



DCPS filed a Response on or about August 16, 2010, which asserts that based on the evaluation data presented at the July 7, 2010 MDT/IEP Team meeting, the Student did not meet the eligibility criteria under the IDEA. -3, p. 1. DCPS further asserts that Petitioner is barred by the terms of an April 28, 2010 Settlement Agreement from seeking any relief for actions prior to that date. -3, p. 2.

The resolution process was not successful, and the 30-day resolution period ended August 25, 2010. A Prehearing Conference (“PHCs”) was held on August 30, 2010, at which the parties discussed and clarified the issues and requested relief. See -5 (Prehearing Order, issued Sept. 13, 2010), ¶ 5. The parties agreed to schedule two days of hearings for September 27 and 28, 2010. *Id.*, ¶ 3. Petitioner elected for the hearing to be closed. *Id.*, ¶ 9.

Five-day disclosures were filed by both parties as directed on September 20, 2010; and the Due Process Hearing was then held as scheduled on September 27 and 28, 2010. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner’s Exhibits:** -1 through -37.

**DCPS’ Exhibits:** DCPS-1 through DCPS-3.

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

**Petitioner’s Witnesses:** (1) Student; (2) Parent-Petitioner; (3) Educational Advocate; (4) Psychological Evaluator; (5) Supervising Psychologist; (6) Private School Special Education Coordinator (“SEC”); and (7) Private School Principal.

**DCPS’ Witnesses:** (1) Andrew Bolton, Compliance Specialist; and (2) Joe Berdin, LEA Placement Specialist.

This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures (“SOP”)*.

## II. ISSUES AND REQUESTED RELIEF

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

- (1) **Failure to Determine the Student Eligible** — Did DCPS deny the Student a FAPE by failing to find her eligible as a child with an Emotional Disturbance (“ED”), as defined under the IDEA, at her MDT meeting of July 7, 2010?
- (2) **Failure to Provide the Student a BIP** — If eligible, did DCPS deny the Student a FAPE by failing to provide her with a BIP as a part of her IEP?
- (3) **Failure to Evaluate for ADHD** — Did DCPS deny the Student a FAPE by failing to evaluate her to determine if she suffers from ADHD, in compliance with 34 C.F.R. 300.304 (c) (4) and DCMR 5-E3005.9 (g)? DCPS asserts that the evaluations were properly limited to those agreed to by the parties.
- (4) **Failure to Determine Appropriate Placement** — If eligible, did DCPS deny the Student a FAPE by failing to determine an appropriate placement? Petitioner alleges that the Student requires special education instruction and supportive services in a small classroom setting such as that currently offered at Private School.

As relief for the alleged denials of FAPE, Petitioner seeks, *inter alia*, (1) Hearing Officer determination of the Student’s eligibility as a child with ED; (2) reconvening of the Student’s MDT/IEP Team to develop an appropriate IEP requiring 27.5 hours/week of specialized instruction, a BIP, and one hour/week of counseling services; (3) immediate DCPS funding and placement of the Student at Private School, retroactive to her enrollment on or about May 26, 2010; and (4) funding of an independent psychiatric assessment to confirm or rule out ADHD.

## III. FINDINGS OF FACT

1. The Student is a     year old child who resides with Petitioner in the District of Columbia.
2. The Student currently attends the Private School, which is located in the District of Columbia and provides full-time special education services to children with various learning and emotional disabilities. She was placed there unilaterally by Petitioner sometime during the second semester of the 2009-10 School Year. *See*     -2, p.2;     -5, p. 2;     -33;     -37, p. 1; *Parent Testimony; Private School Principal Testimony.*

3. Prior to attending the Private School, the Student attended a Public Charter School ("PCS") in D.C. during the 2008-09 and 2009-10 School Years and a DCPS public high school for the 2007-08 School Year. DCPS serves as the LEA of the PCS. Before that, the Student attended various non-public parochial schools and a DCPS elementary school.
4. The Student has spent the past three years in the     grade (one year at the DCPS high school and two years at the PCS), and she also repeated the     grade. The record further indicates that the Student has attended as many as seven (7) different schools.
5. During the 2008-09 and 2009-10 School Years at the PCS, the Student experienced extensive behavioral problems, including over 100 incidents in school that resulted in reprimand or suspension. *See Testimony of Psychologist, Parent, and Educational Advocate;     -10, p. 4;     -28.*
6. On or about November 11, 2009, DCPS convened an initial meeting of the Student's MDT/IEP Team at the PCS. As a result of the review of the screening information at the MDT meeting, a plan was developed to evaluate the Student for special education and related services, and Petitioner executed a written consent for evaluation.     -16; *see also     -2, p. 3; Parent Testimony.*
7. On or about December 7, 2009, while the initial evaluation process was pending, the Student was suspended for bringing a box-cutter to school.     -22.
8. On or about December 23, 2009, the PCS notified Petitioner of its decision to expel the Student as a result of her bringing a box-cutter to school.     23; *DCPS-3.*
9. The PCS did not convene a manifestation determination meeting with respect to the box-cutter incident. Nor did PCS or DCPS conduct a functional behavioral assessment ("FBA") of the Student at this time.
10. On or about March 23, 2010, a case conference meeting was held at the Private School to discuss the Student's educational performance and the need for PCS and/or DCPS to complete the evaluation and eligibility process for the Student. *See HN-33; SEC Testimony.*

11. On or about April 27, 2010, the parties executed a Settlement Agreement (“SA”) in which DCPS agreed to fund the parent’s independent evaluations in the following areas: comprehensive psychological; speech/language; FBA; and vocational assessment. The 04/27/2010 SA also called for DCPS to convene an MDT meeting within 30 business days after receipt of the last of the independent evaluations for the purposes of: reviewing the evaluations; determining eligibility; discussing placement/location of services; and discussing compensatory education if warranted. See 7.
12. On or about May 16, 2010, a copy of the parent’s completed vocational assessment was provided to DCPS. According to the evaluation, the Student has an interest in computer technology or engineering. -12.
13. On or about May 26, 2010, a copy of the parent’s completed speech/language evaluation was provided to DCPS. According to the evaluation, the Student has average speech and language functioning and does not require speech/language interventions. 8.
14. On or about June 15, 2010, a copy of the parent’s completed social history evaluation was provided to DCPS. See -11.
15. On or about June 28, 2010, a copy of the independent comprehensive psychological evaluation of the Student dated June 1, 2010, was provided to DCPS. According to the evaluation, the Student suffers from (*inter alia*) Disruptive Behavior Disorder and Dysthymic Disorder, and she also received a provisional diagnosis of ADHD (Predominately Inattentive Type). -9 (Summary, p. 4). The evaluator recommended that the Student receive a further psychiatric evaluation to confirm the provisional ADHD diagnosis. *Id.* (Recommendation #4). The psycho-educational testing found that the Student’s overall intellectual ability (as measured by the Woodcock-Johnson III) is in the average range of standard scores, with a general intellectual ability score of 91. *Id.*, p. 7; Summary, p. 1. While her achievement test

scores were also in the average range in reading and written expression, she scored significantly lower in math. *Id.* (Summary, pp. 1-3).<sup>2</sup>

16. On or about June 28, 2010, a copy of the parent's completed FBA was also provided to DCPS. Based on the data collected in this evaluation, the evaluator concluded that the Student "exhibits significant behaviors that impact her availability for learning."

-10, p. 8. The report further states that "it is clear that the significant emotional discord she has faced has deleteriously impacted her capacity for self-modulation and control"; and that the Student's "off-task or inappropriate behaviors (lack of focus, odd behavior, and/or slow rate of work) are severe in intensity, occur frequently, and are major in duration." *Id.* The report recommended (*inter alia*) that the Student would "benefit from a small, heavily structured, academic environment that allows for a considerable amount of individualized attention and instruction." *Id.*, p. 9.

17. On or about July 7, 2010, an eligibility meeting of the Student's MDT/IEP Team was convened to review the independent evaluations and complete the other actions specified in the 04/27/2010 SA. *See DCPS-2; DCPS Testimony (Berdin & Bolton).* The meeting was scheduled by the Private School SEC and DCPS Compliance Case Manager Alton West, and took place at the Private School as agreed by all parties. *Bolton Testimony.*

18. At the July 7, 2010 Team meeting, the Psychologist supervising the independent comprehensive psychological evaluation recommended that the Student be found eligible as a child with an Emotional Disturbance ("ED") based on the results of that evaluation. *See -37; Psychologist Testimony.* DCPS' two party representatives (LEA/Monitor and Case Compliance Manager) disagreed with that recommendation, primarily because they believed that the emotional concerns had not been demonstrated to have a sufficient educational impact. *See DCPS-2; Berdin Testimony; Bolton Testimony.*

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<sup>2</sup> The evaluator also reviewed records of earlier psychiatric treatments and psychological evaluation results from the 2000-2001 time period, which he found generally consistent and supportive of his conclusions. These included a prior diagnosis and treatment with medication for ADHD at the Children's National Medical Center, as well as educational testing showing a FSIQ score of 100. *See, e.g., -9; -2, ¶¶ 9-11; Psychologist Testimony.*

19. All other Team members at the July 7, 2010 meeting agreed that the Student met the criteria to be eligible for special education as a child with ED. *DCPS-2; 37; Testimony of Psychologist and Educational Advocate*. They also agreed that a small, structured and therapeutic placement would be appropriate for the Student based on her recent behavioral concerns, her history of academic struggles, and her relative success in the present educational setting at Private School. *DCPS-2, pp. 2-3; 7/7/10 EA Notes (DCPS000009-10)*. These Team members included the Parent, SEC, Clinical Psychologist, Therapist, Vice Principal, Speech/Language Pathologist, Special Education Teachers, and Educational Advocate. *DCPS-2, p. 1*.
20. The Supervising Psychologist who signed the independent comprehensive psychological evaluation report and attended the July 7, 2010 MDT meeting disagreed strongly with DCPS' non-eligibility position at the Team meeting because, in her view, the Student suffers from a "serious emotional disability" that causes her to be "not able to manage her behavior" at school. *Supervising Psychologist Testimony*. The Psychologist has known and observed the Student since she attended the PCS and testified that she has had "serious emotional difficulties" for years. *Id.* The Psychologist also reviewed the earlier psychological records from 2000-01, reviewed teacher reports, and talked with the Student's teachers, counselor, and principal at the Private School. The Psychologist testified that the Student is "very distressed and unhappy," is "very disruptive in class," often becomes "agitated and anxious," and as a result of being upset cannot stay in class to receive needed instruction. *Id.* She further testified that the Student's characteristics of anxiety, depression and agitation/disruption hinder her from performing school work assignments and from successfully interacting with most peers and teachers. She also testified that no disagreement was expressed at the meeting about the contents or methodologies of her comprehensive psychological evaluation. *Id.*<sup>3</sup>

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<sup>3</sup> Although the Supervising Psychologist is employed by the Private School as well as engaged in independent consulting, the Hearing Officer found her to be a credible witness whose testimony stood up on active cross examination by DCPS. She has been a practicing psychologist certified in D.C. since 1964, has conducted thousands of psychological assessments of students, has had extensive interaction with the Student and others who work with her, participated in the 07/07/2010 MDT meeting, and demonstrated familiarity with the contents of the evaluation reports. *See Psychologist Testimony*.

21. With respect to placement, the Supervising Psychologist testified that the Student cannot succeed in a regular high school environment and cannot function in a classroom without “enormous amounts” of therapeutic support. *Supervising Psychologist Testimony*. She also testified that a Section 504 plan did not work at the PCS, as evidenced by the over 100 incident reports, and would not be successful. *Id.*
22. DCPS did not have any DCPS staff psychologist review the independent comprehensive psychological report or attend the July 7, 2010 MDT/IEP Team meeting. Nor did DCPS present any expert witness at hearing to rebut the Supervising Psychologist’s testimony concerning the nature of the Student’s emotional and behavioral difficulties or impact on her educational performance.<sup>4</sup>
23. Based on the information and discussion presented at the July 7, 2010 MDT/IEP Team meeting, Petitioner requested that DCPS provide full-time special education and related services to the Student at the Private School. *DCPS-2; 7/7/10 EA Notes (DCPS000009-10)*. DCPS declined this request and decided that the Student was not eligible for services. However, DCPS did not issue any written notice to Petitioner refusing to identify the Student as a child with a disability under the IDEA.
24. By all accounts, the Student’s performance has improved academically and behaviorally since she began attending the Private School in Spring 2010, and she is receiving educational benefits there. *See Testimony of Parent, Student, Educational Advocate, Supervising Psychologist, and Private School Principal*. The Student is on diploma track, and the cost of the program is                      per day, as approved by the OSSE. *Private School Principal Testimony*. In the Psychologist’s opinion, a full-time special education program like the one offered at Private School (as restrictive as it is) may be the Student’s “only hope of her succeeding” without entering into a residential program. *Id.*

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<sup>4</sup> Despite the fact that DCPS had jointly scheduled the meeting with the Private School for the purpose of complying with DCPS’ obligations under the 04/27/10 SA, it appears that DCPS was not as prepared as it should have been to conduct the July 7 meeting. In addition to there being no DCPS psychologist in attendance, Mr. Berdin testified that he was only at the meeting because he happened to be “in the building.” *Berdin Testimony* (cross examination). He had not worked with the Student, had not reviewed the Student’s prior records, was not aware that she had been retained several times, and was not aware of the volume of behavior incident reports at the PCS. *Id.*

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

##### **A. 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). 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 normal standard is preponderance of the evidence. *See, e.g., Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415 (i) (2) (C) (iii).

##### **B. Issues/Alleged Denials of FAPE**

As discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on each of the specified issues and alleged denials of FAPE.

###### **1. Eligibility/ED Condition**

Petitioner claims that DCPS has denied the Student a FAPE by failing to find the Student eligible as a result of her being emotionally disturbed. Specifically, Petitioner alleges that the independent evaluations show that the Student meets at least three of the five alternative criteria for an Emotional Disturbance (“ED”) under the IDEA.

The statute defines “child with a disability” to include “a child – (i) with ...serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’)...; and (ii) who, by reason thereof, needs special education and related services.” 20 U.S.C. §1401 (3) (A). The regulations further define the term “emotional disturbance” as follows:

*“Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:*

- (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors,
- (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers,
- (C) inappropriate types of behavior or feelings under normal circumstances,
- (D) a general pervasive mood of unhappiness or depression,

(E) a tendency to develop physical symptoms or fears associated with personal or school problems.”

34 C.F.R. §300.8 (c) (4) (i).<sup>5</sup> As the statutory definition makes clear, it is not sufficient for a child merely to be diagnosed with a disability that meets one of the listed criteria. There must also be a demonstrated adverse effect on the child’s educational performance such that the child needs special education. *See* 34 C.F.R. §300.8 (c) (4) (i); *N.C. v. Bedford Central School District*, 51 IDELR 149 (2d Cir. 2008); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

In this case, Petitioner claims that the Student’s condition exhibits the characteristics of subparagraphs (B), (C) and/or (D) of Section 300.8 (c) (4) (i) – *i.e.*, that the Student has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; that the Student exhibits inappropriate types of behavior under normal circumstances; and that the Student has a general pervasive mood of unhappiness or depression. Petitioner further claims that these characteristics have been exhibited over a long period of time and to a marked degree that adversely affects a child’s educational performance. *See* -2, p. 5; -5, p. 2; *Psychologist Testimony*. DCPS disputes these facts, in particular the educational impact of the Student’s condition.

The Hearing Officer concludes that the evidence Petitioner presented at hearing is sufficient to establish a condition meeting the requirements of subparagraphs (B) and (C). Petitioner presented credible expert testimony that was not rebutted by DCPS, either at the MDT/IEP Team meeting or at hearing. That evidence shows that the Student has been unable to build or maintain satisfactory interpersonal relationships with peers and teachers in an educational setting, other than occasionally on a more intensive one-to-one basis (*e.g.*, with her Spanish teacher). The evidence also shows that the Student consistently engages in inappropriate types of behavior under normal circumstances.<sup>6</sup> In addition, this condition has persisted over a long period of time and to a marked degree that adversely affects the Student’s educational

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<sup>5</sup> The regulations also provide that the “term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance” as defined under subparagraph (c) (4) (i). *Id.* §300.8 (c) (4) (ii).

<sup>6</sup> *See, e.g.*, -9; -10; -11; -13; -14; -37; *Supervising Psychologist Testimony; Findings* ¶¶ 16-17, 20-22.

performance, as evidenced (*inter alia*) by the Student's repeated retentions in grade, failing grades, and low achievement scores in math.<sup>7</sup>

The evidence is less persuasive with respect to the characteristics of subparagraph (D) – *i.e.*, “general pervasive mood of unhappiness or depression.” The examiner testified that his diagnosis of dysthymia reflected at most a “low-grade depression”; and he conceded that the Children’s Depression Inventory (“CDI”) administered as part of the comprehensive psychological evaluation “showed no clinical significance.” *Psych. Evaluator Testimony* (cross examination); -9, p. 16. The Student also appeared to be alert and articulate in her testimony at hearing. However, since a child needs to exhibit only “one or more” of the listed characteristics, the Student can be found eligible without satisfying this separate criterion.

In sum, Petitioner has met her burden of proving that DCPS denied the Student a FAPE by failing to find the Student eligible as a child with an Emotional Disturbance under 34 C.F.R. §300.8 (c) (4) (i), (B) & (C).

## 2. BIP

Petitioner next claims that DCPS denied the Student a FAPE by failing to provide the Student a behavior intervention plan (“BIP”) as part of an IEP designed to address her unique needs.

Had DCPS correctly found the Student to be eligible for special education and related services, DCPS would have been required to develop an IEP “reasonably calculated” to confer educational benefits on the Student. *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982); *see* 34 C.F.R. §§ 300.17, 300.324. And for a child whose behavior impedes the child’s learning or that of others, the Team must consider the “use of positive behavioral interventions and supports, and other strategies, to address that behavior.” *Id.*, § 300.324 (a)(2)(i).

In this case, the evidence shows that the Student repeatedly engages in behaviors in school that are extremely disruptive and that impede her learning and the learning of others. *See, e.g., Findings ¶¶ 5, 17, 20-21; Supervising Psychologist Testimony.* Thus, any appropriate IEP developed for the Student must include an appropriate BIP to address her problematic and off-task behaviors.

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<sup>7</sup> *See, e.g., -9; -20; -21; Supervising Psychologist Testimony.*

Accordingly, the Hearing Officer concludes that Petitioner has met her burden on this issue. The failure to provide an IEP that includes an appropriate BIP to address behaviors impeding the Student's learning and the learning of her fellow students constitutes a denial of FAPE.

### **3. Failure to Evaluate for ADHD**

Petitioner also claims that DCPS denied the Student a FAPE by failing to evaluate her to determine if she suffers from ADHD, in compliance with 34 C.F.R. 300.304 (c) (4) and DCMR 5-E3005.9 (g). This further evaluation was recommended in the independent comprehensive psychological evaluation, but has not been done. At the PHC, DCPS counsel appeared to argue that such evaluation is not required because it went beyond the specific areas agreed to in the April 2010 SA, while in closing at hearing counsel suggested that it need not be conducted because the Supervising Psychologist testified that any ADHD concerns were "really part of" the Student's ED condition.

Neither argument has merit. The fact that DCPS agreed to fund certain specified evaluations in the SA cannot relieve DCPS of its continuing evaluation obligation under IDEA. While an ADHD evaluation is no longer needed to determine eligibility, the evidence suggests that it still may yield relevant information that may assist in determining the content of the Student's IEP. *See* 34 CFR 300.304 (b) (1) (ii). At the same time, DCPS must ensure that its evaluation of the Student is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." *Id.*, 300.304 (c) (6).

### **4. Appropriate Placement**

Finally, Petitioner claims that DCPS denied the Student a FAPE by failing to determine an appropriate educational placement at the July 7, 2010, MDT/IEP Team meeting. FAPE obviously "include[s] an appropriate preschool, elementary school, or secondary school education in the State involved," provided in conformity with the student's IEP. 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.<sup>8</sup> Again, having

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<sup>8</sup> *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005) (affirming "placement based on match between a student's needs and the services offered at a particular school"); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (DCPS must offer "placement in a

prevailed on the eligibility issue, Petitioner necessarily prevails on this issue as well. Since DCPS decided that the Student was ineligible under the IDEA, DCPS admittedly did not develop any special education program or determine any educational placement for the Student. The only remaining question is what appropriate remedy should be afforded under the circumstances.

**C. Appropriate Relief**

Having found a denial of FAPE as discussed above, 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, 521-23 (D.C. Cir. 2005). Based on the record developed at hearing, the Hearing Officer has exercised his discretion to order appropriate equitable relief, as set forth in the accompanying Order below. The relief includes placement of the Student at Private School for the 2010-11 School Year.

As the U.S. Court of Appeals for the District of Columbia Circuit has explained, “an award of private-school placement is not...retroactive relief designed to compensate for *yesterday’s* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.” *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (emphasis in original). With respect to prospective private placement awards, *Branham* makes clear that they “must be tailored to meet the child’s specific needs” through a fact-intensive inquiry. *Id.* at 11-12. “To inform this individualized assessment, ‘[c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.’” *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“the nature and severity of the student’s disability, the student’s specialized educational needs, the link between these needs and the

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school that can fulfill the requirements set forth in the IEP”); D.C. Code 38-2561.02 (“DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA”).

services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham*, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

"Because placement decisions implicate equitable considerations, moreover, courts [and hearing officers] may also consider the parties' conduct." *Id.*; *Reid*, 401 F.3d at 524.

The Hearing Officer concludes that Petitioners have adequately demonstrated that the Private School is an appropriate placement and provides educational benefit to the Student. As noted above, Petitioners presented several witnesses who testified at length about the nature and severity of the Student's disabilities, the Student's specialized educational needs, and the link between those needs and the services offered by the Private School. *See Testimony of Psychologist, SEC, Educational Advocate, and Private School Principal*; see also .10, p. 9;

.11. The Private School also charges a rate that has been approved by the OSSE and represents a less restrictive environment than the next option on the continuum (*i.e.*, residential placement) suggested as a possibility by Petitioner's expert psychologist. Moreover, because the Private School is located in the District of Columbia, it better accords with the local statutory priorities contained in D.C. Code 38-2561.02 (c).

DCPS has not proposed any alternative educational program or placement for the Student for the current school year, at either the July 7 MDT meeting, the resolution meeting, or the due process hearing. Thus, Petitioner's proposed placement – where the Student already appears to be showing more progress than she has previously experienced – will be awarded for the duration of the 2010-11 School Year.

DCPS will have an opportunity to review and make its own determination as to the appropriate placement for the Student for the 2011-12 school year, depending on the facts then presented.<sup>9</sup> Thus, at her annual IEP review next year, DCPS will be able to measure the Student's progress, review any updated evaluations or other data presented to the Team, and determine whether the IEP goals are being achieved at the Private School. *See* 34 C.F.R.

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<sup>9</sup> *See Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006) ("While [Private School] might be an appropriate placement for [the Student] at the current time, another school – including a D.C. public school – might be an appropriate placement at a later date depending on [the Student's] progress. Indeed, the purpose of a student's annual MDT/IEP meeting is to track his or her progress and determine what educational and other services are needed.").

300.324(b); *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op.* at p. 6 (“Because 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).”).

Finally, the Hearing Officer agrees with DCPS that the funding of the Student’s placement should not be retroactive to the date of the Student’s enrollment, as requested by Petitioner (*see* -2, p. 8; -5, p. 2). Not only is the record unclear as to the exact date of enrollment, but Petitioner did not prove that DCPS failed to make FAPE available to the Student in a timely manner prior to such enrollment or that she gave notice of her intent to enroll the Student in the Private School at public expense, at least until the July 7, 2010 MDT meeting. *Cf.* 34 CFR 300.148. To the contrary, Petitioner and DCPS agreed at the end of April 2010 that Petitioner would obtain several independent evaluations of the Student to determine eligibility; Petitioner did not provide all completed reports to DCPS until the end of June; and DCPS then acted promptly to convene a team meeting to consider the evaluations. Under these circumstances, there is no basis for ordering the funding of Petitioner’s private placement before the beginning of the current 2010-11 School Year.

## V. ORDER

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

1. The Student is determined to be eligible as a child with a disability as defined under the IDEA, specifically as having an emotional disturbance, **effective at the beginning of the 2010-11 School Year.**
2. The Student shall be placed at the **Private School**,<sup>10</sup> at DCPS expense, effective at the beginning of the 2010-11 School Year, and until such time as the Student’s educational placement changes. DCPS shall issue an appropriate Notice confirming this placement and funding within ten (10) school days, and shall arrange and provide transportation for the Student if needed within five (5) school days or no later than **October 18, 2010.**

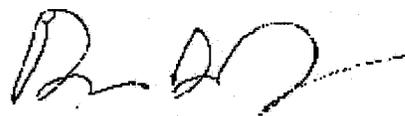
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<sup>10</sup> Private School is identified by name in the Appendix to this HOD.

3. Within **30 calendar days** of this Order (*i.e.*, **by November 8, 2010**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members (including the Parent and appropriate representatives of DCPS and the Private School) to develop an IEP to meet the Student's educational needs that result from the child's disability, which IEP shall conform to all IDEA requirements. The IEP shall include, among other things, a full-time program of specialized instruction, at least one hour per week of counseling or other behavioral support services, a statement of measureable annual goals, and an appropriate behavior intervention plan ("BIP").
4. Petitioner is authorized to obtain an **independent psychiatric evaluation**, at the expense of DCPS, in order to confirm or rule out the Student's ADHD condition. The evaluation shall be completed **within 45 calendar days** of this Order and shall be subject to the rates set forth in the Chancellor's Directive dated July 18, 2008. Upon completion, Petitioner shall provide a copy of all evaluation reports to DCPS for further review by the Student's MDT/IEP Team.
5. All written communications from DCPS concerning the above matters shall include copies to Petitioner and to Petitioner's counsel, Domiento Hill, Esq, by facsimile (202-742-2098) or email ([dhill@jebllaw.biz](mailto:dhill@jebllaw.biz)).
6. Petitioner's other requests for relief in her Due Process Complaint, including compensatory education, are **DENIED**.
7. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: October 9, 2010



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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).