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

STUDENT,[1] **By and through PARENT,** ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: March 21, 2011**

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed January 3, 2011, on behalf of a -year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA, and who currently attends a therapeutic residential program outside the District of Columbia ("Residential Program") where he was parentally placed in April 2010.

Petitioner is the Student's father. He claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (a) failing to timely propose an appropriate program and placement during the 2009-10 School Year; (b) failing to propose an appropriate individualized education program ("IEP") for the 2010-11 School Year; and (c) failing to place the Student in a residential program for the 2010-11 SY. *See Exhibit -1* (Due Process Complaint, filed Jan. 3, 2011), p. 7. Petitioner seeks reimbursement for the costs of placing the Student at Residential Program since April 2010, as well as a separate program a month earlier.

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

DCPS filed its Response on January 13, 2011, which responds that DCPS has not denied the Student a FAPE. Petitioner waived resolution in his Complaint, and DCPS waived resolution in writing on January 21, 2011.

A Prehearing Conference ("PHC") was held on January 24, 2011, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order*, issued Jan. 31, 2011), ¶¶ 7-8. The parties agreed to schedule the due process hearing for two full days.

Disclosures were filed by both parties, as directed, by February 18, 2011, and the Due Process Hearing was held in Room 2006 on February 28 and March 1, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: -1 through -54.

Respondent's Exhibits: R-1 through R-25.

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

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Educational Consultant; (3) Clinical Director, Residential Program; (4) Academic Director, Residential Program; and (5) Clinical Psychologist.

Respondent's Witness: Ashley Lozano, Compliance Case Manager (CCM).

At the close of the hearing, the parties agreed to submit written closing statements by March 11, with the Hearing Officer's Determination due March 21, 2011. The Hearing Officer granted a continuance motion to that effect, which was approved by the Chief Hearing Officer pursuant to the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. Both parties submitted written closing statements on March 11.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The HOD deadline is March 21, 2011.

III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

(1) **Failure to Propose Appropriate Program/Placement (2009-10 SY) —** Did DCPS deny the Student a FAPE by failing to timely propose an appropriate program and placement during the 2009-10 School Year, in approximately March/April 2010?

(2) **Inappropriate IEP (2010-11 School Year) —** Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP for the 2010-11 School Year?

(3) **Inappropriate Placement (2010-11 School Year) —** Did DCPS deny the Student a FAPE by failing to place him in a residential program for the 2010-11 School Year?

As relief, Petitioner requests that: (a) DCPS be ordered to reimburse him for the cost of placing the Student at a residential "wilderness program" from March to April 2010; (b) DCPS be ordered to reimburse him for the cost of placing the Student at a second residential program from April 2010 to the present; and (c) the Student be prospectively placed at the current residential program.

IV. FINDINGS OF FACT

1. The Student is a -year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. *See R-5; R-11*; *R-23.* His current primary disability is Other Health Impairment ("OHI"), based on his diagnosed ADHD condition. *R-19; R-23; R-24.*
2. The Student currently attends a therapeutic residential program outside the District of Columbia ("Residential Program") where he was unilaterally placed by Petitioner in April 2010. *See -1;. -54; Parent Testimony.*

3. Prior to that date, DCPS funded the Student's placement at a non-public special education day school in D.C. primarily designed for students with learning disabilities (the "Private School"). The placement and funding of the Student at Private School was originally made pursuant to an HOD issued by another hearing officer in November 2007. *See R-1; R-2.* It is undisputed that the Student attended Private School and received educational benefit from its program for several years. -*1*, p. 3.

4. During the 2009-10 school year, when the Student was in grade, he began to experience difficulties regulating his behavior and showed signs of increased emotional distress. These difficulties exhibited themselves primarily, but not entirely, outside of school. *See e.g., Parent Testimony;* *7* (noting five police reports, not coming home at night, drinking, lying, stealing father's credit cards, property destruction, and acts of violence). However, they also appear to have impeded his learning and adversely affected his academic and educational performance. *See, e.g., Parent Testimony; Clinical Psychologist Testimony;* *17* (as Student's behaviors escalated, he "became unable to learn at his school," and "became unable to function in a school setting"); *40*, pp. 4-5 ("other than lying, these particular behaviors were not noted in school, although they certainly appeared to have negatively influenced his academic performance"; Student "wasn't paying attention in classes [and] wasn't doing any work").

5. In late December 2009, a meeting was held at Private School with Petitioner (but without DCPS' participation) to discuss the Student's poor academic performance, behavioral issues, and whether Private School continued to be the right placement. *See* -*7; Parent Testimony.* The Private School followed up on 1/3/2010 with an email to Petitioner emphasizing "the new level of concern being raised; [that] despite significant support, he is exhibiting the same difficulties, both academically and behaviorally, that he did in grade." *R-7.*

6. In late February 2010, the Private School issued its Annual Progress Report for the Student, which recommended that he remain in the school for the rest of the 2009-10 school year. *R-16.* It noted improvements, but also indicated significant areas of concern for the Student including class attendance, and incomplete or late assignments. *See, e.g., id.*, pp. 000179-82. The Progress Report included a January 2010 Individual

Psychotherapy Progress Report, which stated that the Student "remains a teen at risk for making poor decisions with respect to academics and rules at home," and that it is "imperative that [Student] begin to show some ongoing motivation about his academics and that he be able to consistently follow the rules both at home and at school." *R-16,* p. 000199. *See also* *-7* (3/30/2010 MDT meeting notes) (statement of Private School's High School Coordinator that the Student "lied often in school").

7. During the 2009-10 school year, the Student's grade point average also deteriorated, to a cumulative GPA of 1.88. His grade GPA was only 1.06, with an F in English and D's in four other subjects. *-10.* This compared with a 2.34 GPA in grade and a 2.01 GPA in grade. *Id.*

8. On or about March 6, 2010, Petitioner removed the Student from Private School and enrolled him in "a wilderness therapy program designed to help teens address school and family difficulties." *-1,* p. 4. *See also* *-5; Testimony of Parent & Educational Consultant.* The program had little or no academic component. *Educ. Consult. Testimony.* Petitioner did not provide any prior notice of this placement to DCPS. The Student remained there for approximately six weeks, until mid-April 2010. *Id.*

9. On March 9, 2010, DCPS convened an IEP team meeting at Petitioner's request "to discuss current behaviors at home that jeopardize [Student's] safety in the community and is having a negative impact in school." *R-8* (3/9/2010 meeting notes), p. 1. At this meeting, Petitioner and his attorney informed DCPS that the Student had been placed by his father at the Wilderness Therapy Program on March 6, and the team noted that the "decision was made independent of [Private School] and DCPS." *Id.,* p. 2. The DCPS "Placement Specialist asked about precipitating circumstances that led to this placement"; and Petitioner "stated that [Student's] continued unsafe behaviors at home prompted this sudden placement." *Id.* The team then scheduled a further IEP meeting for March 30 to discuss progress at the Wilderness Therapy Program and appropriate placement thereafter. *Id.*

10. On March 30, 2010, the Student's IEP team reconvened. The meeting included a further review of events that led to his placement in the Wilderness Therapy Program and his current condition. *R-10* (3/30/2010 meeting notes). Petitioner's counsel discussed the

Student's need for a residential placement. *Id.*, p. 2. DCPS "expressed concern about the lack of behaviors in school not reflected from behaviors at home," and indicated that a psychological assessment should be completed as soon as possible. *Id.*, p. 3. DCPS also requested school reports and other documentation to establish the appropriateness of placement in a more restrictive environment. *Id.*, p. 4.

11. The Student's IEP developed on March 30, 2010, provided for continued full-time specialized instruction and related services in a special education setting. *R-11.* The IEP also continued to indicate that the Student had a Specific Learning Disability. *Id.*, p. 2.

12. On April 5, 2010, the DCPS Placement Specialist sent a letter to Petitioner's attorney formalizing DCPS' request for documents relating to the Wilderness Therapy Program "to assist the MDT in making the best possible decision in regards to placement for [Student]..." *-9.*

13. On or about April 16, 2010, upon discharge from the Wilderness Therapy Program, Petitioner enrolled the Student at Residential Program. Petitioner did not provide any prior notice of this placement to DCPS. *Parent Testimony.*

14. On or about May 11, 2010, Petitioner responded to DCPS' April 5 letter by providing information and documents, including (a) a letter dated 3/29/2010 from the Student's therapist at the Wilderness Therapy Program, (b) an Initial Treatment Plan dated 4/16/2010 from the Residential Program, and (c) a letter dated 5/10/2010 from a therapist at the describing work with the Student and his father. *-19; see also -6, -12, -16.* This was the first communication to DCPS regarding the Student's enrollment at the Residential Program specifically. In addition, on May 12, Petitioner forwarded a letter dated 5/11/2010 from a clinical psychologist working with the Student stating her opinion that he required a therapeutic residential setting at that time. *See -17; -21.*

15. A further IEP team meeting was scheduled to take place on May 13, 2010, *see* -15, but DCPS cancelled the meeting shortly before it was set to begin. DCPS' representatives did not provide any reasons for the cancellation.

16. On or about June 9, 2010, Petitioner filed a due process complaint alleging that DCPS failed to hold a timely IEP team meeting to review the requested information and propose a placement. *22.*

17. On or about June 17, 2010, prior to the date set for hearing on the complaint, DCPS convened an IEP team meeting with Petitioner and his attorney participating. *R-17; 23.* DCPS' participants included a new Placement Specialist and Program Manager who had not participated in the Student's prior meetings and appeared not to have copies of the documents provided by Petitioner the previous month. *R-17.* Petitioner updated the IEP team concerning the Student's parental placements, and provided a written release for DCPS to obtain further information and documents from the Residential Program. *Id.* The following week, Petitioner also provided consent for the release of education records from the Wilderness Therapy Program. *R-14.*

18. On or about July 14, 2010, DCPS adopted a Student Evaluation Plan ("SEP"), which provided that the Student should receive a comprehensive psychological evaluation to include social history and clinical components, in addition to cognitive and academic functioning assessments. *R-15.* Petitioner agreed to the proposed evaluations, *id.,* p. 2, and he "subsequently withdrew his due process hearing request in order to allow the process to be completed." *1,* p. 5. *See also* *-33* (Order of Withdrawal dated 7/21/2010).

19. On or about August 12, 2010, Petitioner's attorney sent a letter to DCPS (addressed to Dr. Richard Nyankori, Deputy Chancellor, Special Education), to confirm that the Student would be attending the Residential Program for the 2010-11 school year and that "we will be continuing to seek public funding." *-36.* It does not appear that DCPS ever responded directly to this letter.

20. On or about August 19, 2010, Petitioner submitted a copy of the most recent Individual Service Plan Review for the Student from the Residential Program, and stated that "DCPS can now move forward with the evaluation process." *-37.*

21. Pursuant to the SEP, DCPS initially sought to evaluate the Student during a brief home visit scheduled for August 20-23, 2010. However, Petitioner declined to make the Student available based on the recommendation of the Residential Program's Clinical Services Coordinator, who advised that educational/psychological testing at that time would interfere with the purpose of the visit (*i.e.*, to work on the father-son relationship). *See* -*35* (7/29/2010 letter from Clinical Services Coordinator); *Parent Testimony.*[2]

22. DCPS then arranged for a comprehensive psychological evaluation of the Student to be conducted by an independent clinical psychologist located near the Residential Program. The evaluation was thereafter completed, [3] and a written evaluation report was prepared on October 4, 2010. -*40.* The report found, *inter alia,* that: (a) updated testing suggested "considerable improvement" in the Student's behavioral and school-related difficulties "in a highly controlled environment"; (b) the Student had made "considerable academic improvement" since arriving at the Residential Program; (c) he appeared to be demonstrating "considerably fewer ADHD characteristics" in that program; and (d) enrollment in the Residential Program appeared to have played a significant factor in these improvements. *Id.,* pp. 10-11. Overall, the report concluded that the Student "appeared to have made progress in all areas in the most restrictive placement among his various placements" (*i.e.,* general education, private day school, and residential); and that "[b]ased on the dramatic difference between his academic grades and teacher ratings on the BRIEF and BASC at [Private School] and [Residential Program], it is quite possible that ***at this point in time*** the conditions inherent in a most restrictive setting are necessary for his success." *Id.,* p. 12 (emphasis in original).

23. On or about October 15, 2010, DCPS convened a meeting of the Student's MDT/IEP team to review the 10/4/2010 comprehensive psychological evaluation and other updated

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[2] Ironically, DCPS staff also apparently traveled to the Residential Program to observe the Student on or about August 20, 2010, without communicating with the school or Petitioner and without realizing that the Student was in D.C. at that time. *See* -*38* (8/30/2010 letter from petitioner's attorney to Richard Nyankori, Ph.D).

[3] The evaluation consisted of record review; classroom observation; interviews of parent, teacher, counselor, and Student; Wechsler Adult Intelligence Scale III; Woodcock Johnson Test of Achievement III; Behavior Assessment System for Children (BASC) Teacher Report; BASC Self Report; and Behavior Rating Inventory of executive Function (BRIEF) Teacher Form. -*40,* p. 2.

information. *R-19.* The DCPS Psychologist indicated that the 10/4/2010 evaluation report appeared to reflect academic and behavioral progress since his prior testing at Private School, that the Residential Program appeared to have "been instrumental to his progress," and that the MDT should "talk about whether the 7-month stay has been enough [for] him." *Id.*, p 1. The MDT discussed and determined that the Student's disability eligibility classification should be OHI based on a clinical diagnosis of ADHD, although Petitioner felt that the Student also met the criteria of serious emotional disturbance ("ED"). *Id.*, pp. 1-2. The MDT then reviewed and revised the Present Levels of Performance, goals, and objectives in the IEP. *Id.*, p. 2; *R-20* (attached mark-up of IEPs). Petitioner also requested DCPS to provide a full-time residential placement in a therapeutic setting. *R-19,* p. 2.

24. On or about November 22, 2010, DCPS reconvened the MDT/IEP team, with additional participants from the Residential Program including the Student's therapist. The therapist informed the team that the Student was doing well in school and in terms of his social/emotional issues, but that he did not think the Student could be successful in a non-residential placement. *R-24.* Petitioner again requested a full-time residential placement in a therapeutic setting. *Id.*, p. 2.

25. As a result of the 11/22/2010 team meeting, a revised IEP was adopted. *R-23.* The Student's primary disability is stated as OHI, and the IEP provides 25.5 hours per week of specialized instruction and two hours per week of behavioral support services in a setting outside general education. *Id.*, p. 5. Except for the social/emotional goals, Petitioner agreed with the goals in the revised IEP; and Petitioner agreed with the levels of specialized instruction and related services provided in the IEP. *Id. See R-23* (11/22/2010 IEP); *42* (same).

26. On or about November 22, 2010, DCPS also issued a Prior Written Notice stating that the IEP team proposes "an outside general education setting that has a therapeutic component to address [Student's] social emotional and academic needs." *R-22.* The notice went on to state that "the IEP team proposed referral[s] to the Lodge School, Frost, and Keller," and that Petitioner's attorney would encourage Petitioner to visit the schools. *Id.*, p. 2. *See also -43.* DCPS did not address how these suggested placements are reasonably calculated

to enable the Student to receive educational benefits. As of that date, DCPS appeared to concede that Private School was no longer an appropriate placement for the Student.

27. The Student has received meaningful educational benefit from the Residential Program. The school is implementing the Student's IEP; and he has made significant progress, both academically and emotionally, with the support of this program. The program has been able to address the Student's unique therapeutic needs while helping him to complete his academic studies so that he may successfully complete high school. *See, e.g.,* *17; 40; Testimony of Parent and Clinical Psychologist.* The Student is on track to graduate with a regular high school diploma this Spring (perhaps as early as mid-April 2011), and he has been accepted into Montgomery Community College. *See Testimony of Parent and Academic Director, Residential Program.*

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that DCPS did not make FAPE available to the Student in a timely manner, during both the 2009-10 and 2010-11 school years, as alleged by Petitioner. The Hearing Officer further concludes that the unilateral parental placement at Residential Program appears to have been appropriate, and the Student has received significant educational benefit from this program. Considering all relevant factors based on the record in this case – including the conduct of Petitioner and DCPS' opportunities to evaluate the Student – the Hearing Officer concludes that partial reimbursement should be granted as set forth herein.

Specifically, DCPS shall reimburse Petitioner for the invoiced tuition and related services of the Residential Program from April 16, 2010 to October 15, 2010 (approximately six months), but not to exceed the cost of the Private School program previously funded by DCPS for the 2009-10 school year. In addition, DCPS shall reimburse Petitioner for all invoiced tuition and related services of the Residential Program from October 16, 2010 to the present (approximately five months).

B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate IEP and/or propose an appropriate educational placement. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The 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); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issues/Denials of FAPE

1. Failure to Propose Appropriate Program/Placement (2009-10 SY)

Petitioner first claims that DCPS denied the Student a FAPE by "failing to timely propose a program and placement" during the 2009-10 school year. *-1,* p. 7. As discussed and clarified at the PHC, this claim relates to the time period of approximately March/April 2010, when Petitioner concluded that the Private School program funded by DCPS was no longer meeting the Student's needs. *See Prehearing Order,* issued Jan. 31, 2011), ¶ 7 (1). For the reasons discussed below, the Hearing Officer concludes that Petitioner has presented sufficient evidence to prevail on this issue.

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

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

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

FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982). [4] Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" [5] In addition, "[b]ecause the IEP must be 'tailored to the unique needs' of each child, *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. 1414 (b)-(d)." [6]

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 *(D.D.C.* 2008). *See also T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) ("Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs"). Like the IEP, a child's educational placement must be "reasonably calculated" to confer educational benefit. *Board of Education* v. *Rowley,* 458 U.S. 176 (1982). "If placement in a public or private residential program is necessary ..., the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. 300.104.

In this case, Petitioner presented substantial evidence to show that the Student's IEP and placement at Private School was no longer reasonably calculated to confer meaningful

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

[5] *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Fuhrmann* v. *East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

[6] *Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6. The issue of whether an IEP is appropriate is a question of fact for hearing. *See, e.g., S.H.* v. *State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

educational benefit on the Student as of March/April 2010, when Petitioner decided to remove the Student and place him in therapeutic settings – first, at the Wilderness Therapy Program, and then at the Residential Program. *See Findings,* ¶¶ 4-7, 22-23. In response, DCPS presented no testimony from anyone at Private School or anyone within DCPS who was involved in the Student's educational program and placement during the 2009-10 school year. The only witness DCPS presented at hearing (Ms. Lozano, its current CCM) was not involved in the Student's case when he was at Private School and could not provide any information about that program or placement.[7]

Petitioner also showed that DCPS failed to timely propose an alternative program and placement during the remainder of the 2009-10 school year. While DCPS promptly convened two IEP team meetings in March 2010 – at which the team appeared to recognize that the Student could not continue his education at Private School – DCPS did not follow up to offer any specific alternative program and placement until some 8 months later, in November 2010. The Hearing Officer concludes that, in so doing, DCPS failed to act in a reasonably timely manner under the circumstances.

Accordingly, Petitioner has met his burden of proving by a preponderance of the evidence that DCPS denied a FAPE to the Student during the 2009-10 school year, to the extent set forth above.

2. **Inappropriate IEP and Placement (2010-11 School Year)**

Petitioner next claims that DCPS denied the Student a FAPE during the 2010-11 school year by failing to propose an appropriate IEP and failing to place him in a residential program (Issues 2 and 3 above). *See -1,* p. 7; *Prehearing Order* (issued Jan. 31, 2011), ¶ 7 (2), (3).

The IDEA requires that, at the beginning of each school year, DCPS must have an appropriate educational program in effect for each student. *See* 34 C.F.R. 300.323 (a). By the time the 2010-11 school year was set to begin, based on the information that DCPS had been able to assemble, DCPS was aware that the Student's prior IEP and placement no longer met his

[7] *Cf. Petway v. District of Columbia,* 2005 WL 3276349 (D.D.C. 2005) (granting tuition reimbursement where, *inter alia,* parent presented witnesses to support position that public school IEP and placement were inappropriate and DCPS presented no evidence at hearing to support appropriateness of proposed public placement).

needs and were no longer capable of providing a FAPE to the Student. Moreover, DCPS ultimately confirmed this conclusion some three months later, in late November 2010.

Although factors outside DCPS' control also may have contributed to the delay in reaching such conclusion (see discussion in Part D below), Petitioner proved by a preponderance of evidence that DCPS failed to offer the Student an appropriate program and placement designed to meet his unique educational needs in a timely manner. Indeed, it appears that DCPS still has not proposed any specific educational placement that has been shown to be reasonably calculated to provide meaningful educational benefit to the Student and that can meet his unique educational needs. Petitioner presented extensive testimony from experts and individuals who know the Student well, while DCPS failed to present any knowledgeable, contradicting witnesses who could testify about the Student's specific needs and how they would be met in any of the three day school programs to which Petitioner was referred. Accordingly, the Hearing Officer concludes that, to this extent, Petitioner met his burden of proving that DCPS denied the Student a FAPE during the 2010-11 school year.

This does not necessarily mean, however, that DCPS was required to place the Student in a residential program for this entire school year. (Nor, as discussed further below, does it mean that DCPS must now reimburse Petitioner for all costs of such a unilateral placement as relief for its denial of FAPE.) To determine whether a residential placement is appropriate, courts and hearing officers generally must analyze "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." *McKenzie v. Smith,* 771 F.2d 1527 (D.C. Cir. 1985), *quoting Kruelle v. New Castle Country School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981). Here, there appears to be conflicting evidence on this issue in the administrative record, and it is a close question.[8] However, as more information was gathered

[8] *See, e.g., Ashland School Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9th Cir. 2009) (residential placement for high school student with ADHD held not necessary for student to receive a FAPE where record showed that she did not engage in disruptive behaviors in class, was well-regarded by her teachers, was able to learn in general education environment, and received good grades; parents enrolled student in residential facility because of her "risky" and "defiant" behaviors at home, including "sneaking out" of the house at night); *Linda E. v. Bristol Warren Regional School Dist.*, 55 IDELR 218 (D.R.I. 2010) (student with increasingly disturbing behavior at home and in school that impacted performance; "while the record reflects that there are particular difficulties in the relationship and interaction S.E. had with her mother, S.E.'s difficulties and troubling conduct were not limited to the home setting.").

and presented to the IEP team over the course of the year, the appropriateness of the residential placement option for this particular Student became more apparent. By the mid-October 2010 team meeting – following the independent evaluation of the Student and further progress at the Residential Program – a preponderance of the evidence appears to support a conclusion that the Student's emotional and educational needs could not be separated and that a residential placement was therefore appropriate. *Cf. McKenzie v. Smith, supra.*

D. Petitioner's Requests for 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). In this case, the primary relief sought is retroactive reimbursement of tuition and other costs of Petitioner's unilateral parental placements.

IDEA provides that "a court or a hearing officer ***may*** require the agency to reimburse the parents for the cost of [private school] enrollment ***if*** the court or hearing officer finds [1] that the agency had not made FAPE available to the child in a timely manner prior to that enrollment ***and*** [2] that the private placement is appropriate." 34 C.F.R. § 300.148 (c) (emphasis added). [9] *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006). Moreover, "equitable considerations are relevant in fashioning relief," *Burlington,* 471 U.S. at 374, and courts and hearing officers have "broad discretion" in the matter. *Id.* at 369. The Hearing Officer therefore "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter,* 510 U.S. at 16.

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[9] In adopting this rule, the U.S. Dept. of Education appeared to suggest that such standards should apply not only to public agencies' own programs for educating children with disabilities, but also to "***public agency placements of children with disabilities in private schools...***" 71 Fed. Reg. 46,599 (2006) (emphasis added; citing *Carter*). *See also* 34 C.F.R. 300.148 (c) (applying to reimbursement to parents of children with disabilities "who previously received special education and related services ***under the authority of a public agency***") (emphasis added).

IDEA further provides that the cost of reimbursement may be reduced or denied if: (1) "at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team ...[of] their intent to enroll their child in a private school at public expense"; or (2) at least 10 business days prior to removal, the parents did not give written notice of their intent to the public agency; or (3) "upon a judicial finding of unreasonableness with respect to the actions taken by the parents." 34 C.F.R. §300.148 (d). *See also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009), slip op. at 16-17 ("When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted").

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner, during both the 2009-10 and 2010-11 school years. The Hearing Officer further concludes that the unilateral private placement at Residential Program appears to be proper, as the Student has received educational benefit from this program. He has made very significant progress, both academically and emotionally, with the support of that program. *See, e.g., Testimony of Private School Representatives and Clinical Psychologist; ·40* (10/4/2010 report from clinical psychologist); *·52* (August 2010 progress report); *·53* (Semester Report Card); *Findings,* ¶ 27. The remaining question is "the appropriate and reasonable level of reimbursement that should be required" based on all relevant factors and equitable considerations. *Carter,* 510 U.S. at 16; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009).

Considering all relevant factors based on the record in this case – including the conduct of Petitioner and DCPS' opportunities to evaluate the Student – the Hearing Officer concludes that partial reimbursement should be granted as set forth herein. Specifically, DCPS shall reimburse Petitioner for the invoiced tuition and related services of the Residential Program from April 16, 2010 to October 15, 2010 (approximately six months), ***but not to exceed*** the cost of the

Private School program previously funded by DCPS for the 2009-10 school year.[10] In addition, DCPS shall reimburse Petitioner for all invoiced tuition and related services of the Residential Program from October 16, 2010 to the present (approximately five months), without limitation. However, Petitioner is not entitled to any reimbursement for the costs of the Wilderness Therapy Program attended by the Student in March-April 2010. The reasons for this decision include the following:

First, Petitioner gave no prior notice to DCPS regarding either of the unilateral parental placements, as required by the IDEA and dictated by equitable principles. Petitioner did not inform DCPS of the specific Residential Program until May 11, 2010, almost a month after placing the Student there, and over two months after removing him from DCPS' Private School placement. The lack of notice operated to deprive DCPS of a reasonable opportunity to review the facts and consider the appropriateness of any changes to the Student's educational program.

Second, the "emergency" circumstances necessitating Petitioner's making such a "sudden placement" in March/April 2010 appear to have been primarily the Student's "continued unsafe behaviors at home" (*R-8*, p. 2; *Parent Testimony*) which educators were not observing in school at the time, although Petitioner believed them to be having a negative impact educationally. *Cf. Ashland School Dist. v. Parents of Student R.J.*, *supra*, 588 F.3d 1004 (9th Cir. 2009), *supra note 8*.

Third, the evidence indicates that the Wilderness Therapy Program is not a residential program designed to provide special education and related services to children with disabilities, 34 C.F.R. 300.104, but rather is a unique form of clinically-designed therapeutic program for struggling adolescents and their families. *See -46; Testimony of Educational Consultant.* There appears to be little or no academic component, with course credits "contextually based in the wilderness experience," and the program does not appear to include any specialized instruction for disabled students. *Id.*

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[10] Petitioner has been billed by Residential Program at the rate of per day, or approximately per 30-day month. *-45; Parent Testimony.* The annual rate equates to approximately on a 12-month basis. Tuition and fees for special education day schools such as Private School would generally fall in a significantly lower range, usually per year. The actual Private School charges for the 2009-10 and 2010-11 school years are not contained in the record, so the Hearing Officer cannot make the calculation in the Order.

Fourth, during the first several months following unilateral placement, DCPS was still attempting to obtain further information concerning the Residential Program to assess its appropriateness. DCPS was not provided with initial requested documentation until mid-May, and it did not obtain Petitioner's release of education records until June, 2010.

Fifth, DCPS was also in the process of evaluating the Student during this period. DCPS obtained Petitioner's consent to evaluate in June, developed an SEP in July, and then unsuccessfully sought to evaluate the Student during a home visit in August, before taking necessary steps to obtain a comprehensive psychological evaluation of the Student by an independent contractor located near the Residential Program. While DCPS might have moved more quickly between late March (when it decided an updated evaluation was needed) and mid-June, other aspects of the delay (e.g., location of the program, inability of the Student to meet with DCPS evaluators during August) do not appear to be the fault of DCPS. Consequently, at least until October, DCPS continued to lack sufficient evaluative data to support the Student's residential placement. DCPS then timely conducted an IEP meeting to review the evaluation.

As for Petitioner's request for prospective placement in the Residential Program, the evidence shows that the Student expects to graduate with a high school diploma within the next month. In light of this fact, the Hearing Officer concludes that any of DCPS' proposed alternative private day school placements would be unnecessarily disruptive at this point, and further, that an extensive analysis under *Branham v. District of Columbia,* 427 F.3d 7, 11-12 (D.C. Cir. 2005), is not warranted under the circumstances. DCPS will be ordered to partially fund the Student's placement at the Residential Program during April 2011, and if necessary through the end of DCPS' 2010-11 school year. If the Student's enrollment continues beyond that date, DCPS should convene an MDT/IEP team meeting to discuss and determine an appropriate placement for the succeeding school year.

VI. ORDER

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

1. Within 30 days of this Order, DCPS shall reimburse Petitioner for the costs of the Student's enrollment at the **Residential Program** [11] for: (a) the period from April 16, 2010 through October 15, 2010; ***provided, however***, that the reimbursable amounts shall not exceed the amount of tuition and fees that would have been charged by the **Private School** [12] during the same time period for the type of program previously funded for the Student by DCPS in the 2009-10 school year; and (b) from October 16, 2010 through April 2011, without limitation.

2. Petitioner's other requests for relief contained in the Due Process Complaint filed January 3, 2011, are hereby **DENIED.**

3. This case shall be, and hereby is, **CLOSED.**

IT IS SO ORDERED.

Dated: March 21, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

[11] **Residential Program** is identified in the Appendix to this HOD.

[12] **Private School** is identified in the Appendix to this HOD.