Officer concludes that the unilateral private placements at Residential Program A and Residential Program B were proper, as the Student has received educational benefit from these programs. The testimony showed that the Student made significant progress in the various academic, counseling, and mentoring programs provided there, including in an evidence-based therapeutic program called Dialectical Behavioral Therapy or "DBT". The Student's emotional functioning improved substantially, which was also important to improving her academic performance. Moreover, the learning specialist testified that she worked with the Student for two hours per day in specialized instruction, and she also worked with other teachers to modify their instruction as part of a full day of academics. See

Testimony of Learning Specialist, Social Worker #2, Educational Consultant, and Clinical Psychologist; P-11; P-13; P-14; P-26.

Because the Hearing Officer did not find that DCPS failed to make FAPE available to the Student prior to (or during) her enrollment in the _____ the Hearing Officer need not make a finding on the second prong of the *Carter/Burlington* test with respect to _____

Assuming *arguendo* that DCPS had failed to make FAPE available in a timely manner prior to (or during) her enrollment at _____ the Hearing Officer would conclude that this placement likely was *not* “proper under the Act” because there is no evidence that the program provided any special education services the Student needed. *See, e.g., Berger v. Medina School Dist.*, 348 F.3d 513 (6th Cir. 2003); *Indianapolis Public Schools v. M.B.*, 111 LRP 6150 (S.D. Ind. Jan. 25, 2011). The evidence indicates that _____ is not a residential educational program designed to provide specialized instruction and related services to children with disabilities, 34 C.F.R. 300.104, but rather is a unique form of clinically-designed therapy for struggling adolescents and their families with a fairly minimal academic component.

Analysis of Appropriate and Reasonable Level of Reimbursement

The remaining question is “the appropriate and reasonable level of reimbursement that should be required” based on all relevant factors and equitable considerations. *Carter*, 510 U.S. at 16. As the Supreme Court made clear in *Forest Grove*: “When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.” 129 S. Ct. 2484 (2009), slip op. at 16-17. The statute also requires that courts and hearing officers consider the overall reasonableness of the actions taken by the parents. *See* 34 C.F.R. §300.148 (d) (3).

Considering all relevant factors based on the record in this case – including the apparent reasons for the private school enrollments, the degree of notice provided by the parent, DCPS’ opportunities to evaluate the Student’s needs, and other equitable considerations and conduct of the parties – the Hearing Officer concludes that ***partial reimbursement*** should be granted as set forth herein. Specifically, DCPS shall reimburse Petitioner for all invoiced and paid ***tuition and***

*related services*⁹ of both Residential Program A and Residential Program B *from March 7, 2011 to August 25, 2011* (approximately 5 ½ months). DCPS shall not be required to reimburse Petitioner for the costs of the Wilderness Therapy Program or of Residential Program A prior to March 7, 2011. Nor shall Petitioner be entitled to reimbursement for any travel and other miscellaneous expenses beyond tuition and related services. The reasons for this decision include the following:

(1) Petitioner unilaterally placed the Student at each of the programs without notifying DCPS or including DCPS in the placement decisions. The lack of notice may have impeded DCPS' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student. DCPS was unable to review the pertinent facts and consider the appropriateness of any changes to the Student's educational program in a timely fashion. In addition, Petitioner does not appear to have made any specific request for DCPS to place or fund the Student in the parentally chosen programs until early March 2011. *Cf.* 34 C.F.R. 300.148(d).

(2) From the evidence available to the Hearing Officer,¹⁰ the circumstances prompting Petitioner to remove the Student from Private School in October 2010 appear to have related primarily to the Student's risky and unsafe behaviors at home and in the community, rather than at school. The Private School educators generally did not observe these behaviors in school, and the behaviors do not appear to have negatively impacted the Student's academic performance at the time. The facts thus would not appear to have supported a residential educational placement for the Student at that time.¹¹

⁹ "Related services" include, among others, counseling, psychological services, and speech-language pathology services, "as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34. *See A.G. v. District of Columbia*, 57 IDELR 9 (D.D.C. July 1, 2011).

¹⁰ Again, the Hearing Officer notes that Petitioner did not testify concerning his reasons for removing the Student from Private School as of October 2010, and also did not seek to introduce any application materials. Such testimony and evidence would have been helpful to understanding the circumstances of the removal, as well as assessing the overall reasonableness of Petitioner's actions. Hearsay testimony of the Educational Advocate regarding what Petitioner may have told him at the time and/or learned later had much less probative value and was given correspondingly less weight.

¹¹ Petitioner curiously argues that "this is not a 'residential' case," that "the Hearing Officer need not ascertain whether [Student] 'needed' a residential program," and that "the proper analysis is to apply the reimbursement test." *Parent's Closing Memorandum*, p. 7. But as *Forest Grove* makes clear, these are not different tests. Whether a parental placement in either a wilderness therapy program or a private therapeutic boarding school is needed to address a student's academic/educational needs is quite relevant to the parent's entitlement to reimbursement. *See* 638 F.3d 1234 (9th Cir. 2011).

(3) During the December 2010-March 2011 time period, DCPS was attempting to obtain and review further information concerning the Student's current educational needs and the appropriateness of the residential programs in which she was placed. DCPS' first opportunity to review an extensive psychological report dated 12/10/2010 came at IEP meetings in January. DCPS requested additional information concerning Residential Program A, and it then pursued the LRE review process and began to explore other proposed day school placements along with Petitioner.

(4) During this same general timeframe, the Student was largely refusing to attend academic classes at Residential Program A. *See Testimony of Social Worker #2 and Learning Specialist.* As a result, she failed to receive any academic credits during the first quarter of 2011 and failed to avail herself of educational benefits during this portion of the parental placement.¹² Even assuming that DCPS should have acted more quickly in deciding that the Student required a new placement, equitable considerations would not support reimbursement for this program as an educational placement prior to the March 7, 2011 IEP.

(5) While Petitioner may not have aggressively pursued the private day school options identified by DCPS beginning March 2011, there is no evidence that Petitioner failed to cooperate in good faith with the IEP process as directed by DCPS. It was DCPS' responsibility to move forward with the placement and funding of the Student in an appropriate non-public special education school or program. *See D.C. Code § 38-2561.03(a); 20 U.S.C. § 1412(a)(5); DCMR 5-E3013.*

(6) Even had DCPS done so, a move to one of the proposed alternative private day school placements likely would have been unnecessarily disruptive during the last few months of the school year, especially given the therapeutic progress then being made by the Student. It likely is for that reason that the IEP team agreed on 03/07/2011 to continue the Student in her parentally placed setting and "review at the end of the school year." *DCPS-8, p. DCPS-000090.*

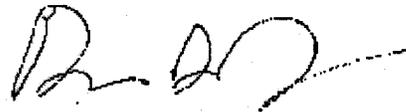
¹² The Learning Specialist testified that the Student missed classes "very often," if not "daily," during the 1st quarter of the year (through March 2011). She was "school refusing" and refused to go to any classes for about a month. *Learning Spec. Test.* (cross examination). Overall, the Learning Specialist estimated that the Student missed about 75-80% of the 1st quarter academic instruction. *Id. See also Educ. Consult. Test.* (cross examination).

VI. ORDER

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

1. Within 30 days of DCPS' receipt of necessary and appropriate documentation from Petitioner, DCPS shall reimburse Petitioner for all costs of tuition and related services for the Student at Residential Program A and Residential Program B¹³ for the period from **March 7, 2011 through August 25, 2011**, that have been invoiced and paid by Petitioner.
2. All other requests for relief contained in Petitioner's Due Process Complaint filed May 25, 2011, are hereby **DENIED**.
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: September 1, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

¹³ Residential Programs A and B are identified in the Appendix to this HOD.