

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

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

<p>STUDENT¹, By and through PARENTS,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p> <p style="text-align: right;">2011 DEC 30 AM 9:18 OSSE STUDENT HEARING OFFICE</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 USC §§1400 *et seq.*

The Due Process Complaint ("DPC") was filed October 27, 2011, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student's parents, against Respondent, District of Columbia Public Schools ("DCPS").

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

On October 21, 2011, the undersigned was appointed as the Impartial Hearing Officer.

On November 3, 2011, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education ("FAPE").

A Resolution Meeting was held on November 8, 2011 but it failed to resolve the Complaint. The statutory 30-day resolution period ended on November 26, 2011. The 45-day timeline for the Hearing Officer's Determination started to run on November 27, 2011 and will conclude on January 10, 2012.

The undersigned held a Prehearing Conference ("PHC") by telephone on November 17, 2011, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by December 9, 2011 and that the Due Process Hearing ("DPH") would be held on December 16 and 19, 2011.

The undersigned issued a Prehearing Order on November 18, 2011, which, *inter alia*, (a) stated the issues for determination by the undersigned, (b) stated that the parties and their counsel would be held to the matters ordered or otherwise set forth in the Prehearing Order, and (c) advised the parties that if either party believed the undersigned had overlooked or misstated any item, the party must bring the alleged omission or misstatement to the attention of the undersigned by November 23, 2011.

Neither party brought to the attention of the undersigned, by November 23, 2011, or subsequently, any alleged omission or misstatement by the undersigned in the Prehearing Order.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection: Petitioner's Exhibits P-1 through P-26²; Respondent's Exhibits R-1 through R-17, and the Impartial Hearing Officer's Exhibits HO-1 through HO-7.

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

(a) Petitioner's Witnesses: Dr. Laura Solomon, Education Consultant; the Education Coordinator at the Private School; and Parent #1; and

(b) Respondent's Witnesses: The Second Grade Teacher; and Emily Pearson, DCPS ABA Autism Coordinator.

The parties filed written closing arguments.³

II. JURISDICTION

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

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is male, Current Age, and attends Current Grade at the Private School, which is a non-public special education school in Private School City, Maryland,

² P-26 was offered at the DPH. Counsel for Respondent did not object to its admission.

³ As agreed at the DPH, Respondent filed on December 21, 2011 and Petitioner filed on December 26, 2011. Petitioner styled its written closing argument as a Memorandum of Points and Authorities.

as a result of unilateral placement by the Parents. The Student previously attended Former Attending School, a public general education school in the District of Columbia. The Student never attended the Home School. As of the date of the DPH, the Student had not been evaluated by Respondent nor determined by Respondent either to be eligible or ineligible for special education and related services as a child with a disability under the IDEA.

Petitioner claims that Respondent has denied the Student a FAPE by failing properly to respond, prior to October 27, 2011, to the Parents' request for evaluation, and by failing to provide a special education program for him.

Petitioner seeks an order that the Private School is a proper placement for the Student for the 2011-12 school year, and an order reimbursing the Parents for tuition and fees at the Private School for the 2011-12 school year.

Respondent denies any violation of IDEA and asserts that placement at the Private School and/or reimbursement of tuition and fees are not appropriate remedies even if a violation of FAPE is found.

IV. ISSUES

As confirmed at the PHC and in the Prehearing Order issued November 18, 2011, the following issues were presented for determination at the DPH:

- (a) Did Respondent deny the Student a FAPE by failing properly to respond, prior to October 27, 2011, to the Parents' request for evaluation? This issue comprises:
 - (i) whether Respondent met its obligations, including timeliness, with regard to evaluating the Student and
 - (ii) whether Respondent had an obligation, prior to October 27, 2011, to reach a determination as to the Student's eligibility.
- (b) If Respondent should have made an eligibility determination prior to October 27, 2011, and if that determination should have been that the Student was eligible,

did Respondent deny the Student a FAPE by failing to propose an appropriate special education program for him?⁴

(c) If the Student was entitled to, but denied, a FAPE, what is the appropriate remedy?⁵

V. BURDEN OF PROOF

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

⁴ Petitioner had identified as a separate issue whether Respondent denied the Student a FAPE by refusing to process his re-enrollment. In its Response, Respondent had asserted that this was not a proper issue for resolution under IDEA. After discussion at the PHC, the undersigned agreed with Respondent that this was not an issue to be resolved in this proceeding, provided, however, that if the alleged failure to re-enroll had an impact on evaluation or determination of eligibility of the Student, or provision of special education services to the Student, Petitioner could introduce evidence of the alleged failure to re-enroll for that purpose. At the DPH, counsel for Respondent clarified on the record that Respondent does not maintain in this proceeding that the Student had to be enrolled in a DCPS school in order to be evaluated or to have his eligibility determined. Respondent's current position is consistent with *District of Columbia v. West*, 54 IDELR 117 (D.D.C. 2010), quoting *James ex rel. James v. Upper Arlington City School Dist.*, 228 F.3d 764,768 (6th Cir. 2000) ("Under the IDEA, 'the obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment.' ... The District's offer to convene an MDT meeting for A.C. was always predicated upon her re-enrollment, a condition that was not required by the IDEA. As such, A.C. was neither required to re-enroll before requesting an MDT nor required to re-request an MDT after her re-enrollment.").

⁵ Petitioner had characterized the issue as whether the Private School is a proper educational placement for the Student. Respondent had asserted that this was a request for relief rather than an issue to be decided. In the Prehearing Order, the undersigned broadened the issue to "what is the appropriate remedy?" to allow consideration of other remedies in the event the undersigned found a denial of FAPE.

VI. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their first hand knowledge or professional expertise. However, the undersigned disagrees with several conclusions reached by witnesses, specifically:

- (a) Dr. Laura Solomon's conclusion that the Student would obtain no benefit from placement in any program in any of Respondent's schools (Findings of Fact 228 and 229 *infra*);
- (b) the conclusion of the Second Grade Teacher that she taught the Student the same way she taught all of his classmates (Finding of Fact 201 *infra*); and
- (c) the conclusion of Parent #1 that the Student "wasn't getting anything out of" the environment in his second grade class (Finding of Fact 204 *infra*).

VII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male Current Age. P-1-1.⁶
2. The Student resides in the District of Columbia. *Id.*

Chronology

3. The Parents noticed problems with the Student in his preschool years, when he demonstrated inflexibility, problems with other children socially, and problems with anger. Testimony of Parent #1.
4. The Parents met with the Student's preschool and obtained private therapy for the Student with two therapists when he was four years old. *Id.*

⁶ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

5. The Parents were advised to enforce consequences and to utilize chore charts.

Id.

6. Kindergarten at the Former Attending School was the Student's best year; he had a relaxed, laid-back teacher and not a lot of demands. *Id.*

7. However, even in kindergarten, the Student had problems with other children.

Id.

8. First grade at the Former Attending School did not go as well for the Student; he exhibited anxiety, eloped out of the classroom to the bathroom, and had serious problems with handwriting. *Id.*

9. The Parents enrolled the Student in social skills groups, where he obtained perfect scores, but this did not resolve his problems. *Id.*

10. In first grade, the Student would talk to classmates but did not have close friends. *Id.*

11. In first grade, the Student would bang his head on his desk, clench his fists, repeat nonsensical phrases, withdraw and "zone out" due to sensory integration issues.

Id.

12. The Former Attending School did not suggest that the Student should be assessed.⁷

13. On May 19 and 28, 2009, the Student was evaluated by Alison L. Weintraub, Ph.D, of the Wake Kendall Group PLLC, who subsequently issued an evaluation report.

P-2.

⁷ Counsel for the parties confirmed on the record at the DPH that no violation of IDEA's "child find" provisions is at issue in this case. Accordingly, the undersigned has given no weight to page six of Petitioner's written closing argument.

14. On June 26, 2009, the Student was evaluated by Sheri Present, MS, OT/L of Canyon Kids Occupational Therapy Services, who subsequently issued an evaluation report. P-3.

15. From June 21 through July 23, 2010, the Student participated in an occupational therapy program at the Camp focusing on sensory integration and motor coordination. Testimony of Parent #1, P-4.

16. The Student did "pretty well" at the Camp and enjoyed the program. Testimony of Parent #1.

17. On July 23, 2010, the 2010 Camp Co-Coordinator issued an evaluation report. *Id.*

18. During the 2010-11 school year, the Student attended second grade at the Former Attending School. Testimony of Parent #1, Testimony of Second Grade Teacher, R-1, P-7.

19. On January 14 and 20, 2011, the Student was evaluated by Nicole M. Stern, Ph.D. of Educational Assessment Associates, who subsequently issued an evaluation report. P-5.

20. In the spring of 2011, the Student was engaging in more severe head-banging, his anxiety was worse, he was developing tics and rapid eye-blinking, and he was "checking out" more frequently in the classroom. Testimony of Parent #1.

21. In the spring of 2011, the Student would chew on his shirt in class and when he would return home the shirt would be ripped with holes and drenched with saliva.⁸ *Id.*

⁸ As discussed *infra*, the Second Grade Teacher testified that she did not recall holes in the shirts or an entire shirt being drenched. The undersigned does not find these differences in testimony material.

22. On one of the times that Parent #1 observed the Student in his classroom, she saw the Second Grade Teacher reading to the class but the Student was sitting by himself away from the group. *Id.*

23. In February or March, 2011, the Parents asked to meet with the Principal of the Former Attending School, who invited the Special Education Coordinator of the Former Attending School and the Second Grade Teacher to the meeting. *Id.*

24. Parent #1 brought a book on sensory integration disorder to the meeting. *Id.*

25. At the meeting, Parent #1 raised the question whether the Student was depressed, and advised the other attendees that the Parents were obtaining a neuropsychological evaluation. *Id.*

26. On March 15, 2011, the Student was evaluated by Angela M. Bollich, Ph.D. of Children's National Medical Center, Division of Pediatric Neuropsychology, Center for Autism Spectrum Disorders. *Id.*, P-6.

27. During March through June 2011, the Former Attending School sent newsletters to the parents of students at that school notifying and reminding them of the need to re-enroll. R-3.

28. In May, 2011, the Parents received Dr. Bollich's evaluation report, which included a diagnosis of Asperger syndrome. Testimony of Parent #1, P-6.

29. When the Parents received Dr. Bollich's report, Parent #1 began to research programs for children with Asperger syndrome. Testimony of Parent #1.

30. Parent #1 applied for the Student to be admitted at the Private School and another school; the Student was rejected at the other school. *Id.*

31. On June 13, 2011, Petitioner's counsel sent a letter via facsimile and first-class mail to the Principal of the Former Attending School. Testimony of Parent #1, P-8-1, R-5.

32. Petitioner's counsel's June 13, 2011 letter requested an Individualized Education Program ("IEP") meeting, and forwarded a copy of Dr. Bollich's evaluation report. *Id.*

33. On June 21, 2011, the Principal of the Former Attending School emailed Parent #1 inviting the Parents to meet with the Principal and Special Education Coordinator of the Former Attending School. Testimony of Parent #1, R-7.

34. On June 22, 2011, Parent #1 emailed the Principal of the Former Attending School stating that the Parents would like to meet and suggesting meeting the following day. Testimony of Parent #1, R-7.

35. Parent #1's June 22, 2011 email also asked the Principal of the Former Attending School when she would be scheduling the IEP meeting. *Id.*

36. From June 22 through July 29, 2011, the Student participated in another occupational therapy program at the Camp, focusing on sensory integration and motor coordination. Testimony of Parent #1, P-9.

37. On June 23, 2011, Parent #1 met with the Principal of the Former Attending School and the Special Education Coordinator of the Former Attending School to discuss the Student's needs relative to the upcoming school year. P-13-1, R-8.

38. At the June 23, 2011 meeting, Parent #1 brought copies of all of the evaluation reports to date and offered them to the Principal of the Former Attending School. Testimony of Parent #1.

39. At the June 23, 2011 meeting, the Principal of the Former Attending School declined to accept the evaluation reports and told Parent #1 that there was “plenty of time for that” and “that’s down the line” pursuant to Respondent’s procedures. *Id.*

40. At the June 23, 2011 meeting, Respondent’s representatives advised Parent #1 of Respondent’s formal process for determining eligibility for special education services, “a process which includes the collection and review of all existing data and recommendations for additional evaluation needed, if any.” P-13-1.

41. At the June 23, 2011 meeting, the Principal of the Former Attending School advised⁹ Parent #1 of the alternate process of developing a “504 Accommodation Plan.” *Id.*, Testimony of Parent #1.

42. At the June 23, 2011 meeting, Respondent’s representatives asked Parent #1 what her plan was for the Student, specifically, whether she planned to place him in private school. Testimony of Parent #1.

43. On June 24, 2011, Parent #1 emailed the Principal of the Former Attending School confirming the Parents’ decision to request the referral and eligibility determination process. Testimony of Parent #1, P-13-1, R-8.

44. On June 27, 2011, the Special Education Coordinator of the Former Attending School sent a letter to the Parents acknowledging the June 24, 2011 referral to special

⁹ In her testimony, Parent #1 characterized the Principal of the Former Attending School as urging the Parents to pursue a “504 Plan” rather than an IEP. Parent #1 testified that she stated to the Principal that the Parents were interested in an IEP and that Respondent should proceed. Whether Parent #1 was definitive on this point at the June 23, 2011 meeting or not is immaterial because the next day, Parent #1 confirmed the Parents’ decision to proceed with evaluation and eligibility for an IEP.

education, describing the next steps in the process, and enclosing a copy of Respondent's Procedural Safeguards Notice. P-13-1, R-10.

45. On August 1, 2011, the 2011 Camp Coordinator issued an evaluation report. P-9.

46. On August 1 and 2, 2011, the Student was evaluated by Laura Solomon, Ed.D., of Special Education Services, Inc. Testimony of Dr. Solomon, P-10.

47. On August 4, 2011, Parent #1 emailed the Principal of the Former Attending School notifying her that the Student had been accepted at the Private School and that the Parents intended to enroll him there for the fall. Testimony of Parent #1, R-6.

48. Parent #1's August 4, 2011 email also stated that the Parents wanted Respondent to continue with the IEP process and that the Parents would consider "whatever program and placement comes out of that process." *Id.*

49. On August 17, 2011, the Principal of the Former Attending School wrote to Parent #1 thanking Parent #1 for having informed her of the Parents' decision to enroll the Student in the Private School for the 2011-12 academic year. P-11-1, R-9.

50. The August 17, 2011 letter also advised Parent #1 that if Parent #1 wanted to proceed with having Respondent determine eligibility for special education services, Parent #1 would need to enroll the Student as a non-attending student at the Home School, and would need to provide the Home School with copies of evaluations that had been conducted (in addition to the evaluation from Children's National Medical Center, which already had been provided to Respondent).¹⁰ *Id.*

¹⁰ As discussed *supra*, Respondent does not take the position in this proceeding that such enrollment was required.

51. Parents received the August 17, 2011 letter on August 24, 2011. Testimony of Parent #1.

52. The letter of August 17, 2011 was the first communication the Parents had received from Respondent about the Student since the June 23, 2011 meeting. *Id.*

53. On August 12, 2011, Parents signed a tuition contract with the Private School for the 2011-2012 school year. P-26.

54. As of the signing of the tuition contract, the Parents became responsible for tuition of _____ plus _____ ACH Debit Charge. *Id.*

55. The Parents made a payment of _____ in August, 2011, and monthly payments of _____ on the fifteenth of October, November, and December, 2011. *Id.*

56. According to the terms of the tuition contract, the Parents' failure to fulfill the financial requirements of the tuition contract will result in the discharge of the Student from the Private School, as well as Parents' responsibility for any remaining balance due. P-26-5.

57. Thus, as of August 12, 2011, the Parents are contractually obligated to the Private School for tuition for the entire 2011-2012 school year (plus the _____ ACH Debit Charge). *Id.*, Testimony of Parent #1.

58. On August 29, 2011, the Student began attending the Private School. *Id.*, P-25-1.

59. Petitioner has not persuaded the undersigned that, after the Student matriculated at the Private School, Parents remained open to a placement of the Student other than the Private School for the remainder of the 2011-2012 school year. Whether or not the Parent's expressed willingness in June, 2011, to consider a placement that

might arise from the IEP process (Testimony of Parent #1, R-6), was genuine, the undersigned finds that after Student's matriculation at the Private School, the Parents were disinclined to withdraw the Student from the Private School during the 2011-2012 school year. The undersigned reaches this conclusion based upon the Parents' great satisfaction with the Student's progress and happiness at the Private School discussed *infra*, and also upon the Parents' contractual obligation for the full school year's tuition.

60. No one from Respondent ever contacted the Parents to request copies of the evaluation reports that Parent #1 had tendered to the Principal of the Former Attending School on June 23, 2011. Testimony of Parent #1.

61. On September 9, 2011, Petitioner's counsel sent a letter by overnight Fed-Ex to the Principal of the Former Attending School challenging the need for the Parents to "re-enroll"¹¹ the Student at the Home School, while stating that the Parents nevertheless would proceed to "re-enroll" the Student at the Home School. P-12-1.

62. Petitioner's counsel's September 9, 2011 letter also requested that the Principal of the Former Attending School contact Petitioner's counsel at her earliest convenience to schedule an IEP meeting. *Id.*

63. Petitioner's counsel's September 9, 2011 letter stated that copies of additional evaluations were enclosed (although there was no list of those evaluations). *Id.*

¹¹ Although the term "re-enrollment" was used by both the Principal of the Former Attending School and by Petitioner's counsel, it should be noted that the Student never was enrolled at the Home School. Rather, he was enrolled at Former Attending School for kindergarten, first and second grade.

64. On September 26, 2011, the Principal and the Special Education Coordinator of the Former Attending School sent a letter to Petitioner's counsel summarizing the meeting of June 23, 2011 and Parent #1's email of June 24, 2011. R-11.

65. The September 26, 2011 letter also stated that the process of determining the Student's eligibility for special education was "paused because, as of the start date of the 2011-12 school year, the student was neither registered as an attending nor a non-attending student in DCPS and notification of his voluntary placement in a non-public school had been received."¹² *Id.*

66. The September 26, 2011 letter summarized the August 17, 2011 letter and noted that to date the Parents had not completed the enrollment process. *Id.*

67. Sometime between September 26, 2011, and October 6, 2011, the Parents went to the Home School and attempted to enroll Student, but the Home School declined to enroll him on that day, instead requiring the Parents to submit a registration packet to Respondent's Private/Religious school Office ("PRO"). Testimony of Parent #1.

68. On October 2, 2011, Dr. Solomon issued an evaluation report, after observing the Student at the Private School. Testimony of Dr. Solomon, P-10.

69. On October 4, 2011, the Education Coordinator of the Private School completed Respondent's form for Private-Religious School Student Referral for Special Education Services. P-14.

70. On October 6, 2011, the Parents submitted a completed registration packet for

¹² As discussed *supra*, Respondent does not take the position in this proceeding that such enrollment was required.

Student to PRO.¹³ Testimony of Parent #1.

71. On October 11, 2011, Petitioner's counsel sent a letter by facsimile and first-class mail to the Principal of the Former Attending School forwarding a copy of Dr. Solomon's "recently completed Diagnostic Educational Evaluation and Consultation Report." P-15-1.

72. On October 13, 20 and 27, 2011, the Student was tested by Speech Language Therapists at the Private School. P-17.

73. On October 27, 2011, Petitioner filed the Due Process Complaint Notice initiating this proceeding. P-1-1.

74. On October 31, 2011, Private School held an IEP Meeting and developed an IEP for the Student. Testimony of the Education Coordinator of the Private School, Testimony of Parent #1, P-25.

75. On November 4, 2011, Katrina W. White-Sneed, an Educational Specialist with Respondent, emailed Petitioner's counsel informing him that she was the new case manager assigned to the Student's case. P-18-1.

76. Ms. White-Sneed's November 4, 2011, email forwarded a letter of invitation for an eligibility meeting/ISP at the Home School on November 18, 2011. P-18-2 and -3.

77. On November 17, 2011, Respondent's counsel and Petitioner's counsel engaged in a series of emails about the purpose and potential effect of the scheduled meeting.¹⁴ P-19-1, R-12, R-13.

¹³ Parent #1 also testified that PRO advised her to submit the forms to Montgomery County, Maryland. If so, this fact is immaterial because Respondent did accept the forms and acted upon them in setting up an IEP meeting, as discussed *infra*.

78. On November 18, 2011,¹⁵ a Multi-Disciplinary Team (MDT) meeting was attended by Parent #1, Petitioner's counsel, the principal and various other staff members of the Home School, Ms. White-Sneed, and other staff members of Respondent.

Testimony of Parent #1, P-20, R-14.

79. The stated purposes of the November 18, 2011 meeting were to review outside evaluations and determine special education eligibility for the Student. P-20-2, R-14-2.

80. The attendees at the November 18, 2011 meeting read aloud the evaluation reports and determined that additional assessments were needed to determine eligibility.

Id.

81. As of November 18, 2011, the MDT's evaluators had not yet received consent from the Private School to observe Student and to speak to Private School staff working

¹⁴ At that time, Respondent was taking the position that because the Parents had enrolled the Student in a private school, the Student would be entitled only to "equitable services" if found eligible for special education. Apparently Respondent was relying upon provisions in IDEA and District of Columbia law relieving a local educational agency of the requirement to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child and the parents elected to place the child in such private school or facility. 20 U.S.C. §1412(a)(10)(C)(i). *Accord*, DCMR 5-E3018.1. These provisions regarding parentally-placed private school children do not apply in the instant case because Respondent has not yet determined that the Student is eligible, Respondent has not yet offered a FAPE, and the Parents therefore have not yet had the opportunity to consider an offer of FAPE. In short, the Parents' decision to enroll the Student at the Private School is not the parental-placement election contemplated by 20 U.S.C. § 1412(a)(10)(C)(i) and DCMR 5-E3018.1. At the DPH, counsel for Respondent confirmed on the record that Respondent is not taking the position in this proceeding that the Parents' enrollment of the Student at the Private School constituted such an election. Rather, if the Student is found eligible, he will be offered a FAPE.

¹⁵ Respondent's notes of this meeting are dated November 15, 2011. P-20-1. However, it is apparent from the chronology above that the meeting occurred on November 18, 2011. The discrepancy in dates is not significant.

with Student in the learning environment to determine which assessments would be appropriate. *Id.*

82. At the November 18, 2011 meeting, Parent #1 and Petitioner's counsel stated they would respond to the request for the release and progress reports from the Private School. Testimony of Parent #1, *id.*

83. At the November 18, 2011 meeting, Respondent's representatives stated that if they found the Student to be eligible, they would develop an IEP for him. Testimony of Parent #1.

84. Sometime in November, 2011,¹⁶ Occupational Therapist at the Private School issued an evaluation report. P-16.

85. Sometime in November, 2011,¹⁷ Speech Language Therapists at the Private School issued an evaluation report. P-17.

86. On November 23, 2011, Petitioner's counsel sent a letter to the Principal of the Home School by facsimile and first-class mail enclosing the evaluation reports by the Occupational Therapist and the Speech Language Therapists at the Private School. P-21.

87. Petitioner's counsel's November 23, 2011 letter also requested a completed consent form for Parent #1 to sign consenting to various observations at the Private School. *Id.*

¹⁶ The report is dated November, 2011.

¹⁷ The report is dated November 3, 2011. P-17-1. However, it was not signed by one of the two signatories until November 28, 2011. P-17-9. Yet it was enclosed with Petitioner's counsel's letter of November 23, 2011. P-21-1. This discrepancy was not explained. The undersigned finds that an unsigned copy of the report was enclosed with the November 23, 2011 letter. In any event, the discrepancy in these dates is not material.

88. On December 5, 2011, Ms. White-Sneed issued a Prior Written Notice proposing observations and evaluations of the Student. P-22-2 and -3, R-16.

89. On December 8, 2011, Parent #1 signed a form consenting to the observations and assessments of the Student. P-22-1, R-15.

90. As of the first day of the DPH, December 16, 2011, the Private School had not been contacted by Respondent to conduct observations of the Student. Testimony of the Education Coordinator of the Private School.

91. As of the first day of the DPH, December 16, 2001, Respondent had not conducted observations of the Student at the Private School. Testimony of Parent #1.

Evaluations

May, 2009 evaluation by Dr. Weintraub

92. Dr. Weintraub's (undated) report indicated that the Parents requested the evaluation because of concerns about the Student's behavior at home. P-2-1.

93. At the time of Dr. Weintraub's evaluation, the Student's behavior in school was not disruptive, and his kindergarten teacher had not expressed concerns. P-2-2. The Student was doing well in school. P-2-4.

94. The purpose of Dr. Weintraub's evaluation was to assess the Student's "abilities and social-emotional development in order to clarify the nature of his frustration, irritability and controlling behavior at home, and to suggest interventions that might help him become more flexible, empathetic and aware of the effects of his behavior." *Id.*

95. Dr. Weintraub identified unevenness in the Student's cognitive functioning. *Id.* Dr. Weintraub also identified emotional factors affecting the Student's behavior. P-2-5.

June, 2009 Evaluation by Ms. Present

96. Ms. Present's (undated) report indicated that the Parents requested the evaluation of the Student's sensory and motor development because of concerns about the Student at home. P-3-1.

97. At the time of Ms. Present's evaluation, there were no reported concerns in school. *Id.*

98. Ms. Present identified a significant discrepancy between the Student's more evenly developed verbal and perceptual abilities and his less well developed sensory and coordination abilities. P-3-9.

July, 2010 Evaluation by the 2010 Camp Co-Coordinator

99. The 2010 Camp Co-Coordinator noted that the Student "craved tactile and proprioceptive input, but tended to attempt to attain this input in potentially self-injurious ways (e.g., banging his head on the table.)" P-4-4.

100. The Student "had difficulty transferring this craving into a less potentially injurious outlet." P-4-5.

101. The Camp Co-Coordinator observed that the Student often became over-excited by sensory input, "resulting in his becoming silly, unfocused, or potentially unsafe." P-4-7.

102. The Camp Co-Coordinator noted that the Student needed extra time to process information, particularly auditory directions and during transitions. P-4-8.

January, 2011 Evaluation by Dr. Stern

103. Dr. Stern conducted an educational and cognitive assessment. P-5.

104. Dr. Stern identified the Student's difficulty "on tasks of working memory and auditory attention." P-5-5.

March, 2011 Evaluation by Dr. Bollich

105. Dr. Bollich conducted a comprehensive neuropsychological evaluation of the Student. P-6-1.

106. Dr. Bollich's (undated) report indicates that the Student lacked engagement at school and tended to "'opt out' of participating in activities both during school and after school." P-6-1.

107. At the time of Dr. Bollich's evaluation, there were no concerns regarding the Student's academics, "but his parents are worried that his lack of engagement may impact academic functioning in the future." *Id.*

108. Dr. Bollich noted that the Former Attending School had reported that the Student would attempt to hide for extended periods in the bathroom. P-6-2.

109. Dr. Bollich noted a significant decline in the Student's scores in verbal skills and a mild increase in Student's performance on visual perceptual tasks as compared to prior evaluation, a discrepancy that Dr. Bollich attributed to a difference in measures used to assess the Student's functioning. P-6-3.

110. Dr. Bollich identified the Student's relative weakness in processing speed and the ability to use language to problem solve. P-6-3 and -4.

111. With regard to executive function skills, Dr. Bollich identified the Student's "significant weaknesses in the areas of flexibility, initiation, working memory, organization and planning of behavior and problem-solving strategies, and poor monitoring which are compounded by poor sustained attention." P-6-4.

112. Dr. Bollich noted that although the Parents' questionnaire indicated the presence of autistic mannerisms, the Student's teacher "did not endorse any concerns in this area." *Id.*

113. Dr. Bollich noted that the Parents expressed concerns regarding the Student's emotional control and monitoring, but these were not noted to be problems in the classroom. P-6-4 and -5.

114. Dr. Bollich noted that neither the Parents nor the Student's then-current teacher indicated significant problems with sustained attention. P-6-5.

115. Dr. Bollich noted that the Student's inflexibility and social deficits compromised his ability to integrate and express himself. *Id.*

116. Dr. Bollich noted that the Student's ability to learn and retrieve information were susceptible to organization deficits. *Id.*

117. With regard to the Student's emotional functioning, Dr. Bollich noted the Student's difficulty modulating his behavior and emotions "resulting in intense reactions to small provocations." P-6-6.

118. Dr. Bollich noted that the Student had diminished social motivation and difficulty engaging in reciprocal interactions. *Id.*

119. Dr. Bollich noted that the Student had repetitive motor behaviors reflecting transient tics, as well as symptoms of anxiety and mood problems. P-6-7.

120. Dr. Bollich diagnosed the Student with Asperger syndrome as well as with Disorder of Written Expression. *Id.*

121. Dr. Bollich concluded that the Student had risks of difficulty with social interactions, difficulty learning, difficulty demonstrating his knowledge, and more significant emotional difficulties. P-6-7 and -8.

122. Dr. Bollich recommended, *inter alia*, flexible instruction, a combination of individualized teaching and/or small group instruction, social skills training, speech-language treatment, occupational therapy consultation and treatment, and psychotherapy. P-6-9 and -10.

123. Dr. Bollich did not recommend a self-contained classroom, or placement in a program limited to children with Asperger syndrome. P-6.

July, 2011 Evaluation by the 2011 Camp Coordinator

124. The 2011 Camp Coordinator noted that the Student repeatedly sought negative attention by singing inappropriate songs and making inappropriate comments including disparaging remarks about activities or foods. P-9-3, -6 and -7.

125. The 2011 Camp Coordinator noted that the Student sometimes chewed on his shirt. P-9-3 and -4.

126. The 2011 Camp Coordinator noted that the Student “appeared to crave vestibular and proprioceptive input” and that his sensory integration challenges were “disruptive to his day and to his classmates.” P-9-5.

127. The 2011 Camp Coordinator noted that the Student engaged in head-banging at various times during the day and was re-directed. P-9-5 and -6.

128. The 2011 Camp Coordinator recommended, *inter alia*, a team-based behavioral program with special education teachers, an occupational therapist and eating disorder specialist. P-9-10.

129. The 2011 Camp Coordinator recommended, *inter alia*, that the Student be placed in a special education program “that can meet his educational, sensory, motor, and behavioral needs.” *Id.*

130. The 2011 Camp Coordinator recommended, *inter alia*, that strong consideration be given to the Student’s placement in a school “where behavioral supports, occupational therapy, and positive social skill development are integrated throughout the school day.” P-9-11.

August, 2011 Evaluation by Dr. Solomon

131. Dr. Solomon conducted a diagnostic educational evaluation of the Student. Testimony of Dr. Solomon, P-10.

132. Dr. Solomon reviewed the Student’s report cards from the Former Attending School, the Dr. Bollich’s evaluation report, three or four occupational therapy evaluations, and Dr. Weintraub’s evaluation. Testimony of Dr. Solomon.

133. Dr. Solomon conducted her own tests on the Student. *Id.*

134. Dr. Solomon spoke with the Director of the Private School, the 2011 Camp Coordinator (who also was one of the 2010 Camp Co-Coordinators) and that Camp Coordinator’s supervisor. *Id.*

135. Dr. Solomon observed the Student at the Camp and at the Private School. *Id.*

136. Dr. Solomon identified the Student's strengths, including math and reading, although he had difficulty with math when given insufficient or too much information, and he had difficulty with inferential comprehension in reading. *Id.*

137. Dr. Solomon identified the Student's weaknesses, including organization and formulation of written language. *Id.*

138. Dr. Solomon noted that the Student had severe problems with social-emotional development and executive functioning. *Id.*

139. Dr. Solomon noted that the Student did not have the social cognition related to the construct of compromise. P-10-13.

140. Dr. Solomon noted that the Student displayed common characteristics of an individual with Asperger syndrome—executive dysfunction, cognitive rigidity, inflexibility, and problems forming and maintaining social relationships. Testimony of Dr. Solomon.

141. Dr. Solomon noted that the Student had a lot of anxiety, which also is consistent with Asperger syndrome. *Id.*

142. Dr. Solomon noted that part of the Student's profile is sensory integration disorder, *i.e.*, difficulty managing space and movement in space, often is accompanied by anxiety, particularly when the Student could not access strategies to reduce his anxiety, *e.g.*, standing on his head. *Id.*

143. Dr. Solomon opined that anxiety was "part and parcel" of the Student's behavior of chewing on his shirt and his difficulty with social interactions, consistent with Asperger syndrome. *Id.*

144. Dr. Solomon concluded that the Student was emotionally disabled, specifically, a child with a form of autism, Asperger syndrome. She also concluded that the Student has a learning disability in written language. *Id.*

145. Dr. Solomon did not consider the Student's anxiety or his learning disability in written language to be "primary," implying that these conditions were secondary to his primary condition of Asperger syndrome. *Id.*

146. Dr. Solomon attributed the Student's weakness in inferential comprehension in reading to his condition of Asperger syndrome, noting that children with this condition lack the flexibility in thinking, shifting and drawing from memory that are required to draw inferences. *Id.*

147. Dr. Solomon opined that the Student requires special education throughout the entire school day, every day. *Id.*

148. Dr. Solomon opined that the Student needs a program where his Asperger syndrome can be programmed for, and where he can get specific instructions. *Id.*

149. Dr. Solomon opined that the Student was not available for education in a general education program, and that he was not available to work on a curricular level with other students in any large group setting or even in a group as small as four students if the group is required to work cooperatively and to report out. *Id.*

150. The Parents already had tentatively selected the Private School and one other school before they met with Dr. Solomon. *Id.*

151. Dr. Solomon supported the Student's placement at the Private School. *Id.*,
P-10-14.

152. Dr. Solomon is familiar with the Private School because she has observed children there, has participated in IEP meetings there, and has met with parents of children who attend the Private School. Testimony of Dr. Solomon.

153. Dr. Solomon acknowledged that the Private School is a highly restrictive environment and justified the Student's attendance there as meeting his need to develop the skills to be able to return to the general education setting. *Id.*

154. Dr. Solomon participated in developing the Student's IEP at the Private School. *Id.*, P-25.

155. The Student's IEP at the Private School calls for 100% special education and related services. *Id.*, P-25.

156. The Private School does not have any IEPs other than full-time special education. Testimony of Dr. Solomon.

157. Dr. Solomon observed the Student at the Private School and characterized him as "invested in the educational process," "doing very well," "receiving an educational benefit" and making progress in math. *Id.*

158. Dr. Solomon observed that the Student had made a friend at the Private School, with whom he played chess, and with whom he demonstrated the ability to negotiate. *Id.*

159. Dr. Solomon did not discuss the Student with any of his teachers from the Former Attending School, nor did she know whether any of the other evaluators had done so. *Id.*

160. Dr. Solomon did consider the information provided by the Second Grade Teacher that was reflected in Dr. Bollich's evaluation report. *Id.*

161. Dr. Solomon did not observe the Student in other than a special education setting. *Id.*

162. Dr. Solomon found the Student's report card from the second grade at the Former Attending School to be "questionable" because Dr. Solomon did not believe the Student had met the benchmarks that the Second Grade Teacher had stated the Student had met, particularly the improvement between the third and fourth quarter markings. *Id.*

163. Dr. Solomon did not attempt to contact the Second Grade Teacher to resolve the apparent discrepancy. *Id.*

November, 2011 Evaluation by the Occupational Therapist at the Private School

164. The purpose of the evaluation by Occupational Therapist at the Private School was to review and update the Student's occupational therapy evaluations and to determine occupational therapy direct service needs. P-16-1.

165. The Occupational Therapist at the Private School noted that the Student appears to seek vestibular and proprioceptive input by, *inter alia*, "chewing on his shirt, pulling his shirt over his knees to pull his body into a tight ball, and banging his head on his desk." *Id.*

166. The Occupational Therapist at the Private School noted that the Student has deficits in visual processing, body awareness, organization and postural stability, that "impact his ability to attend to and complete classroom tasks" and written work. P-16-2.

167. The Occupational Therapist at the Private School recommended that the Student receive processing time, clear expectations, predictable structure and explicit instruction, 30 minutes weekly of direct occupational therapy service, and consultative

occupational therapy service “to address concerns and develop strategies around sensory processing and organization.” *Id.*

November, 2011 Evaluation by the Speech Language Therapists at the Attending School

168. The Student was referred for a speech language evaluation due to concerns expressed by Private School staff and the Parents about the Student’s “pragmatics, social interactions with peers, and the effect of those in the academic setting.” P-17.

169. The Speech Language Therapists noted the Student’s “communicative profile of an autistic spectrum disorder” that can negatively affect the Student’s “ability to form relationships with peers and ultimately affect his academic performance.”

P-17-3.

170. The Speech Language Therapists concluded that the Student has a moderate social language impairment. P-17-7.

171. The Speech Language Therapists recommended, *inter alia*, that the Student receive 60 minutes of speech and language therapy per week at school. P-17-8.

Conclusion Regarding the Student’s Condition

172. Based upon all of the testimony and exhibits in the record, the undersigned finds that the Student has Asperger syndrome, a condition within the autism spectrum, and therefore has autism.

The Student's Ability to Access the General Education Curriculum Without Special Education and Related Services¹⁸

173. Overall, the Student was learning at his grade level(s) in second grade at the Former Attending School. Testimony of the Second Grade Teacher, R-1.

174. The Student's output during second grade was inconsistent; in particular, when he was not engaged, he did not produce. *Id.*

175. The Student met the standard in terms of reading; toward the end of the second grade school year he improved and was "secure" in reading fluency, capable of understanding books at his grade level and comprehending some material above his grade level. *Id.*

176. The Student had difficulty with inferences in nonfiction, particularly finding the meaning. *Id.*

177. The Student's writing skills were stagnant in second grade, approaching but not meeting the standard. *Id.*

178. The Student often did not include punctuation or use upper and lower case properly; however, he did improve the spacing between words. *Id.*

179. During the second grade year, the Student showed growth in math, except fractions. *Id.*

180. During the second grade year, the Student remained "developing" in social studies, which required working with peers. *Id.*

181. The Student's grades in some categories declined from the end of first grade to the end of second grade (*id.*), which the second grade teacher attributed to (a) different

¹⁸ Findings of Fact *supra* related to the Student's evaluations are not repeated in this section.

skills being measured in first and second grade, and (b) the Student's first grade teacher being more lenient in grading, *i.e.*, more likely than the Second Grade Teacher to grade students as "Independent" (Testimony of the Second Grade Teacher).

182. All grades are subjective, to some degree. Testimony of the Second Grade Teacher.

183. Half of the Student's grades on work habits, personal and social skills declined toward the end of the second grade year. *Id.*, R-1-2.

184. In second grade, the Student's frequency of "zoning out" went in waves. Testimony of the Second Grade Teacher.

185. As second grade progressed, the Student followed instructions less well. *Id.*

186. In second grade, the Student rarely would engage independently or raise his hand. *Id.*

187. In second grade, when he had the option, the Student chose to be by himself, but he also had a close friend. *Id.*

188. Other students in the Student's second grade class also chose to be by themselves. *Id.*

189. In second grade, when required to be in group activities, the Student sometimes was "present" but not participating very much. *Id.*

190. In second grade, a few times each week, the Student would linger in the school bathroom to avoid the classroom. *Id.*, Testimony of Parent #1.

191. In second grade, "a couple of times" each day, the Student would bang his forehead with his hand while seated at his desk and bang his head down toward his shoes when sitting on the floor. Testimony of the Second Grade Teacher.

192. When the Student would engage in these head-banging behaviors, his teacher would redirect him. *Id.*

193. In the second grade, the Student sometimes would chew on his shirt.¹⁹ *Id.*,
Testimony of Parent #1.

194. When the Student would chew on his shirt, the teacher would attempt to stop it. Testimony of the Second Grade Teacher.

195. The teacher attributed the shirt-chewing to anxiety or frustration. *Id.*

196. The Student was on medication for anxiety. Testimony of Parent #1.

197. The Second Grade Teacher believes that she was effective in teaching the Student, which she achieved by keeping him next to or directly in front of her in the classroom, by giving him specific direction and redirection, by ensuring that he would “turn” the material she was teaching and repeat it, and by working with him one-on-one when the class was engaged in independent or small-group (“partnership”) work.
Testimony of the Second Grade Teacher.

198. The Second Grade Teacher built rapport with the Student by going along with his silliness, then getting back to her teaching point. *Id.*

199. The Second Grade Teacher assisted the Student in advocating for himself by giving him “feeling” words, for example, by asking the Student if he was having a problem with another student, or by using a story that the Student enjoyed as a vehicle to elicit the Student’s expression of feelings. *Id.*

¹⁹ Parent #1 testified that the shirts would have holes in them and be drenched with saliva. The Second Grade Teacher did not recall holes, or an entire shirt being soaked. These differences are not material, inasmuch as the abnormal behavior of repeatedly chewing a shirt is problematic regardless of the extent or damage done to the apparel.

200. Despite these efforts, the Second Grade Teacher was unable to “get much” out of the Student verbally when he was anxious or frustrated. *Id.*

201. The Second Grade Teacher claimed that she taught the Student the way she taught all of the children in the classroom. *Id.*

202. There was one teacher, and one assistant teacher, in the Student’s second grade class. *Id.*

203. There were 27 students in the Student’s second grade class. *Id.*

204. According to Parent #1, the Student “wasn’t getting anything out of” the environment in his second grade class. Testimony of Parent #1.

205. The undersigned considers Parent #1’s conclusion in the immediately preceding finding to be hyperbolic and does not adopt it as a fact.

206. The undersigned does not agree with the conclusion expressed by the Second Grade Teacher that she taught the Student the same way she taught all of his classmates. Given her description of her special efforts to engage, motivate and redirect the Student, and the size of her class, the undersigned finds that the Second Grade Teacher gave substantial additional attention to the Student.²⁰

207. To the extent the Student was successful in second grade, the undersigned attributes that success to the techniques and individualized attention applied by the Second Grade Teacher, supports which the undersigned finds unsustainable on a prospective basis in other general education classrooms with other teachers unless special education and related services are provided.

²⁰ For example, all 27 students could not be seated next to or directly in front of the teacher.

208. Based upon all of the testimony and the exhibits in the record, and giving more weight to the expert testimony than the lay testimony²¹ the undersigned finds that the Student's disability substantially adversely affects his academic achievement, particularly in the area of written expression, as well as his social-emotional development, and that the Student therefore needs special education and related services to access the general education curriculum.

Whether the Student is Receiving Educational Benefit at the Private School²²

209. The Private School is designed to address the challenges of students with Asperger syndrome, including problems with flexibility and executive function. Testimony of the Education Coordinator of the Private School.

210. There are nine students in the Student's class at the Private School; these students are in grades one through three. *Id.*

211. Since beginning to attend the Private School on August 29, 2011, the Student is doing better in initiating and maintaining transitions, wanders less, requires many fewer prompts to be redirected, is much more engaged in the educational process, asks more appropriate questions and advocates for himself rather than responding in a negative tone. *Id.*

212. The Student has not engaged in head-banging since the end of October, 2011. *Id.*, Testimony of Education Coordinator of the Private School.

²¹ In this context, lay testimony includes the testimony of the Second Grade Teacher, who has been recognized as a "Highly Effective Teacher" for the past two years and featured on Respondent's 2010-2011 calendar as an outstanding teacher, but is not a special education teacher. Testimony of Second Grade Teacher.

²² Findings of fact *supra* related to the Student's evaluations are not repeated in this section.

213. The Student's anxiety is reduced and he no longer clenches his fists.

Testimony of Parent #1.

214. At the Private School, the Student is happy, participating, no longer isolated, and doing well academically. *Id.*

215. The Student has one friend at the Private school with whom he plays chess. *Id.*

216. Four of the nine students in the Student's classroom have full time dedicated assistants because of significant behavior challenges, including eloping out of the classroom; engaging in hitting, kicking and throwing items; running around the classroom; taking off shoes and sox and throwing them around the room; disrobing and running around the classroom; and aggression toward peers and teachers. Testimony of the Education Coordinator of the Private School.

217. One of the four students with a dedicated assistant is being weaned from the need for that assistant, while another student is under review for a dedicated aide. *Id.*

218. Some students from the Private School exited special education last year. *Id.*

219. Based upon the uncontroverted testimony of Parent #1, the Education Coordinator of the Private School, and Dr. Solomon, the Student is receiving educational benefit at the Private School. The undersigned concurs.

Whether an Environment Less Restrictive than the Private School Would be Appropriate

220. The Private School is located in Private School City, Maryland. Testimony of the Education Coordinator of the Private School.

221. The Private School has 40 to 45 students, in grades one through ten, all of whom have Asperger syndrome. *Id.*

222. The Education Coordinator of the Private School believes that the Student requires a self-contained program limited to students with Asperger syndrome.²³ *Id.*

223. Respondent has no program limited to students with Asperger syndrome or high-functioning students with autism. *Id.*, Testimony of Emily Pearson.

224. Respondent is considering implementing a program limited to students with Asperger syndrome and representatives of Respondent have observed at, and met with representatives of, the Private School. Testimony of Emily Pearson.

225. The Private School does not offer any less restrictive environment; all IEPs at the Private School are full-time special education, and all students have Asperger syndrome. Testimony of the Education Coordinator of the Private School.

226. In response to questions from the undersigned, Dr. Solomon reviewed the Student's IEP from the Private School page by page and acknowledged that the majority of the elements can be provided in Respondent's schools. Testimony of Dr. Solomon.

227. In response to questions from the undersigned, Dr. Solomon testified that she knows one teacher at one of Respondent's elementary schools who could provide educational benefit to the Student. *Id.*

228. On redirect examination, Dr. Solomon testified that she would not consider placement of the Student in that teacher's classroom to be appropriate because Dr. Solomon believes the Student requires a program that is specific to Asperger syndrome,

²³ The Education Coordinator of the Private School testified with sincerity and the undersigned does not doubt her veracity. However, her obvious enthusiasm for her employer's program that is limited to children with Asperger syndrome suggests that she has a professional bias in favor of such a highly-restrictive program. Accordingly, the undersigned does not give substantial weight to her opinion on whether the Student would benefit from education in a less restrictive environment.

whose staff is experienced in Asperger syndrome, and where the Student interacts only with other children who have Asperger syndrome. *Id.*

229. Also on redirect examination, Dr. Solomon also testified that in her opinion, the Student could obtain “no benefit” from placement in any program other than an Asperger-specific program and that the Student must be “with kids who are at his same level.” *Id.*²⁴

230. In view of Dr. Solomon’s earlier testimony in response to questions from the undersigned, the undersigned does not accept Dr. Solomon’s conclusion that the Student would obtain no benefit from placement in a non-Asperger-specific program.

231. Located at general education schools, DCPS has multiple self-contained classrooms limited to students with autism. Testimony of Emily Pearson.

232. These classrooms combine students at all points along the autism spectrum, including Asperger syndrome and high-performing autism. *Id.*

233. Students with autism who attend self-contained classrooms at DCPS schools may or may not access the general education classroom for some of the day, *e.g.*, for math or reading on an inclusion basis. *Id.*

234. Students with autism who attend self-contained classrooms at DCPS schools may go to breakfast or lunch with non-disabled students. *Id.*

²⁴ Dr. Solomon offered no explanation for the apparent discrepancy between her detailed and specific testimony (in response to questions from the undersigned) that almost all of the elements of the Student’s IEP could be delivered in Respondent’s schools, and her general testimony on redirect that the Student could obtain no benefit from any program other than an Asperger-specific program, which Respondent does not have. Nor did Dr. Solomon explain the apparent discrepancy between her testimony (in response to a question from the undersigned) that there was a teacher in one of Respondent’s schools that Dr. Solomon knew who could provide an educational benefit to the Student, and her testimony on redirect that placement with that teacher would be inappropriate.

235. Some high-functioning students with autism attend general education classrooms in DCPS schools and receive speech therapy, occupational therapy, and/or hours of specialized instruction in a resource classroom, typically with eight to ten students and one or two teachers.

236. Based upon all of the testimony and exhibits in the record, Petitioner has not persuaded the undersigned that the Student would receive no educational benefit in a less restrictive setting than the Private School.

237. Rather, based upon all of the testimony and exhibits in the record, the undersigned finds that the Student would receive educational benefit from placement at a general education school in Washington, D.C., which would be closer to his home, with occupational therapy and speech-language therapy, either (a) in a general education classroom, with a full time aide initially, receiving hours of specialized instruction in a resource classroom; or (b) in a self-contained classroom with the ability to access the general education classroom for some hours of academic instruction in his strongest subject(s) and to socialize with non-disabled peers for meals or other special activities.

238. The undersigned also finds that, based upon all of the testimony and exhibits in the record, placement at a general education school would allow the Student to exit special education gradually as he developed the necessary skills, a transition that is not available at the Private School.

VIII. CONCLUSIONS OF LAW

Summary

1. Respondent failed to make a timely evaluation of the Student and failed to make a timely determination of his eligibility.

2. Respondent did not deny the Student a FAPE by failing to propose an appropriate special education program for him because the deadline for an initial IEP was subsequent to the date Petitioner filed the DPC herein, and the DPC is therefore premature as to the alleged denial of FAPE.

3. Even if the Student had been denied a FAPE, an Order requiring Respondent to reimburse Petitioner for tuition and fees for the Private School would not be equitable because the timing of Parents' referral of the Student for evaluation effectively precluded the provision of a FAPE unless Respondent happened to decide to place the Student at the Private School for the 2011-2012 school year.

4. Even if the Student had been denied a FAPE, prospective placement of the Student at the Private School would not be appropriate because it is not the Least Restrictive Environment for the Student.

5. The only appropriate remedy is to order Respondent to determine the Student eligible for special education and related services as a child with a disability, *i.e.*, autism.

Respondent's Alleged Violations of IDEA

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

children with disabilities and the Parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR 5-E3000.1.

7. An initial evaluation must be conducted within 60 days of receiving parental consent for evaluation unless the State establishes a different timeframe within which the evaluation must be conducted. 34 C.F.R. § 300.301(c)(1).

8. The District of Columbia, which is a State for purposes of IDEA (20 USC § 1401(31)), has established its own timeframe. Under DC ST § 38-2561.02(a), "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment." The 120 days runs from referral, not consent.

9. In the instant case, Petitioner asserts that the referral was made on June 13, 2011, when Petitioner's counsel wrote the Principal of the Former Attending School requesting an IEP meeting. Respondent asserts that the referral was made on June 24, 2011, when Parent #1 emailed the Principal confirming the Parents' decision to pursue the evaluation and eligibility process.

10. Because Petitioner's counsel's letter of June 13, 2011, specifically requested an IEP meeting, it constituted a referral for evaluation.

11. Because the 120 days runs from referral, not consent, the Parents' consent was not required to begin the 120-day period.

12. Unless tolled or otherwise extended, the 120 day period therefore expired October 11, 2011.²⁵

²⁵ If the June 24, 2011 email constituted the referral, the 120 day period expired October 22, 2011. The difference between these dates is immaterial, because Respondent missed the October 22, 2011 date as well.

13. Respondent's assertion that the delay in evaluating the Student was due to the Parents' delay in providing copies of evaluation reports, although a sound legal argument,²⁶ is not supported by the facts in this case. Specifically, (a) Dr. Bollich's comprehensive evaluation report was provided to Respondent with the initial referral for evaluation (Finding of Fact 32); (b) Parent #1 offered the other evaluation reports to the Principal of the Former Attending School a few days later, on June 23, 2011 (but the Principal declined to accept them) (Finding of Fact 38); and (c) no one from Respondent requested those evaluation reports again (Finding of Fact 60).

14. While the Parents or their counsel might have accelerated the process by providing copies of the additional evaluation reports prior to September 9, 2011, the burden was on Respondent to request those reports, if Respondent believed they were needed, particularly as the reports had been offered and rejected by the Principal of the Former Attending School.

15. Respondent's incorrect instruction that in order to have the Student evaluated, the Parents needed to enroll the Student at the Home School, followed by the Home School's refusal to accept the enrollment and incorrect instruction that the Parents needed to apply through Respondent's Private and Religious Office ("PRO") further delayed the evaluation process without justification, even if Respondents' representatives were well-

²⁶ A Multidisciplinary Team (MDT) evaluating a student may determine that it needs copies of relevant information already available from evaluations or treatment of the child privately obtained by the parent in order to determine whether additional examinations are required. *Richardson v. District of Columbia*, 541 F. Supp. 2d 346 (D.D.C. 2008). Where such relevant information exists, a parent cannot insist that the local educational agency conduct its own examinations, and the parent's failure to provide such information may relieve the agency of its obligation to evaluate the student. *Id.*

intentioned and simply misinformed²⁷ about Respondent's obligations regarding evaluation.

16. Based upon all of the testimony and exhibits in the record, and the legal principles applicable to evaluation of children under the IDEA, Respondent had no excuse to fail to evaluate the Student within 120 days of the referral, *i.e.*, by October 11, 2011. Respondent's failure to evaluate the Student by October 11, 2011, is a violation of IDEA.

17. Once a child has been evaluated,

a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child

34 C.F.R. §300.306(a)(1).

18. The 120-day period for evaluation in the District of Columbia is the period for evaluation *and* determination of eligibility. *D.L. v. District of Columbia*, 111 LRP 71487 (05-1437 (RCL), November 16, 2011), at paragraph 40.

19. Accordingly, Respondent's deadline for determining the Student's eligibility was October 11, 2011, and for the reasons discussed *supra*, Respondent had no justification for failing to meet that deadline.

20. Respondent's failure to determine the Student's eligibility by October 11, 2011, is a violation of IDEA.

²⁷ Respondent's argument in its written closing argument that removal of the Student from DCPS schools "resulted in the eligibility process being handled by a team that was not familiar with the student" is similarly unavailing as a justification for missing the 120-day deadline.

21. The record in this case is sufficient for the undersigned to make a determination of the Student's eligibility without the need for further evaluation, for the reasons discussed *infra*.

22. The IDEA defines a child with a disability as a child—

- (i) with ... autism ... and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

23. "Child with a disability" is further defined in 34 C.F.R. § 300.8(a) as a child evaluated

as having ... a speech or language impairment, ... autism ... and who, by reason thereof, needs special education and related services.

24. "Autism" is defined in 34 C.F.R. § 300.8(c) as

(1)(i) ... a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

25. "Autism" is defined in DCMR 5-E3001.1 as a developmental disability

which:

- (a) Does not include emotional disturbance as defined below;
- (b) Significantly affects verbal and nonverbal communication and social interaction;
- (c) Is often evident before three years old;

(d) Adversely affects a child's educational performance; and

(e) May be characterized by:

(1) Engagement in repetitive activities and stereotyped movements;

(2) Resistance to environmental change or change in daily routines; and

(3) Unusual responses to sensory experiences.

26. The Student has Asperger syndrome, which is included in autism spectrum disorder, *i.e.*, a form of autism. Finding of Fact 172. Although the Student's academic achievement has been adequate overall (Finding of Fact 173), the Student's autism has interfered with some aspects of his learning (Findings of Fact 110, 111, 115, 121, 137, 146, 174, 176, 177, 178, and 180) and to his social-emotional development. (Findings of Fact 115, 117, 118, 119, 121, 138, 139, 183, 184, 185, 186, 189, 190, 191, 193, and 200).

27. Even the Second Grade Teacher, who believed she provided educational benefit to the Student, acknowledged some of these deficits as well as the need to utilize specialized teaching methods to enable the Student to access the general education curriculum. Findings of Fact 192, 194, 197, 198, 199, and 207.

28. The Student needs special education and related services. Finding of Fact 208.

29. Accordingly, Student is eligible for special education and related services as a child with a disability, *i.e.*, autism.

30. Even though Respondent failed to make a timely evaluation of the Student and failed timely to determine him eligible as a child with a disability (autism), those procedural failures did not result in a denial of FAPE as of the date of the filing of the DPC herein, for the reasons discussed *infra*.

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

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

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

32. A parent may file a due process complaint over a local educational agency's procedural violations of IDEA. However, a procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord, Lesesne v.*

District of Columbia, 447 F.3d 828 (D.C. Cir. 2006).

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

34. The requirement of an IEP applies once “a determination is made that a child has a disability and needs special education and related services” 34 C.F.R. §300.306(c)(2). A meeting to develop an IEP must be conducted within 30 days of determination that the child needs special education and related services. 34 C.F.R. §300.323(c)(1).²⁸ *See also*, DCMR 5-E3007.1 (“The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.”).²⁹

²⁸ This *federal* regulation allowing 30 days after the eligibility determination to develop an initial IEP is not limited by its terms to States that follow the 60-day default timeframe for evaluation; accordingly, the 30-day period is available to a State, like the District of Columbia, that has developed its own timeframe as permitted by 34 C.F.R. § 300.1(c)(1). Petitioner’s argument that allowing DCPS 120 days to evaluate and determine eligibility, followed by 30 days to develop an initial IEP “would act as an unreasonable dilution of the IDEA’s procedural mandates” therefore must fail.

²⁹ Petitioner’s written closing argument characterizes the “aggregation” of the 120-day period for evaluation and eligibility determination with the 30-day period to develop an initial IEP as an improper attempt to create a 150-day period. The undersigned agrees that there is no 150-day period. Rather, there are two time periods; the 30-day IEP deadline is triggered by the expiration (or earlier satisfaction) of the 120-day evaluation/eligibility period. This is the same deadline-after-deadline structure utilized in IDEA for the commencement of the 45-day period for issuance of the due process hearing decision: The 45-day period commences 30 days after the receipt of the DPC, or earlier upon mutual waiver of the resolution meeting, agreement that no agreement is possible, or withdrawal from mediation. *See*, 34 C.F.R. §§ 300.510(b), 510(c) and 515(a) and DCMR §§ 5-E3030.3, 3030.4, 3030.8 and 3030.11. Although there is no 75-day period *per se* for the hearing officer to issue a decision, he or she may in fact have 75 days (as the undersigned has in the instant case) if the 30-day resolution period expires. The same logic grants DCPS 150 days to develop an initial IEP (as in the instant case) if the 120-day evaluation/eligibility period expires, even though there is no 150-day period *per se*.

35. Special education and related services are to be made available to the child in accordance with the child's IEP "[a]s soon as possible following development of the IEP." 34 C.F.R. §300.323(c)(2). See also, DCMR 5-E3010.2 ("The LEA shall implement an IEP as soon as possible after the meeting where the IEP is developed or revised").

36. In the instant case, no IEP was developed because Respondent had not made an eligibility determination with regard to the Student.

37. As discussed *supra*, a determination of eligibility was due by October 11, 2011. If Respondent had made its determination that the Student was eligible on that date, Respondent would have had until November 10, 2011, to develop an IEP.

38. The DPC, filed October 27, 2011, was as a matter of law premature to challenge Respondent's failure to develop an IEP proposing a special education program because the IEP was not yet due.³⁰

³⁰ The cases cited in Petitioner's written closing argument are *not* to the contrary. *Alfonso v. District of Columbia*, 422 F. Supp. 2d 1 (D.D.C. 2006) is inapposite because in that case, the child had been found eligible, yet no IEP had been developed more than 30 days later, after which the parents filed their due process complaint. Similarly, *Kitchelt by Kitchelt v. Weast*, 341 F. Supp. 2d 553 (D. Md. 2004), the child had been found eligible several years before the failure to develop an IEP and the parents' filing of their complaint. In short, neither *Alfonso* nor *Kitchelt* involved a prematurely-filed complaint as in the instant case. *Dickens v. Friendship-Edison P.C.S.*, 639 F. Supp. 2d 51 (D.D.C. 2009), cited for the proposition that the 120-day time period applies not only to evaluation and eligibility determination, but also to development of the initial IEP, does not in fact so hold. Rather, the court in *Dickens* made a passing reference to a hearing officer's construction of the 120-day period, but the court's decision does not rely upon that interpretation. In *Scorah v. District of Columbia*, 322 F. Supp. 2d 12 (D.D.C. 2004), the characterization of the 120-day period as including development of the IEP was made by the plaintiffs in their motion, not by the court, and the case did not even involve an alleged failure to timely develop an IEP. As acknowledged by Petitioner, the remaining IDEA cases cited—*Razzaghi v. District of Columbia*, 44 IDELR 271 (D.D.C. 2005); *Bush v. District of Columbia*, 579 F. Supp. 2d 22 (2008); *IDEA Public Charter School v. District of Columbia*, 374 F. Supp. 2d 158 (D.D.C. 2005) and *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002)—all arose prior to the adoption of the provisions granting Respondent 30 days after eligibility determination to develop an initial IEP and cited the superseded provisions.

39. It would violate Respondent's due process rights for the undersigned to judge Respondent's actions, or inactions, regarding developing an IEP that was not due at the time of the filing of the DPC on October 27, 2011.³¹ Respondent filed its Response to the DPC on November 3, 2011 and the parties held a Resolution Meeting on November 8, 2011. If Petitioner wished to complain of Respondent's failure to meet the November 10, 2011 deadline for developing an IEP/proposing a special education program, Petitioner should have moved after that date to amend the DPC, or withdrawn the DPC and filed a new DPC. In either of those situations, Respondent would have had the opportunity to file a new Response, and the parties would have had another Resolution Meeting, addressing all of Petitioner's allegations up to and including the date of the amended or new DPC.

40. The defect of prematurity is jurisdictional in the sense that it cannot be waived. Even if the Respondent does not raise prematurity by prehearing motion or at the DPH, and even if the Hearing Officer allows litigation of a premature DPC and renders a decision on the merits of that DPC, a court reviewing the Hearing Officer's Determination must dismiss the DPC as premature. *Jones ex rel. A.J. v. District of Columbia*, 646 F. Supp 2d 62 (D.D.C. 2009) ("DCPS still had 95 days left . . . when Jones filed her administrative action. Therefore, Jones' administrative complaint was

³¹ The undersigned declines Petitioner's invitation to extend principles of the common law of contracts, including anticipatory repudiation, to actions under IDEA's detailed statutory and regulatory scheme.

premature, and this Court affirms that complaint's dismissal, albeit on different grounds.").³²

41. The undersigned therefore has no authority to consider Respondent's DPC to the extent it challenges actions or inactions after the date of filing. As no IEP was due as of the date of filing, no special education or related services were due as of the date of filing, and no denial of FAPE therefore could have occurred as of the date of filing the DPC.

42. Accordingly, *for purposes of this proceeding*,³³ there was no denial of special education or related services, and Petitioner therefore is entitled to no remedy based on denial of special education or related services.

43. Petitioner is entitled to a remedy only for the failure to timely evaluate and determine the Student's eligibility.

³² Although this case involved a challenge to evaluation rather than a challenge to development of an IEP, the principle of prematurity expressed by the court clearly applies to any challenge raised in a due process complaint to the inaction of DCPS when DCPS' deadline for action has not passed.

³³ The undersigned notes, *obiter dictum*, that Respondent did not meet the November 10, 2011 deadline for developing an IEP for the Student, and still had not developed an IEP as of the DPH. The undersigned shares Petitioner's point of view in its written closing argument that judicial economy is not served by dismissing this portion of Petitioner's complaint. However, based upon the statutory and regulatory provisions discussed at length *supra*, and particularly the binding precedent of *Jones ex rel. A.J. v. District of Columbia* with regard to prematurity, the undersigned has no authority to extend his own authority to issues that were not ripe when the due process complaint was filed.

Remedy

Reimbursement of Private School Tuition

44. Petitioner's request for reimbursement of Private School tuition and fees is not the appropriate remedy for Respondent's failure to timely evaluate and determine the Student's eligibility, for the reasons discussed *infra*.

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

46. Reimbursement does not apply in the instant case, because, as discussed *supra*, for purposes of this proceeding there was no failure to develop an IEP and offer a FAPE. Rather, Respondent's failure timely to evaluate and determine the Student eligible was only a procedural violation of IDEA with no substantive impact on the Student's education as of the date the DPC was filed, because Respondent still had time to develop an IEP and offer a FAPE.³⁴

47. Moreover, even if Respondent's failures to evaluate and determine eligibility were characterized as substantive rather than procedural, and therefore denying the

³⁴ By way of contrast, if an IEP were overdue, or if a defective IEP had been developed, the Parents would have been justified in enrolling the Student in an appropriate private school. *See, N.S. v. District of Columbia*, 709 F. Supp. 57 (D.D.C. 2010) (citing *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492-93 (2009)). The undersigned agrees that the Attending School would have been appropriate for the Student in those circumstances. However, appropriateness of the placement is only one of the criteria for reimbursement, as discussed *infra*.

Student a FAPE, the timing of the Parents' referral for evaluation weighs against reimbursement of tuition as the remedy.³⁵

48. In February-March, 2011, the Parents had concerns about the Student's apparent sensory integration disorder and lack of engagement at school, as well as concerns that his lack of engagement might impact his academic functioning. Findings of Fact 24, 25, 26, 112 and 113.

49. Had the Parents referred the Student to Respondent for evaluation in early March, 2011, when they made arrangements for his evaluation by Dr. Bollich, and had they then provided to Respondent all of the prior evaluation reports,³⁶ Respondent would have promptly observed the Student at the Former Attending School, pursued additional evaluations or assessments, and reviewed Dr. Bollich's report when it became available in May, 2011.

50. Thus, if the Parents had referred the Student to Respondent for evaluation in early March, 2011, when they had reason to believe he had a disability affecting his education, Respondent's staff at the Former Attending School would have completed its evaluation of the Student by early July, 2011. If the Student had been found eligible, an IEP would have been developed by early August, 2011, and a FAPE thereby would have

³⁵ The same delay by the Parents would make reimbursement inequitable even if the DPC were not premature as to Respondent's alleged failure to develop an IEP and to provide a FAPE and the undersigned had jurisdiction over those issues.

³⁶ Specifically, as discussed in greater detail in the Findings of Fact, *supra*, the Student had been evaluated by Dr. Weintraub in May, 2009; by Ms. Present in June, 2009; by the 2010 Camp Co-ordinators in July, 2010; and by Dr. Stern in January, 2011.

been offered in time for the 2011-2012 school year.³⁷

51. Instead, the Parents deferred initiating the evaluation process three months—until June 13, 2011. There was no testimony as to why the Parents waited. The undersigned does not infer a motive of obstructing or manipulating the special education process.³⁸ Rather, given the sequence of events, it is likely that the Parents waited until they had read and reflected upon Dr. Bollich's diagnosis and written report and Parent #1 had begun to research Asperger programs before retaining counsel and deciding to refer the Student to Respondent for evaluation.

³⁷ As a factual matter, the Former Attending School understood its obligation to evaluate currently-enrolled students and likely would have completed the evaluation and eligibility determination promptly. In any event, as a matter of law, the presumption must be that a local educational agency will meet its obligations under IDEA. *See, Schaffer v. Weast, supra.*

³⁸ Petitioner's written closing argument mischaracterizes *N.S. v. District of Columbia, supra*, as standing for the proposition that the parents' intent in placing a child in a private school is irrelevant. In that case, DCPS already had expressed its intent with regard to the student's placement, and the parents had a justifiable basis for being "skeptical" of that placement. The undersigned does agree, however, with Petitioner's conclusion, citing *Sarah M. v. Weast*, 111 F. Supp. 2d 695 (D. Md. 2000) that the test is not whether the parents "have a truly open mind," but rather whether they "make a bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements." Thus, the parents' intent is relevant. *See also, K.G. ex rel. C.G. v. Sheehan*, 56 IDELR 17 (D.R.I. 2010) ("It is significant that there is no evidence that MM's parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE."). At the other extreme, Respondent's written closing argument asserts that the Parents' apparent "fixation" with the Student attending the Private School "demonstrates a lack of sincere interest in collaborating with DCPS in providing the [S]tudent a FAPE." In the instant case, although the undersigned has found that the Parents were *unlikely* to accept any offer of FAPE other than the Private School (Finding of Fact 59, *supra*), the undersigned has *not* found that the Parents were "fixated" upon the Private School, nor that they failed to make a bona fide effort to develop an IEP for the Student or to follow appropriate procedural requirements. Accordingly, the Parents in this case have not "lost the right" to seek a FAPE.

52. Regardless of the Parents' motivation in waiting these three months, their delay deprived Respondent of the time needed to evaluate the Student, determine his eligibility and offer a FAPE in time for the 2011-12 school year. From the date of the referral (June 13, 2011) until the first day of school at the Private School (August 29, 2011) is only 77 days. Respondent is entitled to 120 days for evaluation and determination of eligibility plus 30 days after determination of eligibility for the initial IEP.

53. In these circumstances, even if Respondent had denied Student a FAPE, it would not be equitable to require Respondent to reimburse the Parents the cost of tuition and fees at the Private School. *See, e.g., Dorros v. District of Columbia*, 510 F. Supp. 2d 97 (D.D.C. 2007) (Where the parents "by their own conduct, delayed the commencement of the 120-day review period ... it is disingenuous, at best, for them to seek a reimbursement for the first three months of the 120 day period over two months into the school year").

Prospective Placement at the Private School

54. Because the Private School is not the least restrictive environment for the Student, and has the lowest priority among appropriate placements under District of Columbia law, prospective placement of the Student at the Private School is not an appropriate remedy for Respondent's failure timely to evaluate and determine the Student eligible, even if these failures were characterized as substantive rather than procedural, and therefore denying the Student a FAPE.³⁹

³⁹ The same considerations would make placement at the Private School inappropriate even if the DPC were not premature as to Respondent's alleged failure to develop an IEP and provide a FAPE and the undersigned had jurisdiction over those issues.

55. The IDEA requires that special education be provided in the “Least Restrictive Environment” (LRE)⁴⁰:

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). *Accord*, DCMR 5-E3011.1. *See also*, 34 C.F.R. § 300.114(a)(2).

56 . Parental choice does not supersede the LRE requirement.⁴¹ *See* 71 Fed. Reg. 46541 (August 14, 2006); *see also*, *Shaw v. District of Columbia, supra* (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

57. Dr. Bollich, who conducted the comprehensive neuropsychological evaluation of the Student, made various recommendations concerning special education (Finding of

⁴⁰ For purposes of retrospective tuition reimbursement, as distinguished from a prospective placement, a private placement “need not satisfy a least-restrictive environment requirement to be ‘proper’ under [IDEA].” *C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011), *citing*, *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) and *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 399-400 (6th Cir. 1998). As discussed *supra*, no retrospective tuition reimbursement is appropriate in this case, although for reasons other than LRE.

⁴¹ A parent may, of course, choose to place or retain a child in a non-public school that does not meet the LRE or other requirements of IDEA. However, the local educational agency is not thereby obligated to fund the child’s education.

Fact 122), but notably she did not recommend placement in a self-contained classroom or a program limited to children with Asperger syndrome (Finding of Fact 123).⁴²

58. District of Columbia law adds another element to LRE, that the placement must be "based upon consideration of the proximity of the placement to the student's place of residence." DC ST § 38-2561.01(6)(C). Implementing regulations in the District of Columbia require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement (DCMR 5-E3013.1); and if a placement outside the local educational agency is required, the placement must be in the program that meets the requirements of the child's IEP that is closest to the child's residence (DMCR 5-E3013.7).

59. In the instant case, based upon the evidence of record, although the Student is reported to be doing well at the Private School, the Private School is not the LRE for the Student.⁴³ Students at the Private School are not educated with children who are not disabled⁴⁴ (Finding of Fact 221); the Private School is not proximate to the Student's

⁴² Petitioner's assertion in its written closing argument that the opinions of Dr. Solomon and the Education Coordinator of the Private School are the only expert opinions in the record is inaccurate. The evaluation reports reflect expert opinions and they are in the record.

⁴³ The Findings of Fact and Conclusions of Law in this Determination regarding the inappropriateness of the Private School as a prospective placement based upon LRE considerations are based solely upon the record in this case. These findings and conclusions are not binding prospectively on the MDT or IEP Team, when developing the Student's IEP with the benefit of additional information regarding the Student's needs from observations, assessments and evaluations subsequent to the DPH.

⁴⁴ In fact, four of the students in the Student's class are more severely disabled than he, as evidenced by the fact that they have full-time assistants due to significant behavior problems. Finding of Fact 216.

place of residence (Finding of Fact 220); and the Private School is not the school the child would attend if not disabled.

60. Moreover, when Respondent makes a special education placement, the following order or priority applies among placements that are appropriate for the student:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

DC ST §38-2561.02(c).

61. The Private School would fall in the third and last priority category because it is outside the District of Columbia. Finding of Fact 220. Although this order of priority is not binding upon a Hearing Officer, the undersigned considers these priorities probative when determining an equitable remedy.⁴⁵

62. Based upon applicable law and the equitable considerations discussed *supra*, neither reimbursement of tuition nor prospective placement at the Private School is an appropriate remedy. Rather, the only appropriate remedy in this case is to require Respondent to find the Student eligible, which will trigger the requirement of developing an IEP and offering the Student a FAPE.

IX. ORDER

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

1. Respondent shall convene the MDT or IEP Team no later than ten business days after receipt of this Determination, and the MDT or IEP Team shall make a finding

⁴⁵ As discussed *supra*, the Private School is not the LRE for the Student even if the DCPS priorities were disregarded.

that the Student is eligible for special education and related services as a child with autism. The MDT or IEP Team may also consider whether the Student has other learning disabilities, but such consideration shall not delay finding the Student eligible based upon his autism.

2. Petitioner's other requests for relief are DENIED.

Dated this 30th day of December, 2011.



Charles M. Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

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