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.***	)))))))))))	**Case No. 2012-0556** **Bruce Ryan, Hearing Officer** **Issued: October 29, 2012**

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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 August 16, 2012, on behalf of a [redacted] (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. Petitioners claim that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to develop an individualized education program ("IEP") and to provide an appropriate educational placement for the Student upon determining her eligibility.

During the 2011-12 school year, the Student attended a non-public, special education day school ("Private School A") located in Maryland. During the 2012-13 school year, she has attended a different non-public, special education day school ("Private School B"), also located in Maryland. The Student has attended both schools pursuant to parental placement. Petitioners

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

are the Student's parents. *See Administrative Due Process Complaint,* filed Aug. 16, 2012, pp. 3-7; *Prehearing Order* (Oct. 22, 2012).

On August 31, 2012, DCPS filed a late response to the complaint, denying the allegations that it failed to provide a FAPE to the Student. As subsequently clarified by DCPS' counsel, DCPS asserts that "the LEA must make a FAPE available to all children with a disability who reside in the LEA, unless the parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in the LEA. It is DCPS' position that the exception to make a FAPE available applies to this matter." [2]

Also on August 31, 2012, the parties held a resolution meeting, which did not resolve the complaint. The parties also did not agree to end the 30-day resolution period early. *See Resolution Period Disposition Form*, dated Aug. 31, 2012. Accordingly, the resolution period ended on September 15, 2012. The 45-day timeline for issuance of the Hearing Officer Determination ("HOD"), as extended by an agreed continuance, [3] is November 8, 2012.

On September 26, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to file cross-motions for summary decision and to schedule a due process hearing (if needed) for October 30, 2012. A Prehearing Order was issued to confirm the matters discussed and agreed at the PHC. The parties then filed their five-day disclosures, as required, by October 23, 2012.

Both parties have now filed motions for summary decision,[4] which have been opposed by the other party. The motions are addressed in this HOD.

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[2] Email correspondence from Daniel McCall, Esq., dated Oct. 24, 2012. DCPS' Response to the Complaint had previously stated, in somewhat different language, that "there is an exception to the [FAPE] requirement for 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." *Response,* filed Aug. 30, 2012, pp. 1-2. DCPS' Response further stated: "DCPS has made a written offer to the parent to provide a FAPE at a DCPS school, [and] the IDEA does not require anything further. DCPS has made a FAPE available, and the parent has declined the offer." *Id.,* p. 4.

[3] The HOD timeline was originally scheduled to expire on October 30, 2012. Petitioner filed a consent motion for continuance in order to allow sufficient time for submission of briefs on cross-motions for summary decision and to schedule the due process hearing (if needed) for October 30, 2012. The continuance motion was granted, and the HOD timeline was thereby extended to November 8, 2012.

[4] DCPS' motion for summary decision was filed August 30, 2012, though it was originally styled as a second "motion to dismiss." DCPS clarified that this motion was intended as a motion for summary decision based on undisputed facts. *See Order,* issued Oct. 20, 2012 (referring to motion for summary decision as "Motion #2"). This motion is referred to herein as "*DCPS' Motion for Summary Decision.*" Petitioners' motion for summary decision was filed Oct. 4, 2012, and will be referred to herein as "*Parents' Motion for Summary Decision.*"

II. JURISDICTION

The due process complaint was adjudicated 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 8, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination are:

> **(1) Failure to Develop IEP** — Did DCPS deny the Student a FAPE by refusing to develop an IEP for the Student?
>
> **(2) Failure to Provide Placement** — Did DCPS deny the Student a FAPE by refusing to propose an educational placement for the Student?
>
> **(3) Propriety of Parental Placement** — If DCPS has denied the Student a FAPE, are Private School A and/or Private School B proper placements?

Petitioners requested the following relief: (a) reimbursement for the Student's placement at Private School A from April 2012 through the end of the 2011-12 school year; and (b) placement and funding for the Student at Private School B for the 2012-13 school year, with all related services and costs. *See Complaint, p.7; Prehearing Order* (Oct. 22, 2012), p. 2.

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).

IV. APPROPRIATENESS OF SUMMARY DECISION

Under federal civil procedure rules, summary judgment is appropriate where (a) the movant shows that there is no genuine dispute as to any material fact, and (b) the movant is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whether a fact is "material" is determined in light of the applicable substantive law invoked by the action. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In light of the applicable substantive law, a "genuine issue of material fact" is a fact that is determinative of a claim or defense, and therefore, affects the outcome of the case. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

An opposing party may not rely merely on allegations or denials in its own pleading. Rather, it must properly address the other party's assertion of fact – whether by affidavits or otherwise – by setting out specific facts showing a genuine issue for hearing. *See Fed. R. Civ. P. 56 (e)*. If the responding party fails to do so, then a court or hearing officer may consider the fact undisputed for purposes of the motion and may grant summary judgment if the motion and supporting materials (including the facts considered undisputed) show that the movant is entitled to it. *Id.* [5]

In IDEA administrative due process cases, "the hearing is not governed by formal rules of procedure or evidence." *SOP, Section 700.4*. However, the Hearing Officer has discretion to use civil procedure rules by analogy or as prescribed by the IDEA. *See Appropriate Standard Practices, Section 3. A.* (3). The Hearing Officer finds it appropriate to apply similar summary decision standards in these circumstances, where I am authorized to "take actions necessary to complete the hearing in an efficient and expeditious manner." *SOP,* § 600.1. The Hearing Officer is also directed to "attempt to ensure that all parties have an adequate opportunity to present their cases" and that "the hearing will proceed in an orderly fashion." *SOP,* § 700.4. *See also* 71 Fed. Reg. 46,706-07 (Aug. 14, 2006) (noting hearing officer discretion to make rulings on range of matters, and comments regarding need to rule on summary judgment if there is no claim or controversy to be adjudicated).

In addition, parties are entitled to file motions requesting that a hearing officer "rule or make a decision on a particular issue ***prior to*** or during a hearing," *SOP,* § 401 A. (emphasis added). "Responses contesting facts shall so state ***and supply supporting affidavits, declarations or documents as appropriate.***" *Id.*, §401.C (5) (emphasis added). "If the parties disagree as to the facts relating to the motion, ***and both parties have supported their positions with appropriate affidavits, declarations, or documents,*** if necessary, the Hearing Officer may convene a pre-hearing conference to receive sworn testimony related to the disputed facts, or delay ruling on the motion until the hearing convenes to allow the parties to provide evidence relating to the disputed facts." §401.C (7) (emphasis added).

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[5] *See also Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986) (moving party bears initial burden of demonstrating that no genuine issues of material fact are in dispute; burden then shifts to the non-moving party to demonstrate that genuine issues of material fact are in dispute; but court is precluded from weighing evidence or finding disputed facts).

The Hearing Officer concludes that this case meets the above standards for summary adjudication, as there is no genuine dispute as to any material fact and Petitioners are entitled to judgment as a matter of law. *Cf. Fed. R. Civ. P. 56 (a)*. The set of undisputed facts necessary to resolve the legal issues in this case are included in the Findings section below. This set of facts is undisputed – either because they have not or cannot be genuinely disputed, or because they must be considered undisputed for want of a proper factual response by DCPS to Petitioners' supported assertions of fact in their motion. *Cf. Fed. R. Civ. P. 56 (e)*; authorities cited above.

DCPS' motion for summary decision filed August 30, 2012, requested that the Hearing Officer "grant a SJM as there are no disputes of material facts in this matter and the only decision to be made is a question of law." *DCPS' Motion for Summary Decision,* p. 4. Moreover, at the September 26, 2012 PHC, both parties agreed that the case could be decided on cross-motions for summary decision and agreed to a briefing schedule specifically for that purpose. Yet DCPS now argues that Petitioners' motion for summary decision must be denied on the ground that a hearing is necessary on disputed facts. DCPS had it right the first time.

The only "facts" that DCPS now claims are disputed involve what it describes as "the ***actions of the parents*** in having a continuing desire to obtain a private education at public expense as the true intention of the parents." *Response to Petitioners' SJM, p. 7* (emphasis added). This merely repeats verbatim the same unsupported assertion that DCPS initially made in its own motion for summary decision. *DCPS'Motion for Summary Decision, p. 8*. In contrast, Petitioners have submitted declarations with their motion, including from parent attesting that in April 2012, he requested DCPS to evaluate the Student's needs and propose a special education program and placement to meet those needs. *Parents' Motion for Summary Decision, Exh. 1, ¶ 3*. He also attests that the parents shared their intent to consider all options with the school system and the IEP team, but that DCPS failed to propose anything for them to consider. *Id.,* ¶ 6.

In response, DCPS merely asserts – without supporting affidavit or other materials, and without setting out any specific facts – the "proffer that this student has indicated a desire to remain in a private placement." *Response to Petitioners' SJM, pp. 5-6.* ***This unsupported "proffer" is insufficient to demonstrate a genuine issue for hearing.*** Nor has DCPS ever disputed in its Response or otherwise any of the basic facts alleged in Petitioners' Complaint regarding the actions taken by both parties between April 2012 and July 2012 – including

Petitioners' request for a determination of eligibility and offer of FAPE, the MDT meetings that DCPS convened in May and June 2012, and Petitioners' other contacts with their DCPS neighborhood school and the PRO office.

Finally, to the extent that DCPS' response to the motion can be read to dispute Petitioners' ***subjective intent*** for the Student to remain in her private placement – as opposed to what it asserts as "the actions of the parents" – the Hearing Officer agrees with Petitioners that such factual dispute would not be determinative of any legal issue presented in this case. [6]

In sum, the Hearing Officer finds that the material facts are not in dispute, that an evidentiary hearing in this matter is unnecessary, and that the legal issues can be decided based on the undisputed facts established in the parties' respective motion papers. The case presents a straightforward legal issue as to whether DCPS must develop an IEP for a private school student who resides in the District once DCPS determines the student to be eligible for special education and related services under the IDEA – or whether DCPS may properly insist that the student first enroll and attend a DCPS school. Thus, the matter will be adjudicated by the Hearing Officer on the basis of the existing written record. [7]

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[6] As courts have explained, the parents' subjective intention of considering (or not) what the school system has to offer is not what matters:

> "[U]ltimately 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. "

Sarah M. v. Weast, 111 F. Supp. 2d 695, 701 n. 6 (D. Md. 2000). *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, 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).

[7] Even though not submitted as part of its response to Petitioners' motion for summary decision, the Hearing Officer has also reviewed DCPS' five-day disclosures and found nothing that reveals any genuine dispute as to any material fact. Apart from public and other documents previously submitted in support of DCPS' motion, the disclosures consist primarily of email communications between Petitioners' counsel and DCPS that merely serve to confirm the parties' respective legal positions with regard to DCPS' obligation to develop an IEP. *See DCPS 000074-76, 000082-87.* The disclosures also include certain eligibility documents and undated referral meeting notes that are not determinative of any claim or defense in this action. *See also Petitioners' Exhibits P-19, P-20.*

IV. FINDINGS OF UNDISPUTED FACTS

Based upon the parties' respective motions for summary decision and supporting materials, including the supported assertions of fact that were unaddressed by Respondent, this Hearing Officer makes the following Findings of Undisputed Facts:

1. The Student is a [redacted] who resides in the District of Columbia with Petitioners, who are the Student's parents.
2. During the 2011-12 school year, the Student attended Private School A, a non-public special education school located in Maryland, where she was parentally placed.
3. On or about April 4, 2012, Petitioners initiated the process of asking DCPS to evaluate the Student, determine her eligibility for special education and related services, and make an offer of FAPE. DCPS subsequently reviewed assessments of the Student and convened meetings of the Student's multidisciplinary team ("MDT") for that purpose.
4. On or about June 12, 2012, DCPS determined the Student to be eligible for special education and related services as a child with a disability under the IDEA. She was found to have Multiple Disabilities, including a Speech and Language Impairment and Other Health Impairment.
5. Upon finding the Student to be eligible, DCPS declined to develop an individualized education program ("IEP") for the Student and declined to propose an educational placement for the Student. DCPS informed Petitioners that it would not develop an IEP unless the Student was enrolled and attended a DCPS public school for up to 30 days.
6. On or about August 6, 2012, Petitioners notified DCPS that they intended to place the Student at Public School B for the 2012-13 school year and requested public funding for that placement.[8]
7. On or about August 16, 2012, Petitioners filed the instant due process complaint.
8. Petitioners subsequently enrolled the Student at Private School B at the beginning of the 2012-13 school year, and she currently attends Private School B.
9. Private School B is a non-public school located in Maryland that provides full-time special education to students with disabilities, including learning disabilities, autism, developmental delays, and communications disorders.

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[8] *See DCPS' Motion for Summary Decision, p. 3; Parent Declaration; see also Exhibit P-27-2.*

10. The parental placement at Private School B is proper under the IDEA, and the Student is receiving significant educational benefit from the program.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Alleged Denials of FAPE

Under Issue 1, Petitioners allege that DCPS denied the Student a FAPE by refusing to develop an IEP for the Student. Under Issue 2, Petitioners allege that DCPS denied the Student a FAPE by refusing to propose an educational placement for the Student. For the reasons and to the extent discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof on these two issues.

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).[9] 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 school.[10] 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); *see 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").[11]

In this case, it is undisputed 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, and requested an offer of FAPE; (c) DCPS determined that the Student is eligible as a child with multiple disabilities, including a Speech and Language Impairment and Other Heath Impairment; (d) DCPS declined to develop an IEP for the Student unless she first enrolled in and attended a DCPS public school for up to 30 days; (e) Petitioners

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[9] *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).

[10] *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); cases cited in Petitioner's Opposition to DCPS' Motion, pp. 4-6.

[11] Both IDEA and OSSE regulations further provide that DCPS must ensure that a meeting to develop an IEP is conducted within 30 days of any eligibility determination, *id.,* § 300.323 (c) (1); *DCMR* § 5-E3007.1, which in the case of this Student would have been ***July 12, 2012.***

notified DCPS of their intent to enroll the Student at Private School B and seek public funding; and (f) absent further DCPS response, Petitioners then enrolled the Student at Private School B for 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 first asserts 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 DCPS school***." *DCPS' Motion for Summary Decision, p. 4* (emphasis added). DCPS claims 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.[12] 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.[13] 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,

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[12] *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).

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

regardless of whether they attend a private school.[14] 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 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 next asserts that it "***has*** made a ***written offer to the parent to provide a FAPE*** at a DCPS school, [and] the IDEA does not require anything further. DCPS has made a FAPE available, and the parent has declined the offer." *DCPS' Motion for Summary Decision, p. 3* (emphasis added). But the assertion is wrong. ***Because DCPS has refused to develop an IEP that could be assessed by the parents, it has not yet made a written offer of FAPE.*** And because DCPS has not made an offer of FAPE, the parents cannot be said to have declined such offer in favor of a decision to keep the child enrolled in a private school. [15]

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." [16] An LEA would not need to propose any program for a student as long as the LEA believed that the program it would offer – but which it has ***not actually developed and offered*** – would not be accepted by the parents. This approach is inconsistent with the IDEA's framework. As the Supreme Court made clear in *Forest Grove*, "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." 129 S. Ct. at 2491. *See, e.g., Doe v. East Lyme Bd. of Ed.*, 112 LRP 47179 (D. Conn. Sept. 21, 2012), slip op. at pp. 6-7 (LEA has obligation to develop IEP for student even after parents unilaterally placed him in private school).

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[14] *See Parents' Motion for Summary Decision, pp. 3-4; Parents' Opp. p. 3.*

[15] This distinguishes the recent IHO case cited by DCPS (Case No. 2012-1207), where a FAPE had been offered via an IEP and placement formulated during the previous school year. *See also* 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); *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).

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

Accordingly, the Hearing Officer concludes that DCPS has denied the Student a FAPE by failing to develop an IEP and propose an educational placement upon finding her eligible for special education and related services as a child with a disability under the IDEA. As noted above, it was not and cannot genuinely be disputed that Petitioners requested an offer of FAPE, rather than merely equitable services, when they asked DCPS to propose a program and placement for her.[17]

However, the Hearing Officer does not find any denial of FAPE to have occurred during the 2011-12 school year, but only ***as of the start of the 2012-13 school year***. Because Petitioners did not request that DCPS begin the process of determining the Student's eligibility until April 4, 2012, DCPS had until approximately August 2, 2012, to complete that process within the statutory 120-day timeframe.[18] DCPS determined the Student's eligibility by June 12, 2012, and would have had at least another 30 days to develop an IEP pursuant to IDEA and OSSE regulations (*see* 34 C.F.R. § 300.323 (c) (1); *DCMR* § 5-E3007.1), had they not refused to do so.

B. <u>Appropriate Relief</u>

"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). "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

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[17] *See Findings of Undisputed Facts; see also P-19 & P-20* (correspondence between Petitioners and DCPS), cited at note 7, *supra*; DCPS documents at *P-21* (06/12/2012 MDT meeting notes), pp. 4-6; *P-23* (06/12/2012 Prior Written Notice).

[18] *See* D.C. Code §38-2561.02 (a) (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 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.

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 (as of no later than August 2, 2012, as the 120-day timeline expired) when DCPS refused to develop an IEP and propose an educational placement for the 2012-13 school year. On August 6, 2012, approximately three weeks prior to the beginning of that school year, Petitioners then notified DCPS in writing that they intended to place the Student at Private School B and seek funding for that placement because DCPS had failed to offer a FAPE. DCPS failed to respond with any further offer of FAPE. With no other option having been presented, Petitioners then enrolled the Student at Private School B for the 2012-13 school year, where she continues to be educated. *See Declaration of Parent,* ¶ 8.

The Hearing Officer further concludes that the parental placement at Private School B is proper under the IDEA, as the Student is receiving significant educational benefit from the program. *See Declarations of Parent, Private School B Director, and Educational Consultant,* attached as Exhibits 1-3 of *Parents' Motion for Summary Decision.* Private School B is a non-public school that provides full-time special education to students with disabilities, including learning disabilities, autism, developmental delays, and communications disorders. *Id.* Prospectively, the private placement also appears to be appropriate for 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). As Petitioners point out in their reply, DCPS' Response to Parents' Motion for Summary Decision does not even address Petitioners' showing on this issue. Hence, the issue is deemed to be conceded, both respect to reimbursement and prospective placement.

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 B program from the beginning of the 2012-13 school year. The Order

also places the Student at Private School B for the remainder of the 2012-13 school year, with DCPS funding.[19]

In the end, this case 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 defaulted in that responsibility, Petitioners are entitled to appropriate relief.

VI. ORDER

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

1. Petitioners' motion for summary decision is **GRANTED**;
2. Respondent DCPS' motion for summary decision is **DENIED**;
3. Within **30 days** of DCPS' receipt of necessary and appropriate documentation from Petitioners, DCPS shall reimburse Petitioners for all costs of tuition and related services they have incurred for the Student at **Private School B** [20] for the 2012-13 school year to date;
4. DCPS shall place and fund the Student at **Private School B** [21] for the remainder of **2012-13 school year**, with transportation;
5. Within **30 days** of the date of this Order (*i.e.*, by no later than **November 28, 2012**), DCPS shall convene a meeting of the Student's MDT/IEP Team (including Petitioners) at Private School B for the purpose of developing an Individualized Education Program ("IEP") for the Student for the 2012-13 school year, consistent with her current placement and receipt of educational benefit at Private School B;

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[19] The Hearing Officer notes that in their motion for summary decision, Petitioners are no longer requesting any reimbursement for the costs of Private School A during the 2011-12 school year. Thus, that element of relief appears to have been withdrawn. In any event, because DCPS was not found to have denied the Student a FAPE during the 2011-12 school year, Petitioners are not entitled to any reimbursement for Private School A.

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

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

6. Petitioners' other requests for relief in their Due Process Complaint filed August 16, 2012, are hereby **DENIED;** and

7. The case shall be **CLOSED.**

Dated: October 29, 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).