

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
June 06, 2013

[Parents], on behalf of
[Student],¹

Date Issued: June 5, 2013

Petitioners,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on March 26, 2013. The Petitioners are represented by Michael Eig, Esq., and the Respondent is represented by William Jaffe, Esq. A response to the complaint was filed on April 4, 2013. A resolution meeting was held on April 11, 2013, and resulted in no agreements. A prehearing conference was convened on April 12, 2013 and a prehearing order was issued on April 15, 2013.

The Petitioners filed a motion for telephone testimony for one of their witnesses on May 6, 2013. The motion was denied in a written order on May 14, 2013. The Respondent filed a motion to permit late filing of its disclosures on May 17, 2013, following the disclosure deadline of May 16, 2013. The Petitioners filed an opposition to the motion on May 20, 2013, and a prehearing

¹ Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

conference call was held on that date to discuss the Respondent's motion. The motion was denied in writing on May 21, 2013.

The Petitioners disclosed documents to be submitted as evidence on May 16, 2013, and filed their prehearing brief on that date as well, as required by the Undersigned. The Respondent untimely disclosed documents to be submitted as evidence on May 17, 2013. The Respondent filed an untimely prehearing brief on May 20, 2013.

The due process hearing was convened and timely held at 9:00 a.m. on May 23, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing closed at 3:00 p.m. that day. The due date for this Hearing Officer's Determination (HOD) is June 9, 2013. This HOD is issued on June 5, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide the Student with an individualized education program (IEP) and placement for the 2012-2013 school year that meets the Student's needs that result from her disability and is reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP proposed for the 2012-2013 school year includes: only 1 hour per week of specialized instruction in the general education setting and 2.5 hours per week of specialized instruction outside of the general education setting; only 240 minutes per month of speech and language services and 240 minutes per month of occupational therapy; and lacks small group instruction, a structured environment

with lots of direct adult supervision, and hands-on learning experiences to address difficulties with attention and executive functioning?

The Petitioners are seeking reimbursement for their unilateral placement of the Student in the non-public school² for the 2012-2013 school year, and a determination of placement for stay-put purposes.

The Respondent denied the Student a FAPE and the Petitioners' are entitled to reimbursement for the cost of the Student's education at the non-public school for the 2012-2013 school year.

IV. EVIDENCE

Six witnesses testified at the hearing, five for the Petitioners and one for the Respondent. The Petitioners' witnesses were:

1. The Petitioner, Student's Mother (P).
2. (S.G.), providing an expert opinion on how the Student's disabilities impact her educationally and her educational needs.
3. Dr. (J.D.), providing an expert opinion on the Student's educational needs and the appropriate program and placement the Student requires.
4. (K.R.), providing an expert opinion on the Student's speech and language needs and how the non-public school is meeting those needs.
5. (C.C.), providing an expert opinion on the Student's occupational therapy needs and how the non-public school is meeting those needs.

The Respondent's witness was:

1. Special Education Coordinator, (M.M.)

² The name of the non-public school is listed in Appendix C.

41 of the Petitioners' 46 disclosures were entered into evidence. The Petitioners' exhibits are listed in Appendix A. Three of the Respondent's five disclosures were part of the Petitioners' exhibits. The remaining two disclosures were objected to as untimely by the Petitioners and were thus excluded from the record, pursuant to 34 C.F.R. § 300.512 and D.C. Mun. Regs. 5-E3031.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The witnesses testified credibly. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a _____ year old learner with disabilities who attended a public school³ until the fall of the 2012-2013 school year.⁴ She has learning disabilities in the areas of reading, writing, and mathematics, attention deficit hyperactivity disorder – combined type, developmental motor coordination disorder, mixed receptive-expressive language disorder, and a phonological disorder.⁵ She was determined eligible for special education and related

³ The name of the public school is listed in Appendix C.

⁴ P 28, Testimony (T) of P.

⁵ P 10, P 29.

services by the Respondent prior to her pre-kindergarten year (2010), under the definition of developmental delay.⁶

2. An IEP developed for the Student on March 15, 2011, and was not revised again until September 4, 2012, after the Student had begun attending the non-public school.⁷ The IEP included goals in three areas: adaptive/daily living skills, speech and language, and motor skills.⁸ By February 2012, during her kindergarten year, the Student had mastered just five of 15 goals.⁹ One goal of the four adaptive/daily living skills was mastered (printing her name), and four of five speech goals were met.¹⁰ All of the speech goals were articulation goals.¹¹ None of the six motor skills goals were met, and two had not even been worked on, after nearly a year.¹² The services in the IEP were: unspecified specialized instruction in the general education setting for three hours per week; speech and language pathology in the general education setting for 240 minutes per month; occupational therapy in the general education setting for 120 minutes per month; occupational therapy (OT) outside of the general education setting for 240 minutes per month; and the use of visual cues and support.¹³
3. The Student's Mother had been discussing her concerns about the Student's progress in kindergarten with the Student's teacher all year long.¹⁴ By February the Student's teacher had advised the Student's Mother at a parent-teacher conference that she was considering

⁶ T of P, P 2, P 3, P 4, P 10.

⁷ P 6, T of P. The Respondent initially asserted in its response that the IEP had been revised in February 2012. There is a progress report from the end of the 2011-2012 school year which indicates it is based on an IEP dated February 28, 2012. (P 11) However, neither party had a copy of such an IEP, and the Respondent stipulated at hearing that it did not exist.

⁸ P 6.

⁹ P 7.

¹⁰ P 7.

¹¹ P 6.

¹² P 7.

¹³ P 6.

¹⁴ T of P.

holding the Student back the following school year.¹⁵ Despite concerns from both sides, the Respondent never convened an IEP team meeting to discuss the Student's progress and services during the 2011-2012 school year.¹⁶

4. The Student's Mother began researching alternative schools sometime during the 2011-2012 school year and had selected the non-public by February 2012.¹⁷ The Petitioner's applied to the non-public school in March 2012 and the Student was accepted later that month, despite being after the application deadline.¹⁸ A down payment was made in June to hold the Student's place at the non-public school.¹⁹ The Student was not withdrawn from the public school, however, and did not begin attending the non-public school until the start of the 2012-2013 school year.²⁰
5. In May 2012 the Student underwent a comprehensive independent psychological evaluation which forms part of the basis of the findings of fact concerning the Student's educational needs herein.²¹ The evaluation was conducted by S.G. and was shared with the Respondent in July 2012.²²
6. The Student's disabilities affect her in a broad-based set of skill areas.²³
 - a. The Student's disabilities do not intensely affect her in the area of verbal cognition. In this area the Student has age-appropriate cognitive skills in the verbal aspects of

¹⁵ T of P. (It was also learned that the Student had not been provided with OT services. The Respondent made up these missed services by providing an OT Camp in April 2012. *See*, P 9.)

¹⁶ T of P. (No records offered to show such a meeting was attempted or held.)

¹⁷ T of P, P 8.

¹⁸ T of P.

¹⁹ T of P.

²⁰ T of P.

²¹ P 10.

²² P 10. (The Respondent denies it received the evaluation until late in the summer, but the Respondent's failure to review the evaluation prior to that time was likely the result of its own internal communication issues because the document was delivered. *See*, P 13.)

²³ P 10, T of S.G.

information processing.²⁴ Her vocabulary is in the average range and she has good deductive reasoning.²⁵ She is clearly capable of academic learning, but has a weak fund of stored facts.²⁶

- b. The Student's performance in the area of nonverbal cognition is variable, and she struggles with some nonverbal tasks.²⁷ She has demonstrated an inability to analyze and categorize information without the use of language.²⁸ She is likely to struggle with independent problem solving and with mental organization of information in the classroom.²⁹
- c. While the Student has average working memory skills (keeping information online, manipulating it, and using it), she has poor memorization skills (committing information to memory).³⁰ Her auditory memory is significantly below average which leads to difficulty understanding and retaining what she hears.³¹
- d. The Student has below average to average processing speed, which impacts her ability to produce written material in the classroom.³²
- e. The Student's receptive language skills are inconsistent but within the average range.³³ She makes errors on easy language and does better on complex language, indicating a

²⁴ P 10.

²⁵ P 10.

²⁶ P 10.

²⁷ P 10.

²⁸ P 10.

²⁹ P 10.

³⁰ P 10.

³¹ T of K.R.

³² P 10.

³³ P 10.

gap in language skills.³⁴ She is unable to follow multi-step directions and even one-step directions are challenging.³⁵

- f. In the area of expressive language, however, the Student has difficulty efficiently accessing words, likely contributing to her trouble fluently expressing herself and frequently needing to stop and repair what she said.³⁶ She has significant trouble reciting automatic verbal sequences, such as days of the week in order.³⁷ Her articulation problems make her difficult to understand, require her to repeat herself, and leads to frustration.³⁸ She has difficulty with irregular forms and has word retrieval issues.³⁹
- g. The Student's pragmatic language skills (social skills) are not well developed. She has difficulty maintaining a conversation and timing her remarks, resulting in interruptions.⁴⁰ She also has problems with non-verbal language and has proximity issues – she gets too close to the person with whom she is speaking.⁴¹
- h. In the area of phonological processing, an area of language skills crucial for the development of basic reading decoding, her performance is in the average range for rapid naming, but she has weakness with the skills of phonological awareness and phonological memory, and very significant trouble with the skill of basic sound elision.⁴² She has trouble with very basic sound isolation and manipulation, and difficulty with reciting digit sequences.⁴³ Thus, she has weaknesses in the very basic language building blocks

³⁴ T of K.R.

³⁵ P 10, T of K.R.

³⁶ P 10.

³⁷ P 10.

³⁸ T of P, T of K.R.

³⁹ T of K.R.

⁴⁰ T of K.R.

⁴¹ T of K.R.

⁴² P 10.

⁴³ P 10.

for decoding, without which she will struggle to develop basic sound-symbol connections and to learn basic reading decoding.⁴⁴

- i. The Student has significant difficulty with attention.⁴⁵ She has slow speed with visual search efficiency.⁴⁶
- j. The Student has weaknesses in the area of executive functioning (related to attention), compared to children her age, creating challenges with regard to goal-directed behavior, problem solving, and flexible shifting of actions to meet demands.⁴⁷
- k. In the area of academics, the Student was at a pre-kindergarten level in the area of reading in May of her kindergarten year (2012).⁴⁸ At that time her math skills were also below grade level in that she had difficulty with single digit addition, no mastery of basic counting, and struggled with basic number concepts.⁴⁹ She lacked the skills to begin writing at that time, as she lacked basic pencil control and her speed was labored.⁵⁰ She had not begun to make progress in sound-symbol relationships for reading and so could not spell words.⁵¹
- l. The Student has significant needs in multiple areas of motor skills.⁵² She has challenges with praxis – translating senses to motor action, and she cannot imitate movement patterns.⁵³ She has difficulty with balance and coordinating the use of her body.⁵⁴ Her sensory integration processing skills are weak and she has difficulty paying attention for

⁴⁴ P 10.

⁴⁵ P 10.

⁴⁶ P 10.

⁴⁷ P 10.

⁴⁸ P 10.

⁴⁹ P 10.

⁵⁰ P 10.

⁵¹ P 10.

⁵² T of C.C., P 30.

⁵³ T of C.C., P 30.

⁵⁴ T of C.C., P 30.

more than six to ten minutes at a time, requiring constant cuing from the teacher.⁵⁵ She also has difficulty interpreting tactile movement and irritants distract her.⁵⁶

7. As of the end of the 2011-2012 school year (kindergarten), the Student required:⁵⁷
 - a. Intensive instruction in reading, math, and written language. Her reading instruction required a phonologically-based reading program delivered through intensive, daily, one-on-one or small group instruction to develop her phonemic awareness, phonics skills, the ability to read words in text in an accurate and fluent manner, and the ability to apply comprehension strategies consciously and deliberately.
 - b. Placement in a small, structured educational setting because the Student cannot learn in a large group setting due to language and attention weaknesses interfering with her ability to understand orally presented instruction.
 - c. Maximized structure and direct participation for the Student, with frequent check-ins and monitoring of her work production.
 - d. Advanced notice of the kinds of material to be presented, how long she will need to work, the kinds of responses to be expected, etc.
 - e. Frequent opportunities for “hands-on” involvement, role-play, simulations, and in-class demonstrations, in the classroom, because she benefits from manipulating materials and dramatic enactments and other means of making learning a part of her experience, as opposed to simply observing or listening.
 - f. Training in strategies for organizing time and space, such as predicting expected work time and tracking actual time of completion, to heighten attention and increase on-task behavior and work speed.

⁵⁵ T of C.C.

⁵⁶ T of C.C.

⁵⁷ P 10.

- g. Small incentives for getting work done, particularly work she found difficult, with the Student involved in selecting the incentives, such as a water break, running an errand for the teacher, looking at a book, walking around the room, or drawing on the chalk board.
 - h. A menu of alternatives to engage in while peers are doing seated classwork, such as computer learning time, listening to a recorded book, or playing an educational game. She also required frequent breaks and having an approved fidget to help stimulate her focus.
 - i. Speech and language therapy.
 - j. Occupational therapy.
8. At the end of her kindergarten year, the Respondent advised the Petitioners that the Student would be promoted to first grade after all.⁵⁸ The Student's report card, however, shows significant inconsistencies in the Student's recorded performance, and is of questionable value.⁵⁹ For example, by the completion of the fourth term, the Student was marked as proficient in English Language Arts, overall, despite only showing secure skill development in two of 20 skill areas.⁶⁰ In the area of Health and Physical Education the Student was marked as exceeding the standards, despite being marked as still developing in three of the six skill areas, and not having been introduced to the remaining three.⁶¹
9. On July 9, 2012, the Petitioner, through counsel, faxed the Principal of the Student's school a letter, attaching a copy of the May 2012 independent psychological evaluation, advising the Respondent that the Petitioners did not believe the Student was progressing and that her IEP

⁵⁸ T of P, T of M.M.

⁵⁹ P 12.

⁶⁰ P 12.

⁶¹ P 12.

did not meet her needs.⁶² The Petitioners also advised the Respondent, in the letter, that “they intend to withdraw [Student] from [Public School] and seek public funding to place her in the [Non-Public School]. Nonetheless, the parents are certainly willing to return to the IEP table to discuss the impact the enclosed psycho-educational report should have on [Student’s] educational placement.”⁶³ The Respondent did not attempt to convene an IEP team meeting until after additional prompting from the Petitioners, and then scheduled the meeting for August 22, 2013, but then rescheduled the meeting until September 4, 2013, due to its failure to ensure the school psychologist had an opportunity to prepare for the meeting of August 22, 2013.⁶⁴

10. The Student began attending the non-public school on or about August 28, 2012, the start 2012-2013 school year for the non-public school.⁶⁵

11. The IEP team revised the IEP on September 4, 2012, and amended it on October 24, 2012.⁶⁶

The revised IEP included academic goals in the areas of math (four goals) and reading (five goals).⁶⁷ It included functional goals in the areas of adaptive/daily living skills (five goals), communication/speech and language skills (three articulation goals), and motor skills/physical development (six goals).⁶⁸ The services in the IEP were: unspecified specialized instruction in the general education setting for one hour per week; unspecified specialized instruction outside of the general education setting for two and a half hours per week; speech and language pathology outside the general education setting for four hours per month; and occupational therapy outside of the general education setting for 240 minutes per

⁶² P 13. (The letter states that the Petitioners’ told the Respondent this “[a]t the most recent IEP meeting, . . .” However, there is no evidence in the record conclusively showing when that IEP team meeting was.)

⁶³ P 13.

⁶⁴ P 14, P 15, P 16, T of P, T of M.M.

⁶⁵ T of P, P 19, P 28.

⁶⁶ P 25, P 27, T of P, T of M.M.

⁶⁷ P 27.

⁶⁸ P 27.

month.⁶⁹ Supplementary aides and services included: use of visual cues and supports; deliver information in small chunks; provide a visual schedule of daily activities; use of a timer; use of manipulatives; provide positive encouragement and reinforcement; allow for breaks as needed; provide small group instruction and work; check-in frequently with the Student; use modeling; differentiate grade-level work, if necessary; provide visual of multi-step directions; have a checklist available as she completes activities; sit in close proximity to the teacher; gain attention before delivering instruction; provide gestural and visual reminders; provide repeated practice of skills; use peer models; interpret oral directions; repetition of directions; simplification of oral directions; visual aids; markers to maintain place; and a location with minimal distractions.⁷⁰

12. The Student's IEP did not address all of her speech and language or OT needs.⁷¹

13. The Student performed well at the non-public school. The school provides services only for students with disabilities and develops individualized learning programs for them.⁷² There are ten students per class, with three adults: two teachers and an intern.⁷³ Reading skills are addressed one on one with a specialized reading program (Wilson), and the Student has been very responsive to this instruction with great progress in her decoding.⁷⁴ Math instruction has been provided either three to one or one on one, and the Student has learned to add and subtract.⁷⁵ Literature class has been difficult for the Student because stories are read to her and she has difficulty with recall, but as of January she was proficient in writing

⁶⁹ P 27.

⁷⁰ P 27.

⁷¹ T of K.R., T of C.C.

⁷² T of J.D.

⁷³ T of J.D.

⁷⁴ T of J.D., P 34.

⁷⁵ T of J.D.

opinions/answers, and developing in the four other areas tracked.⁷⁶ The Student was engaged in visual arts class and dance, which was a challenge due to the Student's OT needs.⁷⁷ Her social studies are taught largely outdoors using a dramatic framework with costumes and characters, immersing students in the program.⁷⁸ The Student is positive, happy, and progressing educationally at the non-public school.⁷⁹

14. The Petitioners paid \$35,440.00 in tuition for the 2012-2013 school year at the non-public school, \$2,115.00 for speech and language services, and \$1,200.00 for OT services.⁸⁰ They could not afford to continue to pay for the speech and language services and OT services after the winter break, so those services were integrated into the classroom, where the non-public school could provide them at no additional cost to the Petitioners, but they were not provided at the same level as when independently provided.⁸¹ The Student did not benefit from the integrated speech and language services, and requires them to be provided outside of the classroom setting in an individualized manner.⁸² The Student has benefitted from the integrated OT services, but not as much as she could have, and she is not yet performing motor skills at her age level.⁸³

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

⁷⁶ T of J.D.

⁷⁷ T of J.D.

⁷⁸ T of J.D.

⁷⁹ T of P, T of J.D., T of K.R., T of C.C., P 28, P 34.

⁸⁰ T of P.

⁸¹ T of P, T of J.D., T of K.R., T of C.C.

⁸² T of K.R.

⁸³ T of C.C.

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

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

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to

resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs*, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, it reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b). The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii).

3. A local education agency (LEA) does not have to pay for the cost of education, including special education and related services, of a child with a disability at a private school if the LEA made FAPE available and the parents elected to place the child in the private school. 34 C.F.R. § 300.148(a). If a hearing officer finds the LEA had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate, the LEA may be required to reimburse the parents for the cost of the enrollment, even if the private school does not meet the State standards that apply to public schools. 34 C.F.R. § 300.148(c).
4. On July 9, 2013, the Petitioners advised the Respondent that they had expressed their concerns that the Student was not progressing and that the level of services in the IEP did not meet her needs. They also advise the Respondent that they intended to withdraw the Student from the school and seek public funding to place her in the Lab School of Washington. It is unknown when the last IEP for the Student was. No evidence conclusively shows an IEP

team meeting prior to September 4, 2012. The Petitioners did demonstrate that they repeatedly engaged the Student's kindergarten teacher about their concerns, largely based on the concerns the teacher shared with them. So, when the July 9, 2012, notice was provided to the Respondent, it had an obligation to react. It failed to do so. It finally scheduled an IEP team meeting for August 22, 2012, shortly before the start of the 2012-2013 school year for the Student. The Respondent did not proceed with the meeting prior to the Petitioners' announced withdrawal of the Student from the public school, and delayed the meeting until September 4, 2012. The Student, by that time, had already been in the non-public school for a week. There was no placement proposed by the public school to reject and it remains unclear what, if any, IEP was in place at the time. For this reason alone the Petitioners met the first prong of the analysis for reimbursement for private school, because no FAPE was made available to the Student in a timely manner prior to her enrollment at the private school. If the subsequent IEP proposals are considered, those IEPs do not offer a FAPE. The IEP proposed September 4, 2012, while much better in terms of the specific supplementary aides and services, lacks the services the Student requires because it lacks speech and language goals in areas of need the Student had. It also lacked the intensive instruction she required in the areas of reading (with a focus on phonemic awareness), math, and written language, and a placement that emphasized structure and direct participation by the Student due to her attention and executive functioning deficits. The IEP was internally inconsistent in that it required small group instruction and a location with minimal distractions (both appropriate for the Student) but placed the Student outside of the general education setting for instruction only two and a half hours per week. The amendment proposed in October 2012, did not

address these failures and this revision of the IEP, and its amendment, also failed to offer the Student a FAPE.

5. In order to be reimbursed, parents must show the private school is appropriate for their child with a disability. The private school need not meet State standards that apply to education provided by the State Education Agency or Local Education Agencies. The [REDACTED] [REDACTED] is appropriate for the Student. Even with the Petitioners' in ability to privately fund the necessary related services of OT and Speech and Language, the school was able to deliver a scaled-down version of those services to assist the Student. The question arises, then, that if the non-public school can deliver a scaled-down version of such services and still be appropriate, why cannot the public school do the same thing and still be appropriate? In this case, the services delivered to the Student, even in a scaled-down version, still addressed the multiple subareas of need the Student had. For example, the Student's speech and language needs covered a wide area of speech and language issues, from articulation to receptive language. The Respondent's program was only addressing articulation. The non-public school, when it was no longer providing all the speech and language services, was still providing a small classroom environment with kinesthetic teaching that helped with the Student's receptive language needs. Likewise, many OT services were integrated into the Student's classroom experience. Finally, the fact that the Parents could no longer pay for the Student's necessary services should not be determinative as to whether the private placement is appropriate. For example, if the Parents had to subsequently remove the Student from the school entirely because they no longer had the funds to pay for it, this fact would not weigh on whether the private school was appropriate. Rather, the focus must be on the services

actually provided, or that could be provided. The Student made significant educational progress and the Petitioners' private placement was appropriate for the Student.

6. The Respondent argues that the non-public school is not appropriate because it is not the least restrictive environment for the Student. A variation of the argument is that the Petitioners have not shown 27.5 hours of specialized instruction per week are necessary for the Student to make progress. This argument, in its various forms, is without merit. As already noted, IDEA does not require parents' private placement to meet State standards to be determined appropriate. The LRE requirement is one of those standards that, if required to be applied in such a case, would often result in a denial of reimbursement, because parents of children with disabilities often, naturally, look for schools that specialize in working with students with special needs when they believe such children are not being appropriately served in the public school setting. "Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program. See Rowley, 458 U.S. at 181 & n. 4, 102 S.Ct. at 3038 & n. 4; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044-45 (5th Cir.1989). In any event, the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body, see Burlington, 471 U.S. at 373, 105 S.Ct. at 2004; H.R.Rep. No. 332, 94th Cong., 1st Sess. 2 (1975); the school district has presented no evidence that the policy was meant to restrict *parental* options when the public schools fail to comply with the requirements of the Act." Carter By & Through Carter v. Florence Cnty. Sch. Dist. Four, 950 F.2d 156, 160 (4th Cir. 1991) aff'd, 510 U.S. 7, 114 S. Ct. 361 (1993) (Emphasis in original). Just as in Carter, the Parents here placed their child in a school specialized in meeting the needs of students like her. Thus, the argument that their choice was too restrictive is unavailing.

7. The Respondent has also consistently argued in this case that the Petitioners failed to provide notice to the LEA prior to withdrawing her and seeking public reimbursement. The evidence is clearly contrary to this argument, and the Respondent's argument has been consistently conclusory, lacking any proffered or actual facts to back it up. The Respondent's position appears to rest on the fact that the Petitioners researched, found, and put a down payment on the non-public school for the 2012-2013 school year prior to the end of the 2011-2012 school year when the Student was still attending the Respondent's school. The Petitioner provided formal notice of their intent to seek public funding for the non-public school, to begin in the fall, on July 9, 2012, during the summer months when school was not in session. The Petitioners reasonably remained willing to work with the Respondent to develop an appropriate public program for the Student, and the Respondent squandered this opportunity over the summer. It then held a team meeting in the fall, after the new school year started, and has subsequently argued the Petitioners were no longer entitled to an IEP (even though the staff were working to revise the IEP). The Respondent attempts to bolster this argument with the assertion that it "exceeded its legal obligation" and provided no evidence that the staff actually thought they did not need to have an IEP for the Student. Thus, the facts (that the Respondent was revising the IEP after the Student began attending the non-public school) supports a conclusion that the Respondent did know it was required to provide a FAPE to the Student, and the dispute is really about whether the program it proposed was appropriate. As described in conclusion four, above, the Respondent's programs were not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet all of her other needs that result from her disability, and so denied her a FAPE.

8. Because the Student was denied a FAPE, because the non-public school is appropriate for the Student, and given the timely notice to the Respondent of their intent to send the Student to the non-public school in the fall and their efforts to continue to work with the Respondent during the summer and even after the school year started in the fall, the Petitioners are entitled to reimbursement for the cost of the 2012-2013 school year at the non-public school. They are not entitled to reimbursement for evaluations they paid for and have provided no legal argument for that nor requested it. Because the Undersigned agrees with the Petitioners' placement, this order must be treated as an agreement between the District of Columbia and the Petitioners under 34 C.F.R. § 300.518.

VII. DECISION

The Respondent denied the Student a FAPE when it did not timely propose an IEP for the 2012-2013 school year. The Petitioners' private placement of the Student was appropriate. The Petitioners are entitled to reimbursement for the cost of the non-public school and related services for the 2012-2013 school year.

VIII. ORDER

Within 30 calendar days of this order the Respondent will reimburse the Petitioners \$38,755.00 for the costs they incurred for the 2012-2013 school year at the non-public school, for tuition and reimbursable related services.

IT IS SO ORDERED.

Date: June 5, 2013



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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