

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

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STUDENT,<sup>1</sup> )  
By and through PARENTS, )  
 )  
 *Petitioners,* )  
v. )  
 )  
DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS, )  
 )  
 *Respondent.* )

Case No.

Bruce Ryan, Hearing Officer

Issued: November 14, 2010

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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND AND RECORD**

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.*, and its implementing regulations, against Respondent District of Columbia Public School ("DCPS").

The case concerns an     year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student has a primary disability of Other Health Impairment ("OHI"), due to his diagnosed Attention Deficit Hyperactivity Disorder ("ADHD"), and a full-time individualized education program ("IEP"). The Student currently attends a non-public, special education day school located in the District of Columbia ("Private School A") that services disabled students up to age 12. Petitioner has requested a change of placement to a different non-public, special education day school located in suburban Maryland serving disabled students through the 12<sup>th</sup> Grade ("Private School B"). DCPS proposes to place the Student at a DCPS public school offering full-time special education ("Public School").

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

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STUDENT HEARING OFFICE

Petitioner's Complaint was filed September 17, 2010. It alleges that DCPS has denied the Student a free appropriate public education ("FAPE") by (a) failing to provide an appropriate placement for the 2009-10 and 2010-11 School Years; and (b) failing to comprehensively re-evaluate the Student as conditions warranted during the 2009-10 School Year. As relief, Petitioner seeks placement and funding of the Student at Private School B for the 2010-11 SY, along with compensatory education to address deficits allegedly suffered due to DCPS' denial of FAPE during the 2009-10 SY. *P-1*.

DCPS filed its Response on or about September 30, 2010, asserting that the Student has not been denied a FAPE and that Petitioner's requests for relief are unwarranted. DCPS asserts that, following the filing of the Complaint, it convened an MDT/IEP team placement meeting on September 23, 2010, and issued a Prior to Action Notice on September 30, 2010, proposing a change in placement to Public School. DCPS asserts that Public School offers a full-time therapeutic environment that can provide educational benefit and can implement the Student's full-time IEP. *DCPS-1*.

A resolution meeting was held on September 30, 2010, which was not successful, and the 30-day resolution period ended without resolution. *P-2; DCPS-12*. A Prehearing Conference ("PHC") was then held on October 15, 2010, at which the parties discussed and clarified the issues and requested relief. *See DCPS-2* (Prehearing Order, issued Oct. 19, 2010), ¶ 5.

Disclosures were filed by both parties as agreed on October 21, 2010, and the Due Process Hearing was held on October 26 and 27, 2010. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

**Petitioner Exhibits: P-1 through P-29.**

**DCPS Exhibits: DCPS-1 through DCPS-14.**

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

**Petitioner's Witnesses:** (1) Petitioner (Foster Father); (2) Pre-Adoptive Father; (3) David Missar, Ph.D. (Evaluating Expert); (4) Social Worker; (5) IEP Coordinator, Private School A; and (6) Education Program Coordinator, Private School B.

**DCPS' Witnesses:** (1) IEP Coordinator, Private School A; and (2) Principal, Public School.

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*.

## II. 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:

- (1) **Failure to Provide Appropriate Placement** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement for the 2009-10 and 2010-11 School Years?
- (2) **Triennial Re-evaluation** — Did DCPS deny the Student a FAPE by failing to comprehensively re-evaluate the Student as conditions warranted, pursuant to 34 C.F.R. 300.303?

As relief for the alleged denials of FAPE, as noted above, Petitioner seeks (a) placement and funding of the Student at Private School B for the 2010-11 School Year; and (b) compensatory education to address deficits allegedly suffered due to DCPS' denial of FAPE for the 2009-10 School Year.

## III. FINDINGS OF FACT

1. The Student is an -year old child who resides with Petitioner in the District of Columbia. He has been determined to be eligible for special education and related services as a child with a primary disability of Other Health Impairment ("OHI") under the IDEA. *See P-1; P-11-6; P-16-2; DCPS-3; Petitioner's Testimony.*
2. Through the 2007-08 School Year, the Student attended a DCPS elementary school, where he received full-time special education and related services pursuant to an IEP. *See P-15.*
3. While attending the DCPS elementary school in April 2008, the Student was admitted to the Children's National Medical Center ("CNMC") "after he ran out of the school building and stood in ongoing traffic." *DCPS-8*, p.1. "He was evaluated for 21 days and upon discharge was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Disruptive Behavior Disorder Not Otherwise Specified (NOS), Post-traumatic Stress Disorder (PTSD) by history,

and Adjustment Disorder with mixed disturbance of emotion and conduct.” *Id.* He was also prescribed medication. *Id.*<sup>2</sup>

4. In August 2008, DCPS agreed to place and fund the Student at Private School A for the 2008-09 School Year, with transportation and related services specified in his IEP. *P-4-p.2.* Private School A is a non-public, full-time, special education day school located in the District of Columbia. *See P-1; Private School A Testimony.*
5. The Student enrolled at and attended Private School A the past two School Years (2008-09 and 2009-10). He continues to attend Private School A this School Year (2010-11), where he is currently in the     grade. *See P-1; Private School A Testimony; Petitioner’s Testimony.*
6. The Student currently has an IEP dated November 13, 2009, which provides for 26.5 hours per week of specialized instruction and 60 minutes per week of behavioral support services (counseling) in a setting Outside General Education. *P-16-p.23; DCPS-3 (IEP p. 6).* The IEP provides, *inter alia*, that the Student “lacks focus, attention and impulse control for a sustained period of time,” that he “needs a small classroom setting with minimal distractions,” and that he “needs extended concentration when learning new [math] skills.” *P-16-pp. 3-6.* In addition, the FBA conducted at that time notes that the Student’s “disruptive and at times unsafe behavior has increased this school year,” that his “activity level is hyperactive, restless, generally off-task, [and] highly distractible,” and that his behavior is worse when he perceives there is less structure or less control of his environment. *P-16-pp. 19-22.*
7. During the 2009-10 SY, the Student experienced behavior problems in and out of school. These included incidents in which he ran off the school bus between December 2009 and February 2010, and an incident in which the bus driver and aide were hit with a broom. *See P-5; P-6; P-13; Petitioner Testimony.* The Student has also been removed from the classroom due to his behavior problems on numerous occasions. *Id.*
8. In March 2010, the Chief Social Worker at Private School A found that the Student’s “[t]roubles with impulse control, involuntary movements ..., aggressive acting out and

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<sup>2</sup> *See also P-11-6 (10/15/2009 D.C. Dept. of Mental Health evaluation) (Student “meets diagnostic criteria for Attention Deficit Hyperactivity Disorder (ADHD), in that he has a long history of having trouble sitting still, getting bored easily, having difficulty concentrating, and managing his impulses.”).*

oppositonality continue to interrupt his educational and social emotional progress in the program.” *P-19-1* (March 2010 Therapy Progress Report). At this time, the Student was again hospitalized for psychiatric therapy at CNMC “due to suicidal and homicidal ideation, as well as destruction of property.” *P-13-2*. He was discharged from CNMC in early April, *P-12*, and reportedly continues to take medication prescribed from his hospitalization. *P-13*.

9. Following the Student’s return to Private School A in April 2010, his behavior continued to deteriorate and interfere with his educational and social/emotional progress. The Student demonstrated an inability to manage his behavior in the classroom, and he was repeatedly removed to a “spare room area” of the school, often for extended periods in which he was not able to access his specialized instruction. He was also subjected to therapeutic holds in attempts to manage the behavior. *See Petitioner’s Testimony; Private School Testimony; P-21* (June 2010 Therapy Progress Report, noting that since the March report, “there have been multiple holds and several bus reports reflecting [Student’s] problematic, and at times unsafe, behavior”); *P-22* (Reports of Therapeutic Holds, April-May 2010).
10. In June 2010, the Chief Social Worker again found that the Student “is a needy youngster who continues to require a great deal of social emotional support to better manage impulses and interactions with others.” *DCPS-6*. She further noted that “[t]he diagnostic evaluations requested from previous semesters including a neurological exam, psychological, and MRI have not yet been made available for the treatment team to review.” *Id.*
11. Despite the Student’s psychiatric re-hospitalization and deteriorating behavior that was impeding his learning, DCPS did not conduct any additional evaluations during the 2009-10 SY. DCPS also did not convene any meeting of the Student’s MDT/IEP Team to review the Student’s needs and progress or the continued appropriateness of his placement at Private School A.
12. On or about August 23, 2010, following inquiry by Petitioner’s attorney, DCPS authorized Petitioner to obtain an independent comprehensive psychological evaluation of the Student. *See P-6-2*.
13. On August 24, 2010, Petitioner wrote to DCPS acknowledging receipt of the IEE authorization and stating that it would be scheduling the comprehensive psychological as soon as possible. At the same time, Petitioner formally requested a change of educational

placement for the Student to Private School B, another non-public, full-time special education day school located in suburban Maryland. *P-6-2*.

14. On September 2, 2010, the Student was evaluated by David Missar, Ph.D., a licensed clinical psychologist. Dr. Missar conducted a comprehensive psychological evaluation of the Student, which included a clinical interview and behavioral observations, updated cognitive testing, updated academic achievement testing, and personality tests. Dr. Missar completed a report that is dated September 2, 2010. *P-13-1; Missar Testimony*. However, a copy of the report was not provided to DCPS until October 19, 2010, when Petitioner's attorney said she received it "in its final form." *P-27-1; see also DCPS-14*.
15. Dr. Missar's evaluation report concludes that "[t]he most significant diagnostic impression remains [Student's] ADHD" and that it is "also quite likely that a great deal of his conduct problems and opposition and defiance stem from, or are exacerbated by, his ADHD." *P-13-p. 10*. It also found that the Student was mildly depressed and has a learning disability in math that requires academic attention. *Id.* Academically, the report found that the Student's September 2010 achievement scores were very consistent with (and in some cases even a bit lower than) his 2008 scores – "suggesting that he has made minimal, if any, academic progress over the past two years." *P-13-6; see P-29 (comparison chart); Missar Testimony*. The report recommends that the Student "continue in a therapeutic school placement, with a small classroom setting, a small student-teacher ratio, and more individualized attention due to his ADHD and emotional disabilities." *P-13-p. 11*.
16. Dr. Missar presented extensive, highly credible, expert testimony at hearing to support his evaluation report and recommendations. Dr. Missar has been a licensed psychologist in private practice in D.C. for the past 17 years. ADHD has been one of his focus/specialty areas, including research and implications for educational programming. Over the years, he has treated or examined thousands of students with ADHD and attended hundreds of IEP meetings for such students. He has also testified in a number of previous due process hearings. *See Missar Testimony; P-24 (resume)*.
17. Among other things, Dr. Missar testified that the Student has severe problems with attention and distractibility that limit his learning in the classroom "quite a bit"; that his poor impulse control further compromises his ability to pay attention and focus; that most of his academic

scores (and especially math, which is below his cognitive potential) are lowered due to the attention issues; that removal from instruction for misbehavior adversely affects the Student by only reinforcing his lack of learning and problems with learning tantamount to “learned helplessness”; that a school environment in which students are allowed to run the hallways would be a “nightmare” for an impulsive and unfocused child such as the Student; and that a clinical re-evaluation of the Student should have been conducted to assess his needs coming out of the CNMC hospitalization in April 2010. *Missar Testimony*.

18. DCPS did not present any psychological or other expert testimony to rebut Dr. Missar’s testimony and report. The only additional witness presented by DCPS was the Public School Principal, who has never met or observed the Student.
19. On September 9, 2010, the 2010-11 SY began at Private School A, and the Student resumed his attendance there. That same date, Petitioner’s attorney wrote DCPS to follow up regarding scheduling an MDT/IEP team meeting to discuss Petitioner’s request for a placement transfer for the Student to Private school B. *P-8-1*. At this point, Petitioner appears not to have mentioned Dr. Missar’s 09/02/2010 evaluation or offered to supply a copy of any written results at this time. *Id.*
20. On September 23, 2010, subsequent to the filing of the complaint in this case, a meeting of the Student’s MDT/IEP team was held to discuss the parent’s concern with his current placement at Private School A. The meeting was attended by Petitioner, Petitioner’s attorney, DCPS’ Compliance Case Manager and Progress Monitor, the Private School SEC and Special Education Teacher, and two social workers. *DCPS-9*. The team discussed, *inter alia*, DCPS’ one observation of the Student and concerns regarding Private School A’s ability to address the Student’s behavioral needs. *Id.* The parent felt that the Student’s IEP goals were not being met and that the school program was “just not a good match” for him. *DCPS-11, p. 2*. The DCPS Progress Monitor then identified Public School as a possible placement for the Student. *DCPS-9*. Some concerns were expressed as to its ability to implement the IEP and provide therapeutic services, and further discussion regarding placement was deferred to the resolution session meeting. *Id.*; *see also DCPS-10; DCPS-11*.
21. On September 30, 2010, a resolution session meeting was held, at which the Public School’s Principal described the program being proposed for the Student. *DCPS-12*. The Principal

answered questions from Petitioner and described, *inter alia*, various instructional approaches as well as the Alternative Behavior Center (“ABC room”), which the school uses to de-escalate severe behavioral situations and is staffed by a behavior specialist. *Id.*

22. Following the meeting on September 30, 2010, DCPS issued a Prior to Action Notice proposing a change in placement from Private School A to Public School. *DCPS-13*. The Notice explained that DCPS had convened a resolution meeting that day to resolve the complaint alleging Private School A was not an appropriate placement/location of services and stated that Public School could implement the IEP. *Id.*
23. The evidence shows that, at least by April 2010, the Student’s placement in the Private School A program was not reasonably calculated to meet the Student’s unique special education needs and was not providing him with meaningful educational benefit.
24. The evidence shows that, as of September 2010, DCPS did not offer any educational placement reasonably calculated to meet the Student’s unique special education needs and provide him with meaningful educational benefit. The evidence indicates that the Public School program, as presently structured, is not reasonably tailored to meet the Student’s specific behavior and social/emotional needs that result from his disabilities – in particular, his chronic ADHD symptoms that adversely affect his educational performance. Public School also does not appear capable of implementing the IEP requirements for a setting with minimal distractions (*see P-16-3, P-16-4, P-16-26*).<sup>3</sup>
25. The evidence shows that Private School B can offer an appropriate special education program that is reasonably calculated to meet the Student’s unique needs and provide him with meaningful educational benefit. The Student would become the 9<sup>th</sup> student in a middle school class comprised mainly of graders, with a teacher and assistant. He would also benefit from a positive behavior reinforcement and prevention program, separate “Wilson

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<sup>3</sup> While DCPS’ witness claimed that behavior management problems experienced at the Public School during the 2009-10 SY (*see, e.g. P-28*) are being corrected with the assistance of mainly new staff, Petitioner presented other testimony that such problems are continuing. The Student’s Pre-Adoptive Father, who is employed by a firm providing dedicated aides and other paraprofessionals to DCPS schools (including Public School), testified that he has visited the school many times both last school year and this 2010-11 School Year, including as recently as 2-3 weeks before the hearing. He testified that he personally witnessed students running through the hallways, using profanity to staff, and fighting. *See Pre-Adoptive Father’s Testimony*. For his part, the Public School Principal appeared to concede a “lack of immediate discipline” as a characteristic of the school’s program, reflecting a desire not to “escalate situations” with an “active population of kids.” *Public School Principal Testimony*.

reading” classes, academic remediation in smaller groups, and additional pull-out math resources. Any removal from instruction would be for very limited periods of time (e.g., 6-10 minutes) in support areas staffed by behavior managers, the school would be able to provide a setting with minimal distractions, and the school would employ proven strategies to address the Student’s attention problems. *See Private School B Testimony.*

#### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

##### **A. Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as failures to implement an IEP. 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 prevail. *See* DCMR 5-E3030.3. The normal standard is preponderance of the evidence. *See, e.g., NG. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

##### **B. Issues/Alleged Denials of FAPE**

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met his burden of proof, in part, on Issue 1 (Inappropriate Placement) and has met his burden of proof on Issue 2 (Re-evaluation). Thus, the Hearing Officer concludes that Petitioner has prevailed in whole or in part on both issues. Appropriate relief is discussed in Part C.

##### **1. Inappropriate Placement**

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) (emphasis added); 34 C.F.R. § 300.17; DCMR 5-E3001.1. “If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an ‘appropriate’ public school program available, *i.e.*, one ‘reasonably calculated to enable the child to receive educational benefits,’ the District need not consider private placement, even though a private school might be *more* appropriate or better able to serve the child.” *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (emphasis in original). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005) (affirming “placement based on *match between a student’s needs and the services offered at a particular school*”) (emphasis added); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988) (quoting *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 207 (1982)); D.C. Code 38-2561.02 (“DCPS shall place a student with a disability in *an appropriate special education school or program* in accordance with this chapter and the IDEA”) (emphasis added).

In this case, the evidence shows that, at least by April 2010, the Student’s placement in the Private School A program was not reasonably calculated to meet the Student’s unique special education needs and was not providing him with meaningful educational benefit. *See Findings*, ¶¶ 9, 20, 23. The evidence also shows that, as of September 2010, DCPS did not offer any educational placement reasonably calculated to meet the Student’s unique special education needs and provide him with meaningful educational benefit. The evidence indicates that the Public School program, as presently structured, is not reasonably tailored to meet the Student’s specific behavior and social/emotional needs that result from his disabilities – in particular, his chronic ADHD symptoms that adversely affect his educational performance and his IEP requirements for a setting with minimal distractions. *See, e.g., Findings*, ¶¶ 15-17, 24; discussion in Part C, *infra*.

For example, there appear to be too many distractions and lack of controls within the Public School program, especially for a child with the Student’s attention and impulse control problems and his tendency to be influenced by, and feed off, other students’ misbehaviors. *See Testimony of Dr. Missar, Pre-Adoptive Father, Social Worker, and Public School Principal; P-5; P-13*. DCPS’ witness (Public School Principal) did not adequately explain how the school program would be structured to address the Student’s severe ADHD/attention issues in that setting. The Public School program also would allow removal of the Student from the classroom for up to half a day, a practice which has not proven successful for him and is likely only

exacerbating his learning difficulties. *Id.* Moreover, to the extent Public School is in the process of “restructuring” itself – with over 75% new staff this school year (some of whom have no prior teaching experience and have not been fully trained) and new instructional programs still being developed and rolled out as of the date of hearing, all as a result of the principal’s own unfavorable evaluations last SY (*Public School Principal Testimony*) – the effects of such restructuring are as yet unproven. *Cf. N.S. v. District of Columbia*, 110 LRP 26678 (D.D.C. May 4, 2010), slip op. at 12 (parents ‘cannot be penalized for refusing to rely on a hope that appropriate services would be provided after an initial test period”).

Accordingly, the Hearing Officer concludes that Petitioner met his burden of proof on Issue 1 to the extent DCPS has been shown to have denied the Student a FAPE by failing to provide an appropriate educational placement for the Student for the period from at least April 2010 to the present.

## **2. Triennial Re-evaluation**

The IDEA provides that DCPS “must ensure that a reevaluation of each child with a disability is conducted ... if [DCPS] determines that the educational or related services needs ... of the child warrant a reevaluation” or the child’s parent or teacher requests it. 34 C.F.R. §300.303 (a). Such a reevaluation “may occur” not more than once a year and “must occur” at least once every three years, unless the parent and DCPS agree otherwise. *Id.* §300.303 (b)(2). *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

Petitioner claims that DCPS denied the Student a FAPE by failing to comprehensively re-evaluate the Student as conditions warranted during the 2009-10 School Year, particularly upon his discharge from psychiatric hospitalization and return to school in April 2010. DCPS asserts that “the student has current evaluations,” including a psychological assessment dated 01/21/2009 and an FBA dated 11/13/2009. *DCPS-1*, p. 1. The Hearing Officer concludes that

Petitioner prevails on this issue. Even without a parental request for re-evaluations, DCPS should have recognized that the Student's changed circumstances and needs warranted at least an updated comprehensive psychological evaluation (of the type later conducted by Dr. Missar) as of April 2010. DCPS could not reasonably continue to rely on a 2 ½ page January 2009 psychological assessment that, by its own terms, was limited to a "brief cognitive measure" (*i.e.*, the Wechsler Abbreviated Scales of Intelligence or WASI) designed only to evaluate his then current functioning. *DCPS-8*.

Accordingly, the Hearing Officer concludes that DCPS failed comprehensively to re-evaluate the Student for approximately a four-month period between April and August 2010, when it finally authorized Petitioner to obtain his own independent evaluation. DCPS' failure to do so violated IDEA and its implementing regulations cited above, and it also constitutes a denial of FAPE to the Student during this period. *See, e.g., Harris v. DC, supra*, 561 F. Supp. 2d at 68-69 (failure to act on request for independent evaluation is not a "mere procedural inadequacy"; "such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA"). Alternatively, the Hearing Officer concludes on the basis of the record evidence presented by Petitioner that this procedural violation has (i) impeded the Student'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, and/or (iii) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a); *see Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006).

### **C. Appropriate Relief**

Having found a denial of FAPE, the IDEA authorizes the Hearing Officer to fashion "appropriate" 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). "Appropriate" equitable relief may include a "prospective injunction ... placing the child in a private school," *School Comm. of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359, 369-70 (1985), which remedy "must be tailored to meet the child's specific needs" through a fact-intensive inquiry. *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005). For the reasons discussed below, the Hearing Officer will exercise his discretion to order appropriate

equitable relief, based on the denials of FAPE found herein and the specific factual record developed at hearing. The relief is set forth in the accompanying Order.

The Hearing Officer notes that the present posture of this case is somewhat problematic. On the one hand, Petitioner complains that DCPS failed to re-evaluate the Student during the 2009-10 SY and then failed timely to investigate and authorize another placement for the 2010-11 SY until after he filed his complaint in mid-September, leaving Petitioner to search for a suitable private placement. On the other hand, once DCPS authorized an IEE in August 2010, Petitioner then obtained an independent psychological evaluation of the Student by the beginning of September but never informed DCPS of the results until October 19, shortly before the disclosure date for this hearing. This unfairly preempted the normal MDT/IEP process and deprived DCPS of the ability to consider such results in connection with decisions made with respect to the provision of FAPE to the Student at the September 23 and 30 meetings, as required by the IDEA, *see* 34 C.F.R. 300.502(c)(1).<sup>4</sup> The law contemplates that evaluation results be considered in developing a child's IEP and that placement, in turn, be based on the IEP. *E.g.*, 34 C.F.R. 300.116(b)(2), 300.324(a)(1)(iii). In that manner, appropriate review of the specific needs of the Student is to drive decisions on placement, rather than procedural gamesmanship.<sup>5</sup>

On balance, the Hearing Officer concludes that placement at Private School B on an *interim basis* only – at least until DCPS can complete its normal review process – would constitute appropriate equitable relief under the circumstances. Accordingly, this is intended as a temporary placement pending completion of the MDT/IEP process outlined in the Order below. *See, e.g., Verhoeven v. Brunswick Sch. Comm.*, 207 F. 3d 1 (1<sup>st</sup> Cir. 1999); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); *Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006).

As noted above, it is largely undisputed that the current placement at Private School A is not appropriate for the Student. Nor does the Hearing Officer believe that an interim placement

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<sup>4</sup> The record suggests that Petitioner may have incorrectly believed the Student could merely obtain a “transfer of his private placement, granted under the settlement agreement dated August 5, 2008,” *P-6-1*, rather than follow the normal MDT/IEP placement review process.

<sup>5</sup> *See, e.g., Kitchelt v. Weast*, 42 IDELR 58, n. 1 (D. Md. 2004) (fact that parents may believe from beginning that public school system cannot provide a FAPE does not disqualify reimbursement, “so long as they continue in good faith (e.g., no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system....[T]he key consideration is that the parents pursue in good faith the development of the IEP and the possibility of public school placement.”).

at Public School would be appropriate because the present record reveals significant concerns as to whether it can meet all the special education needs of the Student, especially those relating to his ADHD symptoms and behaviors. As Dr. Missar testified, all full-time special education settings are not the same. While both Public School and Private School B can provide roughly equivalent class sizes of students with similar disability profiles and student/teacher ratios, the uncontroverted evidence shows that the latter tolerates (and may even encourage to some degree) a more chaotic environment that in this case likely would be detrimental to the Student's educational needs. *See, e.g., Testimony of Public School Principal, Pre-adoptive Father, and Dr. Missar.*

In contrast, Private School B generally does not allow students to be out of the classroom, either roaming hallways or even in the supervised behavioral management room for more than a very short period of time. *See Private School B Testimony.* Overall, considering the nature and severity of the student's disability (especially his ADHD symptoms documented by Petitioner's expert), the student's specialized educational needs, and the link between these needs and the services offered by Private School B, the evidence shows that Private School B can provide an appropriate program reasonably "tailored to meet the child's specific needs." *Branham v. District of Columbia, supra*, 427 F.3d at 11-12.

The relative equities in this case based on the parties' respective conduct, however, suggest that DCPS should be given a reasonable opportunity to convene a team meeting to review and consider all updated information, in order to assess how it may impact the structuring of the Student's program before any judgments are made on a more permanent prospective placement. This applies in particular to the results of Dr. Missar's comprehensive psychological evaluation, which DCPS funded in late August but has not previously been shared with the MDT/IEP Team. *Cf. Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (relevant factors that courts and hearing officers are directed to consider in private placement reimbursement cases include adequacy of notice provided by parents as well as school district's opportunities for evaluating the child); *Branham v. District of Columbia, supra*, 427 F.3d at 12 ("Because placement decisions implicate equitable considerations, moreover, courts [and hearing officers] may also consider the parties' conduct").

Accordingly, the Order requires that DCPS convene a meeting of the Student's MDT/IEP Team to (a) review the updated evaluations and the Student's progress to date, (b) review and

revise the IEP as appropriate to meet the Student's needs,<sup>6</sup> and (c) discuss and determine an appropriate placement within 30 calendar days of the Student's interim placement at Private School B. Such meeting should be combined with an annual review under 34 C.F.R. 300.324(b), which the record indicates was due November 13, 2010, and completion of any further re-evaluation deemed appropriate. The Team should then consider the appropriateness of Private School B's program going forward, as well as any DCPS public placement options, based on the updated information.<sup>7</sup>

Finally, with respect to compensatory education, the Hearing Officer concludes that Petitioner has failed to meet his burden under *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Petitioner has generally demonstrated harm from DCPS' failure to re-evaluate the Student and provide an appropriate placement since approximately April 2010, and has suggested that some math tutoring and remedial reading would be helpful to the Student. *See, e.g., Missar Testimony*. However, Petitioner has not shown that compensatory education of any specific types and amounts are "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d at 524; *see also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'"). Thus, Petitioner has not demonstrated entitlement to any specific award of compensatory education relief.

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<sup>6</sup> Among other things, Dr. Missar testified that the annual IEP goals in math, reading, and the area of social/emotional /behavior should be reviewed and revised as appropriate. *See Missar Testimony; P-16-3 through P-16-6*.

<sup>7</sup> As DCPS correctly argues, should such further review demonstrate that an appropriate special education school or program is available within the D.C. public school system, that option would be given priority under D.C. Code 38-2561.02, even if a private school might be *more* appropriate or better able to serve the Student. *See, e.g., Roark v. District of Columbia*, 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006).

## V. ORDER

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

1. The Student shall be immediately placed at **Private School B**,<sup>8</sup> on an **interim basis**, until such time as any change is effected in the Student's educational placement following completion of the MDT/IEP meeting(s), annual IEP review, and re-evaluation process set forth in this Order. DCPS shall also provide transportation services to Private School B.
2. Within **30 calendar days** of the Student's placement at Private School B, DCPS shall convene a meeting of the Student's MDT/IEP Team, with all necessary members (including Petitioner) participating. The purposes of the meeting shall include: (a) to review all updated evaluations of the Student, including, but not limited to, the Psychological/Psycho-educational Evaluation Report of C. David Missar, Ph.D., dated September 2, 2010; (b) to review and revise, as appropriate, the Student's November 13, 2009 IEP, including annual goals and services to be provided; (c) to review the Student's progress at Private School B during the 2010-11 School Year; and (d) to discuss and determine an educational placement appropriate to meet the unique needs of the Student that result from his disability. The discussion of alternative placements may include, but need not be limited to (i) continuation of the interim placement at Private School B and (ii) placement at **Public School**<sup>9</sup> or another DCPS school, for the 2011-12 School Year and/or the remainder of the 2010-11 School Year.
3. DCPS shall consolidate the MDT/IEP Team meeting convened pursuant to Paragraph 2 with an annual IEP review under 34 C.F.R. 300.324(b) and with a reevaluation of the Student under 34 C.F.R. 300.303(a). To the extent the MDT/IEP Team determines that additional evaluations are needed as part of a re-evaluation, a student evaluation plan shall be developed at this meeting, and any such evaluations shall be commenced immediately by DCPS or shall be authorized to be conducted independently by Petitioner. Within **30 calendar days** of receiving the results of any such additional evaluations, DCPS shall convene a further MDT/IEP Team meeting to review such evaluations and complete the re-evaluation process.
4. Within **10 calendar days** of the completion of all MDT/IEP Team meetings and the re-evaluation process specified above, DCPS shall issue any new notice of proposed placement for the Student.
5. Nothing in this Order shall preclude Petitioner from filing a separate due process complaint on any issue arising out of any further action taken by DCPS pursuant

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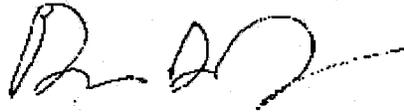
<sup>8</sup> See Appendix.

<sup>9</sup> See Appendix.

to this Order, including but not limited to the evaluation or educational placement of the Student or the content of the Student's IEP going forward.

6. Petitioner's other requests for relief in his Due Process Complaint, including compensatory education, are **DENIED**.
7. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***



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Impartial Hearing Officer

Dated: November 14, 2010

**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).