



Petitioner alleges that DCPS has violated the IDEA and denied Student a free appropriate public education (“FAPE”) by failing to provide an appropriate placement, as described further below under the specified hearing issues.

DCPS filed a timely Response to the Complaint on April 11, 2013, which denies the allegations. However, DCPS’ Response admits that District Charter cannot provide the service hours outside of general education required under Student’s individualized education program (“IEP”). *See Response, p. 2.* DCPS’ Response asserts that Student was referred for consideration of a more restrictive placement; and that in March 2013 DCPS’ Office of Special Education conducted an observation and prepared a report for IEP Team review which had not been acted upon when the Complaint was filed. *Id.*

On or about April 26, 2013, DCPS held a resolution meeting that did not result in an agreement. The parties also did not agree to end the 30-day resolution period early. The resolution period ended without agreement on May 4, 2013, and the 45-day timeline for issuance of the Hearing Officer Determination expires on June 18, 2013.

On May 10 and 16, 2013, Prehearing Conferences (“PHCs”) were held to discuss and clarify the issues and requested relief. After discussing the time necessary to hear this matter, it was determined that approximately one full day of hearing time would be sufficient. The parties agreed to schedule the Due Process Hearing for June 6, 2013; and a Prehearing Order was issued May 22, 2013. On May 30, 2013, the parties filed their five-day disclosures, as required.

The Due Process Hearing was held as scheduled on June 6, 2013. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: **P-1 through P-12.**

Respondent's Exhibits: **R-1 through R-5.**

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

Petitioner's Witnesses: (1) Parent/Petitioner; (2) Social Worker, District Charter; and (3) Educational Director, Private School.

Respondent's Witnesses: DCPS presented no witnesses and rested on the record following Petitioner's case.

The parties presented oral closing statements on the record at the conclusion of the June 6, 2013 hearing.

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The HOD deadline is **June 18, 2013**.

## **III. ISSUES AND REQUESTED RELIEF**

Pursuant to the Prehearing Order, and as modified and stipulated at the due process hearing, the sole issue presented for determination at hearing is:

**Failure to Provide Appropriate Placement/Location** — Did DCPS deny the Student a FAPE by failing to identify and provide an appropriate placement and/or location of services for Student under the IDEA and D.C. Code § 38-2561.02(b), in that (i) District Charter cannot implement Student's current individualized education program ("IEP"); and (ii) Student requires a small structured therapeutic program with the behavioral and academic supports he needs?

The Prehearing Order had also specified an issue regarding DCPS' alleged failure to implement Student's IEP since January 2013, but Petitioner withdrew that issue at the outset of the due process hearing based on the parties' five-day disclosures and stipulations. The parties stipulated and agreed on the record that: (1) Student's current IEP is dated February 4, 2013, and provides 23 hours per week of special education services in a combination setting, with 15 hours/week in an Outside General Education setting and eight hours/week in a General Education setting;<sup>2</sup> (2) Student needs a structured therapeutic program/setting to address his behavioral and academic issues; and (3) District Charter cannot implement Student's IEP and cannot provide the required therapeutic program/setting that Student needs. DCPS further agreed that it was willing to provide Student with a full-time (27.5 hours per week) outside general education IEP going forward.

As relief, Petitioner requests that DCPS be ordered to place and fund Student in an appropriate school/program that can implement his current IEP. *See Prehearing Order*, ¶ 6.<sup>3</sup> Petitioner identified Private School as an appropriate school/program in her five-day disclosures, and she has proposed that Student be placed there for the 2013-14 school year. DCPS identified Public School as an appropriate school/program in its five-day disclosures, and DCPS has proposed that Student be placed there for the 2013-14 school year.

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<sup>2</sup> Student's 2/4/2013 IEP also provides one hour per week of related services in the form of Behavioral Support Services in an Outside General Education setting. *See R-3*, p. 8.

<sup>3</sup> Petitioner had also requested an award of compensatory education for DCPS' alleged failure to provide services prescribed by the IEP since January 2013, *see Prehearing Order*, ¶ 6, but Petitioner withdrew that request at hearing after withdrawing the implementation issue.

#### **IV. FINDINGS OF FACT**

Based upon the parties' stipulations and the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Student is a ■-year old student who resides with Petitioner in the District of Columbia. *See Parent Test.*
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Until January 2013, Student's primary disability was classified as Emotional Disturbance ("ED"). *See P-1 (8/8/2012 IEP).* Based on recent evaluations, Student has now been determined to have Multiple Disabilities, including ED and Other Health Impairment ("OHI") due to his Attention Deficit Hyperactivity Disorder ("ADHD") condition. *R-1 (1/23/2013 MDT meeting notes). See also Parent Test.*<sup>4</sup>
3. During the 2011-12 and 2012-13 school years, Student has attended District Charter, which is a D.C. public charter school for which DCPS acts as LEA. He is currently in the 7<sup>th</sup> grade. *See Parent Test.; Social Worker Test.*
4. On or about August 8, 2012, Student's MDT met and developed an IEP, which provided 24 hours per week of special education services and one hour per week of related services. The special education services consisted of 12 hours per week of specialized instruction in a General Education (inclusion) setting and 12 hours per week of specialized instruction in an Outside General Education setting. It included appropriate instruction in Reading, Mathematics, and Written Expression, based on specified annual

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<sup>4</sup> The record reflects that Student has a long history of behavioral problems and therapeutic interventions since he was three years old. *See generally P-5 (4/23/2012 Psychiatric Evaluation); Parent Test.*

goals. The related services consisted of behavioral support services in a General Education setting. *See P-1, p. 7.*

5. In late August 2012, Student was referred for an independent psychological evaluation by a Licensed Clinical Psychologist. The evaluation included a clinical interview, social history, and records review. It also included a variety of testing methods including: Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”); Behavior Assessment System For Children, 2d Edition (“BASC-2”) - Parent, Teacher, and Student Ratings; Children’s Depression Inventory–2 (“CDI-2”); Scale for Assessing Emotional Disturbance (“SAED”); and Clinical Assessment of Attention Deficit-Child (“CAT-C”). Following the evaluation, a written report assessing Student’s cognitive and emotional functioning was completed on or about November 20, 2012. *P-3, pp. 1-4.*
6. With respect to cognitive functioning, the November 20, 2012, psychological evaluation report measured Student’s Full Scale IQ (“FSIQ”) as 68, which falls within the Borderline range. However, the FSIQ score did not adequately capture the variability in level of development of different cognitive skill sets. Student was found to have significant impairments in his verbal and processing speed skills. On the other hand, his perceptual reasoning and working memory skills, while underdeveloped, were relative strengths for him. *See P-3, pp. 5-7, 11-12.*
7. With respect to social/emotional and behavioral functioning, the November 20, 2012, psychological evaluation report noted that Student appeared to have difficulties sustaining attention, sitting still, and regulating his impulses, and also may be experiencing mood symptoms. *See P-3, pp. 8-10, 12-13.* Student was found to have ADHD, Combined Type, which was largely contributing to his behavioral difficulties and also impeding his

academic functioning. *Id.* The report concluded that he likely met the criteria of OHI due to his having ADHD. *Id.* The evaluator recommended that Student continue to receive specialized instruction, both inside and outside the classroom, for all core academic subjects, and that he would also benefit from continued behavioral support services. . *Id.*, pp. 14-15.

8. In November 2012, DCPS also administered the Woodcock-Johnson III Tests of Achievement to Student to measure Student's academic achievement and oral language abilities. *See P-4.* When compared to others of his age, Student's oral language abilities were measured within the low average range (standard score range 78-87; percentile range 7-19); and his Broad Reading (56-61), Broad Math (59-65), and Math Calculation (60-69) standard scores were all within the very low range (<1 to 2 %). These scores roughly approximated the 2d-3d grade levels in each area. Overall, Student's academic skills were considered very limited. *Id.*
9. On or about January 18, 2013, a DCPS School Psychologist completed a Review of Independent Assessment with respect to Student's independent psychological evaluation. She recommended that, given the current information, Student's MDT should consider if Student may require a change in disability classification to better meet his needs. *See P-6.*
10. On or about January 23, 2013, DCPS convened a meeting of Student's MDT/IEP Team at District Charter to review Student's recent evaluations. Based on DCPS' review of the independent psychological evaluation, Student's ADHD condition was found prevalent, and his disability classification was changed from Emotional Disturbance to Multiple Disabilities – OHI/ED. DCPS also reviewed the educational evaluation and found Student's achievement to be significantly low in all areas – math, reading, and written expression. *See R-1 (1/23/2013 meeting notes); P-9*

(same). The MDT/IEP Team determined that Student needed a more restrictive environment. *See P-11.*

11. On or about February 4, 2013, DCPS reconvened a meeting of Student's MDT/IEP Team at District Charter to review and revise Student's IEP based on the updated information. The Team decided to increase the amount of time Student would be pulled out of the General Education setting, from 12 hours per week to 15 hours per week of specialized instruction. *See R-2 (2/4/2013 meeting notes); R-3 (2/4/2013 IEP). See also P-10.*
12. The February 4, 2013 IEP developed by Student's MDT provides 23 hours per week of special education services and one hour per week of related services. The special education services consist of 15 hours per week of specialized instruction in an Outside General Education setting and eight (8) hours per week of specialized instruction in a General Education setting. The hours are divided equally into the three areas of Reading, Math, and Written Expression, according to specified annual goals. The related services consist of behavioral support services in an Outside General Education setting. *See P-2, p. 8; R-3, p. 8.*
13. According to the 2/4/2013 IEP, Student's disability significantly affects his access to, and progress in, the general education curriculum. Student's "deficiencies in controlling his impulses, regulating his behavior, and responding to negative stimulations in the classroom affect his ability to fully engage in class." *R-3, p. 7.* In addition, Student "is at times inappropriate and defiant"; and his "behavior often interferes with his learning when material is presented in a whole-class setting, instead of in a small group or one-on-one." *Id.* The IEP further states that Student "requires a small group setting in order to be academically successful." *Id., p. 8.*

14. In addition, substantial other evidence indicates that Student has experienced significant behavioral problems at District Charter, and that District Charter lacks an appropriate setting and behavioral management program adequate to meet Student's needs. *See R-1-3* (1/18/2013 physical aggression toward teacher found manifestation of disability); *Social Worker Test.* (describing conduct, including leaving class and becoming destructive of school property; Student needs a small-group setting of no more than 10-12 students, with a full-time behavioral technician assisting the teacher); *Parent Test.* (describing behavioral problems and disciplinary suspensions for, *inter alia*, hitting staff, fighting with other students, throwing chairs, and destroying property).
15. Subsequent to the 2/4/2013 MDT/IEP meeting, Student was referred to DCPS' "LRE Team" for consideration of alternative placements. The referral was made by the LEA Representative at District Charter because Student was having a "very difficult time" making progress in his current setting. *P-7.* On or about March 1 and 4, 2013, Student was observed by the LRE Team, which also reviewed background documents. The LRE Team found that the need for a more restrictive school environment could not be substantiated at that time and recommended further IEP Team review. *Id.*, p. 5.
16. Since March 2013, DCPS has not offered or proposed any alternative placement and/or location of services for Student, either at an MDT/IEP Team meeting or in a Prior Written Notice ("PWN").
17. At hearing, the parties stipulated and agreed on the record that: (a) Student's current IEP is dated February 4, 2013, and provides 23 hours per week of special education services in a combination setting, with 15 hours/week in an Outside General Education setting and eight hours/week in a General

Education setting; (b) Student needs a structured therapeutic program/setting to address his behavioral and academic issues; and (c) District Charter cannot implement Student's current IEP and cannot provide the required therapeutic program/setting that Student needs. DCPS further agreed that it would provide Student with a full-time IEP requiring 27.5 hours per week of services in an Outside General Education setting going forward.

18. On or about May 21, 2013, Student was accepted at Private School. *See P-12*. Private School offers a full-time, outside general education program in grades 3 through 12, primarily for ED students but also for students with other conditions including multiple disabilities. *Priv. Sch. Test*. The school provides specialized instruction and related services, including behavioral support and counseling, to meet IEP requirements. The school provides a structured therapeutic program/setting through (*inter alia*) "at the moment" crisis counseling staff, individual and group behavioral counseling, and an overall school-wide behavior management system. *Id.* Student would be placed into a classroom with eight other students in the 7<sup>th</sup>-8<sup>th</sup> grade, a certified special education teacher, and a teaching assistant (*i.e.*, 9 to 2 student/adult ratio). *Id.* Private School is on the OSSE-approved list of non-public schools for DCPS students. *Id.*

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

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. "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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public

Education (FAPE).” 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer’s determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

In this case, the Hearing Officer concludes that Petitioner has met her burden of proving by a preponderance of the evidence that DCPS denied Student a FAPE by failing to identify and provide an appropriate placement and/or location of services for Student under the IDEA and D.C. Code § 38-2561.02(b). Accordingly, appropriate relief is granted in the form of the prospective placement requested by Petitioner.

**A. Issue/Alleged Denial of FAPE**

FAPE means “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. “The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The “IEP must be ‘reasonably

calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’ *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, statutory law in the District of Columbia requires that “DCPS shall place a student with a disability in an appropriate special education school or program” in accordance with the IDEA. D.C. Code 38-2561.02 (b). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”). Educational placement under the IDEA must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

While enrollment in charter schools is a matter of parental choice under D.C. law, and Petitioner voluntarily enrolled Student at District Charter, DCPS as LEA had an obligation to propose an appropriate alternative placement once it became clear that District Charter could not meet Student’s defined special education needs. *See* 5-E DCMR §§ 3019.4, 3019.8 (a). DCPS has failed to meet this obligation here.

The parties stipulated and agreed that Student needs a structured therapeutic program/setting to address his behavioral and academic issues. They also stipulated and agreed that District Charter cannot implement Student’s current IEP

and cannot provide the required therapeutic program/setting that Student needs. Hence, District Charter is not an appropriate placement and/or location of services for Student.<sup>5</sup>

The undisputed evidence also shows that District Charter requested a DCPS placement review, that DCPS commenced such review, and that DCPS never identified or proposed any alternative school/program for Student over the course of the next few months. DCPS thus defaulted in its obligation to provide an appropriate placement and/or location of services that could meet Student's special education needs. This failure amounts to a denial of FAPE.

### **B. Appropriate Relief**

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Where the school system defaults in its obligation to propose an appropriate placement in accordance with IDEA requirements, such equitable relief may include either tuition reimbursement or prospective private placement, which is the relief requested by Petitioner in this case. *See, e.g., Burlington*, 471

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<sup>5</sup> It does not matter whether District Charter (or the alternatives proposed by the parties, *see Part B, infra*) are viewed as "placements" or "locations of services" in this case. "Under the IDEA, an appropriate location of services is one which can implement a student's IEP and meet his specialized educational and behavioral needs." *James v. District of Columbia*, Civ. Case No. 12-376 (RJL) (D.D.C. June 9, 2013), slip op. at 8-9, *citing* 20 U.S.C. 1401 (9), and *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008). A change in location of services may also constitute a change in educational placement if the educational settings are substantially and materially different. *See James*, slip op. at 7, *citing A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F. 3d 674 682 (4<sup>th</sup> Cir. 2004) (no change in placement if "new setting replicates the educational program contemplated by the student's original assignment"). The distinction is relevant primarily to procedural issues concerning parental participation, which is not involved here. Under either formulation, District Charter fails, consistent with the parties' stipulations.

U.S. 359, 369 (1985); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Wirta v. District of Columbia*, 859 F. Supp. 1 (D.D.C. 1994),

“Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C.Cir.2005) (citing *Rowley*, 458 U.S. at 202). “Because placement decisions implicate equitable considerations, moreover, courts [and hearing officers] may also consider the parties’ conduct.” *Id.* <sup>6</sup>

In this case, Petitioner proposes that Student be placed at Private School as a remedy for DCPS’ denial of FAPE. DCPS argues that this request should be denied because Public School would be an appropriate placement and/or location of services for Student.

The undisputed evidence shows that Private School would be an appropriate placement and/or location of services for Student under the relevant factors described in *Branham*. The nature and severity of the student’s disability, the student’s specialized educational needs, the link between these needs and the services offered by Private School, and the extent to which the placement

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<sup>6</sup> As the Court of Appeals explained in *Branham*, “an award of private-school placement is not...retroactive relief designed to compensate for *yesterday’s* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.” 427 F.3d at 11 (emphasis in original). *Branham* makes clear that prospective private placement awards “must be tailored to meet the child’s specific needs” through a fact-intensive inquiry. *Id.* at 11-12. “To inform this individualized assessment, ‘[c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.’” *Id.* at 12, quoting *Carter*, 510 U.S. at 16; see also *Reid*, 401 F.3d at 523-24.

represents the least restrictive environment all appear to support the requested relief. *See Pet. Test.; Priv. Sch. Test.; Social Worker Test.; Findings*, ¶ 18. Thus, Private School has been demonstrated to be a good fit for the Student; and it would provide educational benefit to Student, including small-group academic instruction and behavior management. *Id.* Moreover, it is the *only* school/program before the Hearing Officer that has been shown (a) can implement his IEP (including as it is proposed to be amended by DCPS to provide a full-time program) and (b) can meet the Student's stipulated need for a structured therapeutic program/setting to address his unique behavioral and academic issues.

In contrast, DCPS presented no evidence to show that Public School would be able to implement Student's IEP or would otherwise be an appropriate placement and/or location of services for Student. Because DCPS and Student's MDT/IEP Team never made any determination to place Student at Public School prior to hearing,<sup>7</sup> Public School could only be considered as an equitable remedy for the denial of FAPE adjudicated herein. But the Hearing Officer was presented no facts on which to enter such relief. Indeed, the only testimony on this subject (presented by Petitioner) suggested that the school could *not* offer a structured therapeutic program/setting and would *not* be a good fit for Student. *See Social Worker Test.; Parent Test.*<sup>8</sup>

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<sup>7</sup> There is no dispute that a proposed change from District Charter to Public School would have required parental participation and an MDT determination, even though it is his neighborhood school, since the new setting would not replicate the educational program contemplated by the student's original assignment. *See note 5, supra.*

<sup>8</sup> Nor is Public School entitled to any statutory priority under D.C. Code 38-2561.02 (c) since such placement was not made in accordance with IDEA requirements and has not been shown to be appropriate for Student.

Based on the consideration of the entire record herein, the Hearing Officer concludes that Private School would be an appropriate educational placement and/or location of services based on its ability to implement Student's IEP and the fit between his needs and the services offered at that school/program. It therefore would be an appropriate equitable remedy for DCPS' denial of FAPE.

## **VI. ORDER**

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

1. Respondent District of Columbia Public Schools ("DCPS") shall place and fund Student at **Private School**<sup>9</sup> for the **2013-14 school year**, with transportation; and
2. Within **30 calendar days** of Student's enrollment at Private School, DCPS shall convene a **meeting of the Student's MDT/IEP Team to review and revise Student's IEP**, as appropriate and consistent with DCPS' stipulation in this case: **(a)** to provide at least 27.5 hours of specialized instruction and related services in an Outside General Education setting; and **(b)** to make other appropriate changes necessary to provide for a structured therapeutic program and setting.



Dated: June 18, 2013

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Bruce Ryan, Impartial Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

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

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<sup>9</sup> **Private School** is identified in the Appendix to this HOD.