DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENTS,**[1] ***Petitioners,*** **v.** **DISTRICT OF COLUMBIA** **PUBLIC SCHOOLS,** ***Respondent.***	)	**Bruce Ryan, Hearing Officer** **Issued: November 25, 2012**

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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 September 11, 2012, on behalf of a now 14-year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student attends a non-public, special education day school ("Private School") located in the District of Columbia pursuant to parental placement.

Petitioners are the Student's parents. They claim that DCPS has denied the Student a free appropriate public education ("FAPE") by failing: (a) to timely evaluate her; (b) to timely find her eligible; (c) to find her eligible for speech/language services; and (d) to propose an individualized education program ("IEP") for the Student upon determining her eligibility. *See Administrative Due Process Complaint,* filed Sept. 11, 2012, pp. 3-7; *Prehearing Order* (Oct. 24, 2012).

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

On September 19, 2012, DCPS filed its Response to the Complaint, denying the allegations that it failed to provide a FAPE to the Student. DCPS responds that "students who have been placed by their parents in a private school, and who have indicated their desire for the student to remain in the private school" are not entitled to special education and related services pursuant to 34 C.F.R. 300.137 (a). *Response, pp. 1-2.* DCPS asserts that "[t]his student has always been in a private school at all times relevant to this [Complaint], and the parents have indicated a desire for the student to remain in a private placement." *Id., p. 2.* It further asserts that "DCPS is not obligated to develop IEPs or placements until such time as the student complies with the PRO policy to enroll and attend a DCPS school." *Id.* [2]

On September 26, 2012, the case was reassigned to this Hearing Officer, without a prehearing conference ("PHC") or due process hearing having been scheduled.

On September 27, 2012, a resolution meeting was held, which did not resolve the Complaint. The parties also did not agree to end the 30-day resolution period early. Accordingly, the resolution period ended on October 11, 2012. The 45-day timeline for issuance of the Hearing Officer Determination ("HOD") is November 25, 2012.

On October 16, 2012, a PHC was held to discuss and clarify the issues and requested relief. At the PHC, Petitioners indicated that they intended to file a motion for summary decision, and the parties agreed to a briefing schedule for the motion. The parties also agreed to schedule the due process hearing (if needed) for November 16, 2012. A Prehearing Order was issued to confirm the matters discussed and agreed at the PHC. Briefing and five-day disclosures were then completed by November 8, 2012.

On November 14, 2012, the Hearing Officer issued an Order regarding Petitioners' motion for summary decision. Having reviewed the motion, opposition and reply, together with supporting documentation, the Hearing Officer decided to exercise his discretion to defer ruling on the issues presented in the motion until the hearing convened to allow the parties to provide evidence relating to any potentially disputed facts. *See Special Education Student Hearing Office*

[2] On September 17, 2012, DCPS also filed a motion, which was styled a "Motion to Dismiss" but was based upon a statement of proposed "undisputed material facts." On September 20, 2012, Petitioners filed an opposition to that motion. The motion was pending when the case was reassigned on September 26, 2012. DCPS' motion to dismiss, as well as its motion for directed finding at hearing, shall now be deemed denied for the reasons stated in this HOD.

Due Process Hearing Standard Operating Procedures ("*SOP*"), §401.C (7). The Hearing Officer noted, *inter alia*, that Issues 1 and 2 as set forth in the Prehearing Order appeared to present fact questions for hearing; that Issue 4 and Petitioners' request for prospective placement relief may raise additional fact questions regarding whether the proposed private placement is appropriate for the Student; and that the legal determination under Issue 3 regarding DCPS' Private & Religious Office ("PRO") guidelines may benefit from development of a fuller factual record. [3]

The Due Process Hearing was held as scheduled on November 16, 2012. Petitioners elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioners' Exhibits: P-1 through P-34; P-36 through P-38.[4]

Respondent's Exhibits: DCPS-1 through DCPS-7. [5]

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

Petitioners' Witnesses: (1) Head of Junior High Program ("HJHP"), Private School (testifying as an expert in special education administration); (2) Speech/Language Pathologist ("SLP"), Private School; and (3) Father.

Respondent's Witness: (1) Ms. Debborah Lahre-Joyner, DCPS' School Psychologist; (2) Ms. Danielle Edmond, DCPS' Speech & Language Pathologist; and (3) Ms. Janis Bryant, Case Manager, DCPS PRO.

Following hearing, both parties filed written closing arguments by November 21, 2012.

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[3] To the extent necessary and consistent with the findings of fact and conclusions of law contained in this HOD, Petitioners' motion may now be deemed to be granted in part and denied in part on legal grounds.

[4] Petitioners withdrew Exhibit P-35 of their disclosures, which was the resume of an expert witness that they chose not to present.

[5] The Hearing Officer sustained Petitioners' objection to Exhibit DCPS-8 for the reasons stated on the record. Exhibit DCPS-8 consisted of selected pages of Federal Register commentary and a court decision that did not constitute evidence, but which the Hearing Officer ruled could be cited by DCPS as legal authorities in its closing argument and reviewed by the Hearing Officer in their entirety.

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 statutory HOD deadline is November 25, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the Prehearing Order, the issues presented for determination are:

(1) Failure Timely to Evaluate and Determine Eligibility — Did DCPS fail to evaluate the Student and find her eligible for special education and related services in a timely manner?

> Under this issue, the Hearing Officer will first determine whether DCPS has violated procedural requirements under the IDEA and D.C. Code §38-2561.02(a), and then determine whether any such procedural violation has had one or more of the substantive effects specified in 34 C.F.R. § 300.513 (a) (2).

(2) Failure to Find Student Eligible for Speech/Language Services — Did DCPS deny the Student a FAPE by failing to determine her to be eligible for speech and language services?

(3) Failure to Develop and/or Propose an IEP — Did DCPS deny the Student a FAPE by failing to develop or propose an IEP for the Student following determination of eligibility?

(4) Propriety of Parental Placement — If DCPS has denied the Student a FAPE, is the Lab School of Washington a proper educational placement?

In their Complaint, Petitioners requested that DCPS be ordered to: (a) reimburse Petitioners for the Student's placement at Private School during the 2011-12 school year; [6] and (b) place and fund the Student at Private School for the 2012-13 school year. Petitioners do not

[6] The Hearing Officer notes that Parents' Closing Memorandum requests only that DCPS be ordered to place and fund the Student at Private School for the 2012-13 school year. Thus, Petitioners no longer appear to seek reimbursement for the costs of their parental placement during the 2011-12 school year. In any event, because the Hearing Officer has determined that Petitioners did not meet their burden of proof on Issue 1, and DCPS has not been found to have denied the Student a FAPE prior to the 2012 summer, Petitioners are not entitled to receive reimbursement for the 2011-12 school year. *See* discussion, *infra.*

seek any compensatory education relief. *See Complaint, p.7; Prehearing Order* (Oct. 24, 2012), p. 3, ¶ 8.

IV. FINDINGS OF FACT

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

1. The Student resides in the District of Columbia with her mother, who is one of the Petitioners. *See Father's Test.* [7]
2. Since the beginning of the 2011-12 school year, the Student has attended Private School, which is a non-public day school located in the District of Columbia that provides full-time specialized instruction and related services to students with disabilities. The Student was placed there by Petitioners. *See Father's Test.* Prior to that school year, the Student attended another non-public school in a regular education setting. *Id.* [8] The Student has never been enrolled and attending a DCPS public school. *Id.*
3. On or about October 28, 2011, Petitioners referred the Student to DCPS and asked it to begin the process of evaluating the Student, determining her eligibility for special education and related services, and providing an offer of FAPE. DCPS' Private and Religious Office ("PRO") handled the referral. *Father's Test.; Bryant Test.; P10; P13.*
4. In December 2011, DCPS moved the PRO from its Early Stages facility to the DCPS' administration building at 1200 First Street, N.E., where Ms. Bryant became its Program Manager. *See Bryant Test.* Ms. Bryant obtained a copy of Petitioners' referral in late January 2012, and she convened a previously scheduled meeting with Petitioners to review the referral on February 9, 2012. *Id.; P21.*
5. At the February 9, 2012 meeting, the Student's multidisciplinary team ("MDT") reviewed existing data and agreed that additional information was needed. Petitioners indicated that they would provide the PRO Case Manager with documentation of speech

[7] The Student's parents are divorced. Her father shares joint custody and lives in Virginia. *Father's Test.* DCPS does not dispute the Student's residency in the District of Columbia.

[8] DCPS argues that "[t]here was no evidence to support the change from a regular education on grade level to an alleged need for a full-time special education segregated placement" at that time. *DCPS' Post-Hearing Brief,* p. 2. However, because no reimbursement is being sought or awarded for the 2011-12 school year, such facts would not be relevant to the issues presented in this case.

and language testing conducted at Private School. The MDT also agreed that a further psychological evaluation was warranted, including an observation of Student at Private School by DCPS' School Psychologist (Ms. Joyner). *See P21-3; DCPS-2.* DCPS then issued a Prior Written Notice ("PWN") confirming the proposed actions. *P21-4.*

6. On or about February 14, 2012, Petitioners signed the necessary consent forms for the proposed evaluations. A further MDT meeting was scheduled for March 22, 2012. *P19; P21-3; DCPS-5, p. 000046; Father Test.*
7. The March 22, 2012 MDT meeting was cancelled because DCPS personnel were unable to obtain access to Private School for their observations. *See DCPS-5, p. 000046; Bryant Test.; Joyner Test.; Edmond Test.*
8. On or about April 17, 2012, a further MDT meeting was held. By this time, Ms. Joyner and DCPS' Speech/Language Pathologist (Ms. Edmond) had observed the Student in her classroom at Private School. *DCPS-5, p. 000047.* However, Petitioners "requested that the review of the evaluations and eligibility be put on hold." *Id., p. 000046. See also Father's Test.* Petitioners indicated that the Student was doing "much more poorly" than when she was last evaluated psychologically in January 2010, and requested that additional observational data be included in the reports. *DCPS-5, p. 000047.* They also requested that Ms. Edmond consult with the SLP at Private School and include such information in her review. *Id. See also Joyner Test.; Edmond Test.; Bryant Test.*
9. A further MDT meeting was scheduled for May 11, 2012, but the meeting was cancelled by Petitioners' attorney. *See DCPS-5, p. 000047; Bryant Test.* The meeting was then rescheduled at Petitioners' request. *Id.*
10. On or about July 30, 2012, DCPS convened the rescheduled MDT meeting, with Petitioners in attendance. At this meeting, DCPS determined the Student to be eligible for special education and related services as a child with a disability under the IDEA. DCPS found that she met the eligibility criteria for Other Health Impairment ("OHI") due to her chronic health problems such as Attention Deficit Hyperactivity Disorder ("ADHD"), which adversely affects her educational performance. *DCPS-5; DCPS-7.* [9]

[9] The Student has been diagnosed with ADHD, Executive Dysfunction, and anxiety. *See DCPS-5.* Due to her disabilities, the Student's otherwise average academic abilities are impeded and she struggles with integrating multiple skills, maintaining attention in reading, negotiating spatial aspects of math, and organizational structuring in written expression. *See HJHP Test.; SLP Test.; Father Test.*

11. Upon finding the Student to be eligible, DCPS refused to develop an individualized education program ("IEP") for the Student. DCPS acknowledged that "parents and attorney are requesting an IEP for the student." *DCPS-5,* p. DCPS000048. However, DCPS informed Petitioners as follows: "Based on the current PRO guidelines, students are not eligible for an IEP unless they are enrolled and attending a DCPS Public School." *Id. See also DCPS-7; Bryant Test.; Father Test.*
12. On or about July 30, 2012, DCPS also found that the Student was not eligible to receive speech and language services, either in an IEP or as equitable services under an individual services plan ("ISP"). *See DCPS-5; DCPS-7.* Petitioners have shown that speech/language pathology services would assist the Student to benefit from special education. *See SLP Test.*
13. On or about August 6, 2012, Petitioners notified DCPS that they intended to maintain placement for the Student at Private School for the 2012-13 school year and requested public funding for that placement. *P33-2.* Petitioners stated that they were doing so because DCPS had denied the Student her right to an IEP and appropriate special education and related services. *Id.* Petitioners had previously contracted with Private School and had paid all tuition and fees for the 2012-13 school year in or about June 2012. *See Father's Test.*
14. Private School is a non-public school located in the District of Columbia that provides full-time special education to students with disabilities, including ADHD and other types of OHI, learning disabilities, and communications disorders. Private School is approved by the Office of the State Superintendent of Education ("OSSE") to provide special education services in the District of Columbia.
15. The parental placement at Private School is proper under the IDEA, and the Student is receiving significant educational benefit from the program. She is making academic and social/emotional progress in the program and is expected to continue to make progress there. Private School also appears to be the least restrictive environment to meet the Student's needs, according to the educational professionals who work with her and consistent with her prior evaluations and teacher recommendations.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioners carry the burden of proof on each of the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). "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. 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.

For the reasons discussed blow, the Hearing Officer concludes that Petitioners have failed to meet their burden of proof on Issue 1; Petitioners have met their burden of proof on Issue 2, to the extent described herein; and Petitioners have met their burden of proof on Issues 3 and 4.

Issue 1: Failure Timely to Evaluate and Determine Eligibility

D.C. Code § 38-2561.02 (a) provides that "DCPS shall assess or evaluate a student, who may have a disability and who may require special education services, ***within 120 days from the date that the student was referred*** for an evaluation or assessment" (emphasis added). As this statute has been construed by the courts, DCPS "must conduct a full and individual initial evaluation" within the required time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); 5-E DCMR §3005.2. This means that DCPS ordinarily must complete and review the initial evaluation in all areas of suspected disability, determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within 120 days. *See Hawkins v. D.C.,* 539 F. Supp. 2d 108 (D.D.C. 2008)*; D.C. v. Abramson,* 493 F. Supp. 2d 80, 85 (D.D.C. 2007); 5-E DCMR §§3002, 3013.

In this case, Petitioner referred the Student for evaluation on or about October 28, 2011. [10] DCPS did not hold its first meeting on the referral until February 9, 2012, approximately 104 days from the date

[10] DCPS complains that Petitioners submitted an outdated enrollment form to the neighborhood school, but that does not invalidate the referral. OSSE regulations impose on DCPS' PRO the obligation to supply the parent of a parentally placed private school child with the correct form at the time of the parent's request. *See* 5-E § 3004.1 (d) ("If the child to be referred does not attend a D.C. public school and the parent does not register the child to attend a D.C. public school at the time the referral is made, this referral shall be submitted by the parent to a site designated by the Superintendent ***on a form to be supplied to the parent by that site at the time of the parent's request.***") (emphasis added).

of the referral. Obviously, this pace was dilatory when measured against the statutory timeline. However, at that initial meeting, all team members (including Petitioners) appeared to agree that additional information was needed to conduct a full and fair evaluation of the Student, including updated assessments and observations. Petitioners then gave their written consent to proceed with such assessments. *See Findings,* ¶¶ 5-6. Following that, DCPS experienced delay in obtaining access to Private School for purposes of the observations, which was not the fault of DCPS. *Id.,* ¶ 7. At the next meeting in April, Petitioners then requested that DCPS' review of the Student's evaluations and eligibility be "put on hold" in order to gather additional evaluative data, and a further meeting in May was cancelled by Petitioners' attorney. *Id.,* ¶¶ 8-9. *See also Father's Test.* (cross examination).

Based on the foregoing facts and circumstances, the Hearing Officer concludes that Petitioners have not proved that DCPS should be found to have violated D.C. Code § 38-2561.02 (a)'s 120-day timeline requirement in connection with their referral. While DCPS was certainly heading in that direction by early February 2012, Petitioners appear to have initially acceded to a process in which further evaluative information was sought to be collected, and then specifically requested that the eligibility determination be held up for that purpose.

Even assuming *arguendo* that DCPS committed a procedural violation of D.C. Code § 38-2561.02 (a), such procedural delays give rise to viable IDEA claims only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006). In this case, Petitioners have not carried their burden of proof in that respect because they have not shown that any procedural delay in obtaining a timely initial evaluation ***during the 2011-12 school year*** either (i) impeded the Student's right to a FAPE, (ii) significantly impeded the parents' opportunity to participate meaningfully in the decision-making process regarding the provision of a FAPE, or (iii) caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513 (a) (2). Not surprisingly, Petitioners appear to have dropped their request for reimbursement of 2011-12 school year expenses. *See Parents' Closing Memorandum,* pp. 1, 14-16. The consequences of DCPS' failure to propose a valid, written IEP prior to the ***start of the 2012-13 school year*** [11] is addressed separately under Issues 3 and 4 below.

[11] *See, e.g., Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 5 (D.D.C. 2006); *Gerstmyer v. Howard County Pub. Sch.,* 850 F. Supp. 361, 365-66 (D. Md. 1994); *Parents' Closing Mem.,* pp. 4-5.

Issue 2: Failure to Find Student Eligible for Speech/Language Services

Under Issue 2, Petitioners claim that DCPS denied the Student a FAPE by "failing to find her eligible for speech/language services." *Complaint,* p. 7; *see also id.,* p. 6. Because DCPS has already determined the Student to be eligible for special education based on her OHI/ADHD disability, this amounts to an argument that her IEP should address her speech/language issues with appropriate "related services" under the IDEA, as Petitioners' closing brief appears to recognize. *See Parents' Closing Memorandum,* pp. 5-6.

DCPS defends this claim only by arguing that "speech services are irrelevant" because it asserts that Petitioners "refused the DCPS offer of an ISP." [12] Since DCPS refused to develop any IEP for the Student, it did not consider the content of her IEP, including whether speech/language services should be provided as a related service.

At hearing, Petitioner presented sufficient evidence to show that such services should be included as part of the Student's educational programming. Both the therapist who conducted the comprehensive speech/language evaluation of the Student and her current therapist who also updated her testing concur that the Student has significant language issues that require remedial therapy. *See P8; P38; SLP Test.* While DCPS' speech/language pathologist Ms. Edmond felt that the Student's test results were primarily affected by her attention disorder (*see Edmond Test.*), her opinion is entitled to less weight since she has not tested or worked with the Student. *Cf. McKenzie v. Smith,* 771 F.2d 1527, n. 17 (D.C. Cir. 1985). Moreover, even accepting her rationale for not finding a speech and language impairment, this would not preclude provision of speech/language therapy as a related service to assist the Student to benefit from special education, as DCPS' witnesses appeared to acknowledge. *See, e.g., Joyner Test.* [13]

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[12] *DCPS' Post-Hearing Brief,* filed Nov. 20, 2012, p. 1 n. 1; *Response in Opposition to Parents' SJM,* filed Nov. 6, 2012, p. 1 n. 1; *Motion to Dismiss,* filed Sept. 17, 2012, p. 1 n. 1. *See also Edmond Test.* DCPS' Response to the Complaint was silent on this issue.

[13] A child need only be evaluated as having one of the disabilities enumerated in 34 C.F.R. § 300.8 to qualify for special education and related services. Thus, a child found to have an "Other health impairment" under § 300.8 (c) (9) need not also be found to have a "Speech or language impairment" under § 300.8 (c) (11) in order to receive speech-language pathology services to address communicative impairments and assist the child to benefit from special education. *See* 34 C.F.R. § 300.34 (a), (c) (15).

Issue 3: Failure to Develop and/or Propose an IEP

FAPE is defined by the IDEA to mean "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) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1. Courts have repeatedly stressed that 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). "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* D.C. Code § 38-2561.02 (b) ("DCPS shall place a student with a disability in an appropriate special education school or program" in accordance with the IDEA); *Branham v. District of Columbia,* 427 F. 3d 7, 12 (D.C. Cir. 2005).

Under the IDEA, the ***residency***, not ***enrollment***, of a disabled child triggers an LEA's obligation to provide FAPE. The IDEA expressly requires States to make a FAPE "available to all children with disabilities ***residing in the State*** between the ages of 3 and 21," 20 U.S.C. §1412 (a) (1) (A) (emphasis added), and requires States to have in effect an IEP at the beginning of each school year "for each child with a disability ***within its jurisdiction***." 20 U.S.C. §1412 (d) (2) (A) (emphasis added); 34 C.F.R. 300.323 (a).[14] Courts have consistently construed this plain statutory language to mean that LEAs must evaluate and offer a FAPE to eligible children who reside in its district, regardless of whether they are presently enrolled in a public or private

[14] *See also* 34 C.F.R. §§ 300.148, 300.507-08, 300.511 (implementing regulations providing that due process procedures are available for disputes as to whether a school system has made FAPE available to a student enrolled in a private school).

school.[15] Because the Student resides within the District of Columbia and has been found by DCPS to be a child with a disability under the IDEA, she is entitled to the benefit of these statutory and regulatory provisions.

An "offer of FAPE," moreover, requires the LEA to develop an IEP that specifically prescribes what services the child would be provided, and in what setting. *See* 20 U.S.C. § 1414 (d); 34 C.F.R. § 300.320. "One of the purposes of the IEP is to ensure that the services [to be] provided are formalized in a written document that can be assessed by parents and challenged if necessary." *N.S. v. District of Columbia,* 709 F. Supp. 2d 57, 73 (D.D.C. 2010); s*ee also Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006) ("written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child"). The IDEA further provides that DCPS must have an IEP in effect at the beginning of each school year, and it must ensure that a meeting to develop an IEP is conducted within 30 days of any eligibility determination. *See* 34 C.F.R. § 300.323 (a), (c) (1); *DCMR* § 5-E3007.1.

In this case, the evidence shows that: (a) the Student resides in the District of Columbia; (b) Petitioners requested DCPS to evaluate and determine the Student eligible for special education and related services under the IDEA; (c) Petitioners specifically requested an offer of FAPE, rather than equitable services; (d) DCPS determined that the Student is eligible as a child with an Other Heath Impairment; (e) DCPS refused to develop an IEP for the Student unless she first enrolled in and attended a DCPS public school; (f) Petitioners notified DCPS of their intent to maintain the Student's enrollment at Private School and seek public funding in lieu of an offer of FAPE; and (g) DCPS failed to respond further to that notice prior to the start of the 2012-13 school year.

Nevertheless, DCPS maintains that it was not required to develop an IEP for the Student, despite finding her eligible as a disabled child under the IDEA. DCPS argues that, under the policy of its Private & Religious Office ("PRO"), "DCPS is not obligated to develop IEPs or placements until such time as the student complies with the PRO policy to ***enroll and attend a***

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[15] *See, e.g., Woods v. Northport Public School,* 2012 WL 2612776 (6th Cir. July 5, 2012); *Doe v. East Lyme Bd. of Ed.*, 112 LRP 47179 (D. Conn. Sept. 21, 2012); *Moorestown Township Board of Education v. S.D.,* 811 F. Supp. 2d 1057 (D. N.J. 2011); *District of Columbia v. West*, 699 F. Supp. 2d 273 (D.D.C. 2010); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007); other cases cited in *Parents' Closing Memorandum*, pp. 8-13.

DCPS school." *DCPS' Post Hearing Brief,* p. 7 (emphasis added). DCPS asserts that this PRO policy is consistent with the IDEA regulation at 34 C.F.R. § 300.137 (a) and commentary by the U.S. Department of Education in responding to certain regulatory questions in April 2011. However, neither authority supports DCPS' position in this case.

Section 300.137 (a) provides that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. §300.137 (a). However, this provision applies only to unilateral parental placements ***where FAPE is not at issue***, as federal judicial interpretations illustrate.[16] As other sections of IDEA and OSSE regulations make clear, agencies are "not required to pay for the cost of education, including special education and related services, of a child with a disability ***if the LEA has made FAPE available to the child*** and the parents elected to place the child in a private placement." DCMR § 5-E3018.1 (emphasis added); *see* 34 C.F.R. § 300.148(a). "Taken as a whole, the regulatory scheme reflects the fact that under the IDEA, when the parent of an eligible child ***opts out of a public school where a FAPE could be provided***, that parent is opting for a lesser entitlement," *i.e.,* equitable services.[17] Then, and only then, does the child forego his or her "individual right to receive special education services" from the residence LEA.

Nor does the Department of Education commentary quoted by DCPS support its analysis. When read in full, the commentary does not contradict the established proposition that school systems must evaluate and offer FAPE to eligible children who reside in their districts, regardless of whether they attend a private school. *See Parents' Closing Mem.*, pp. 10-12. To the contrary, it specifically recognizes the distinction between a resident LEA's responsibilities (a) to make an "offer of FAPE," as determined by the child's IEP team, and (b) to "make FAPE available" prospectively by actually delivering services only where "parents choose to accept the

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[16] *See, e.g., Bd. of Educ. v. Johnson,* 543 F. Supp. 2d 351, 357 (D. Del. 2008) (citing 20 U.S.C. § 1412(a)(10(C)(i)); *Nieuwenhuis v. Delavan- Darien Sch. Dist.,* 996 F. Supp. 855, 866 (E.D. Wisc. 1998). DCPS cites no contrary case authorities construing Section 300.137(a). *See also District of Columbia v. Vinyard,* 2012 WL 5378122 (D.D.C. Nov. 2, 2012), slip op. at 8 ("although the District presents its position as necessarily following from a straight read of the federal regulations [34 C.F.R. § 300.137], its interpretation has been rejected by several federal courts as being inconsistent with the IDEA's mandate that states make a FAPE 'available to all children with disabilities residing in the state between the ages of 3 and 21'").

[17] *Nieuwenhuis v. Delavan- Darien Sch. Dist.,* 996 F. Supp. at 866 (emphasis added).

offer of FAPE and enroll the child in a public school." *Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools,* 111 LRP 32532 (April 1, 2011), Questions B-4, B-5, E-3.

DCPS also argues that it "has made a written offer to the parent to develop an IEP and provide a FAPE available at a DCPS school, where the facts support a parental intent to remain in a private school, [and] the IDEA does not require anything further. DCPS has made a FAPE available, and the parent has declined the offer." *DCPS' Post Hearing Brief,* p. 9. This argument has two main flaws. First, because DCPS has refused to develop an IEP that could be assessed by the parents, it has not in fact made a written offer of FAPE. An offer "to develop an IEP" only ***after*** a child enrolls and attends a DCPS public school for some period of time does not equate to an actual written IEP describing the proposed program. [18]

Second, because DCPS did not extend any offer of FAPE, Petitioners cannot have made clear their intent to decline such offer in favor of a decision to keep the Student enrolled in Private School. Beyond that, the mere fact that a parent may desire that his or her child remain in a particular non-public placement, *see Father's Test.* (cross examination), is not determinative of the legal issue presented. As courts have explained:

> "Ultimately whether parents have a truly open mind about the matter is not the test. ***Parents may be committed to private school for their child whatever the school authorities may propose.*** They may honestly feel that the best the school authorities can offer their child is not enough. ***This cannot ipso facto mean that the parents, as citizens and taxpayers, lose the right to seek a 'free appropriate public education' for their child. So long as they make a bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements***, they can take their chances, place their child in private school, and attempt to convince an ALJ and/or court later on that the offering of the school authorities does not measure up to a 'free appropriate public education' for their child. "

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[18] This distinguishes the recent IHO case cited by DCPS (Case No. 2012-1207), where a FAPE had previously been offered via an IEP and placement formulated during the prior school year. *See also Greenland Sch. Dist. v. Amy N.,* 358 F. 3d 150 (1st Cir. 2004) (reimbursement denied where, *inter alia,* school officials developed IEP that set forth detailed plan for providing appropriate special education services in public school); *N.S. v. District of Columbia, supra*; D.C. Code § 38-2561.03 (a) (1) ("DCPS shall be responsible for the placement and funding of a student with a disability in a nonpublic special education school or program when ... DCPS cannot ***implement the student's IEP*** or provide an appropriate placement in conformity with DCPS rules, the IDEA, and any other applicable laws or regulations..") (emphasis added).

Sarah M. v. Weast, 111 F. Supp. 2d 695, 701 n. 6 (D. Md. 2000) (emphasis added). [19] This same rationale applies with equal force to situations where, as here, an LEA refuses to offer any IEP at all.

In this case, the facts show that Petitioners made a bona fide effort to develop an IEP for the Student and otherwise followed appropriate procedural requirements, so that they could assess DCPS' educational plan for their child. They also initiated the process early in the 2011-12 school year, which should have allowed ample time to determine eligibility and develop an IEP for the parents to consider before having to make a decision regarding the Student's education for the 2012-13 school year. Nor does Petitioners' entry into a contract and/or payment of tuition for the 2012-13 school year prior to July 2012 preclude reimbursement, as explained in the next section below. [20]

If the Hearing Officer were to adopt DCPS' position, Petitioners "would have to enroll their child in public school with no information about the type of program the district may offer, where the child may be placed, or even if the district's IEP would constitute a FAPE." [21] An LEA would not need to propose any program for a student as long as the LEA believed that the program it could offer – but which it has not ***actually*** developed and offered – would likely not be accepted by the parents. This approach is inconsistent with the IDEA's framework, since "a school district's ***failure to propose an IEP of any kind*** is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." *Forest Grove*, 129 S. Ct. at 2491 (emphasis added). *See also School Comm. of Burlington v. Department of Ed. of Mass.,* 471 U.S. 359, 369 (1985) (holding that § 1415(i)(2)(C)(iii)'s grant of authority to order

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[19] *See also N.S. v. District of Columbia,* 709 F. Supp. 2d 57, (D.D.C. 2010) ("school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement") (quoting *Union Sch. Dist. v. Smith,* 15 F. 3d 1519, 1526 (9th Cir, 1994)); *Kitchelt v. Weast,* 341 F. Supp. 2d 553, 558 n. 1 (D. Md. 2004) (fact that parents may believe from beginning that public school system cannot provide a FAPE does not disqualify reimbursement, "so long as they continue in good faith (e.g., no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system"); *Doe v. East Lyme Bd. of Ed.*, 112 LRP 47179 (D. Conn. Sept. 21, 2012) (rejecting LEA argument that parent's actions in placing child outside district indicated she had no intention of accepting LEA offer of IEP).

[20] *See also Doe v. East Lyme Bd. of Ed., supra,* slip op. at 6-7 (LEA had obligation to develop IEP for student even after parents unilaterally placed him in private school).

[21] *Moorestown Township Board of Education v. S.D., supra,* 811 F. Supp. 2d at 1070.

"appropriate" relief includes "the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, ***rather than a proposed IEP***, is proper under the Act") (emphasis added). [22]

Accordingly, the Hearing Officer concludes that DCPS has denied the Student a FAPE by refusing to develop an IEP upon finding her eligible for special education and related services as a child with a disability under the IDEA. As discussed above, Petitioners clearly requested an offer of FAPE, rather than merely equitable services, when they asked DCPS to propose a program and placement for the 2012-13 school year.

Issue 4: Propriety of Parental Placement & Appropriate Relief

"IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school." *Forest Grove School District v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2496 (2009).[23] "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." *Id. See also 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).

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner when DCPS refused to develop an IEP and propose an

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[22] DCPS elicited testimony at hearing that Private School accepts students before they draft a written educational plan, and appeared to suggest that this practice supported its position here. However, Private School is not an LEA and therefore is not bound by IDEA requirements. Moreover, when a parent enrolls a child at Private School, the parent at least knows that the child will be provided a full-time, special education setting. As Petitioners note (*Parents' Closing Mem.*, p. 7 n. 1), if they were forced to enroll Student in their neighborhood DCPS school without an IEP, they would be accepting an undefined program of specialized instruction in an undefined setting for an undefined amount of time. *See also Father's Test.*

[23] *See also Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 163 (4th Cir. 1991), *aff'd*, 510 U.S. 7 (1993) ("When a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'") (quoting Rowley, 458 U.S. at 207).

educational placement for the 2012-13 school year. On August 6, 2012, approximately three weeks prior to the beginning of that school year, Petitioners notified DCPS in writing that they intended to maintain the Student's placement at Private School and seek funding for that placement because DCPS had failed to offer a FAPE. DCPS then declined to respond with any further offer.

The Hearing Officer further concludes that the parental placement at Private School is proper under the IDEA, as the Student is receiving significant educational benefit from the program. *See Father Test.; HJHP Test.; SLP Test.; P23; P24.* Private School is a non-public school that provides full-time special education to students with disabilities, including OHI/ADHD, learning disabilities, and communications disorders. *Id.* It has been certified by the OSSE and provides services that meet the Student's educational needs. *Id.; Findings,* ¶¶14-15.

DCPS nevertheless suggests that Petitioners should be denied reimbursement because they had committed to continuing the Student at Private School by signing a contract and paying 2012-13 tuition and fees in advance prior to DCPS' July 30, 2012 refusal to develop an IEP. *See DCPS' Post Hearing Brief,* p. 5, ¶ 18. The Hearing Officer disagrees. On this point, the court's observation and reasoning in *Kitchelt v. Weast, supra,* is instructive:

> "The mere fact that parents may enroll their child in a private school while the IEP process is underway – typically in the spring or summer for the fall term – is not by itself proof of bad faith on their part. In the great run of cases, the parents will simply be bowing to reality. Enrollments in special education facilities may fill up quickly. They may not always be available in late summer when the IEP is finally ready. As before, the key consideration is that parents pursue in good faith the development of the IEP and the possibility of public school placement."

341 F. Supp. 2d at 558, n. 1. As it turns out, Petitioners were wise to take the action that they did on behalf of their child, since no IEP was ultimately put forward by DCPS.

Prospectively, the Private School placement also appears to be appropriately tailored to meet the needs of the Student, considering the nature and severity of her disabilities, her specialized needs, and the link between those needs and the services offered at Private School. *See Branham v. District of Columbia,* 427 F.3d 7, 12 (D.C. Cir. 2005). Private School can provide a full-time, special education program within a small, structured setting that is well suited to the Student's particular needs. Moreover, the placement aligns very well with the

recommendations made by the Student's evaluators, and is able to provide the Student with the placement that she needs to access her education. *See HJHP Test.; SLP Test.; Father Test.*

The only 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 circumstances, including the conduct of the parties and DCPS' opportunity to evaluate the Student, the Hearing Officer concludes that DCPS should reimburse Petitioners for their full cost of the Private School program from the beginning of the 2012-13 school year. The Order also places the Student at Private School for the remainder of the 2012-13 school year, with DCPS funding.

In the end, this case – like several others that DCPS appears to be currently litigating before hearing officers and the District Court – boils down to a basic proposition, with potentially broad consequences. DCPS wants to require private school children to enroll and physically attend public school in order to obtain an IEP. But this position is at odds with both the language and structure of the IDEA, as it is has been construed by the Supreme Court and federal courts in this Circuit. When a resident disabled child's parents request a FAPE, rather than merely seeking equitable services, DCPS must respond with an offer of FAPE for the parents to consider. And DCPS cannot "offer a FAPE" without first developing the IEP and proposed placement that comprise such offer. Because DCPS has defaulted in that responsibility, Petitioners are entitled to appropriate relief.

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 DCPS' receipt of necessary and appropriate documentation from Petitioners, DCPS shall reimburse Petitioners for all costs of tuition and any related services they have incurred for the Student at **Private School** [24] for the 2012-13 school year to date.
2. DCPS shall place and fund the Student at **Private School** [25] for the remainder of **2012-13 school year**, with transportation.

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

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

3. Within **30 days** of the date of this Order (*i.e.*, by no later than **December 24, 2012**), DCPS shall convene a meeting of the Student's MDT/IEP Team (including Petitioners) at Private School for the purpose of developing an Individualized Education Program ("IEP") for the Student for the 2012-13 school year, consistent with this HOD and her current placement and receipt of educational benefit at Private School. The IEP shall include specialized instruction to meet the unique needs of the Student, an appropriate amount of speech and language pathology services as a related service, and any other services and supports determined necessary by the MDT/IEP Team.

4. Petitioners' other requests for relief in their Due Process Complaint filed September 11, 2012, are hereby **DENIED.**

5. The case shall be **CLOSED.**

Dated: November 25, 2012

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).