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

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: July 5, 2011**

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 March 10, 2011, on behalf of a year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends a non-public school for children with learning disabilities (the "Private School"), which is located in the District of Columbia. Petitioner is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to provide an appropriate individualized education program ("IEP") and placement/site for the 2010-11 school year. Petitioner requests retroactive tuition reimbursement and prospective placement at Private School.

DCPS filed its Response on March 28, 2011, which states that DCPS has not denied the Student a FAPE. DCPS asserts that it made FAPE available to the Student in a timely manner and is not responsible for reimbursement of the Private School tuition.

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

A resolution session was also held on March 28, 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of April 9, 2011. A Prehearing Conference ("PHC") was then held on April 22, 2011; the parties filed five-day disclosures on May 11, 2011; and the Due Process Hearing ("DPH") was scheduled for May 18 and 20, with a third session if necessary on May 27, 2011. Petitioner elected for the hearing to be closed.

It turned out that a third session was needed on May 27. Additionally, due to the complexity of the case and amount of oral testimony and documentary evidence presented, the parties desired to obtain a transcript and prepare written closing arguments. Accordingly, the parties agreed that written closings would be due June 17 and the Hearing Officer Determination ("HOD") would be due June 27, 2011. A continuance motion was granted on that basis on May 24, 2011. Subsequent delays in obtaining the transcript from the outside vendor for the Student Hearing Office resulted in a further continuance for written closings to June 24, and for the HOD to July 5, 2011.

At the DPH, the following Documentary Exhibits were admitted into evidence:

> **Petitioner's Exhibits:** P-1 through P-25. (P-20 through P-22 were admitted over DCPS' objections.)
>
> **Respondent's Exhibits:** R-1 through R-22 (without objection).

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

> **Petitioner's Witnesses**: (1) Parent-Petitioner; (2) Educational Consultant; (3) Speech-Language Pathologist ("Private School SLP"); and (4) Academic Director, Private School.
>
> **Respondent's Witness**: (1) Special Education Teacher; (2) Speech-Language Pathologist ("DCPS SLP"); (3) Elementary School Special Education Coordinator ("ES SEC"); and (4) Middle School Special Education Coordinator ("MS SEC").

II. JURISDICTION

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

III. ISSUES AND REQUESTED RELIEF

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

(1) **Failure to Develop an Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) at an MDT/IEP team meeting held on or about August 25, 2010?

(2) **Failure to Provide an Appropriate Educational Placement** — Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate educational placement for the 2010-11 School Year, based on the 08/25/2010 IEP?

Specifically, Petitioner alleges that the 08/25/2010 IEP and placement proposed for the Student were inappropriate in that: (a) the Student requires instruction in small, self-contained special education classes due to her deficits in auditory processing, comprehension, and attention; (b) inclusion classes have proven to be ineffective, both academically and behaviorally, for the Student; (c) the IEP fails to provide the Student with sufficient, direct, special education instruction; and (d) the IEP/placement were determined without the input of the DCPS neighborhood middle school ("MS) staff or anyone with specific knowledge of the special education program at MS. *See Complaint,* ¶ 15. [2]

The Complaint requested that the Hearing Officer order: (a) DCPS to reimburse the parent for her educational expenses related to the unilateral placement of the Student at Private School for the 2010-11 school year; and (b) continued prospective placement at Private School. At the first DPH session on May 18, Petitioner withdrew her request for prospective placement relief in light of a proposed MDT/IEP Team meeting scheduled for May 19, 2011.

[2] At the PHC, Petitioner's counsel stated that the Complaint does not seek to assert the circumstance in paragraph 15 (d) as a separate procedural issue. Petitioner's counsel also stated that the Complaint raises no issue concerning the timeliness of DCPS' offer of FAPE as of 08/25/2010.

IV. FINDINGS OF FACT

1. The Student is a -year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. Her primary disability is Specific Learning Disability ("SLD"). *P-2; R-2.* She lives in the District of Columbia with her mother and two siblings. *Parent Test.*
2. From kindergarten through 4th grade, the Student attended her neighborhood DCPS elementary school ("ES). During this time period, various concerns were expressed regarding the Student's acquisition of academic skills, as well as her auditory comprehension, and executive functioning abilities. *Parent Test.; ES SEC Test.* She received a variety of interventions at school, and her mother supplemented the school supports with independent tutoring. *Id.*
3. In September 2008, during fall of her 4th grade year at ES (2008-09 school year), the Student received a comprehensive psychological evaluation. *P-14.* The evaluator found the Student to present with an extremely complex cognitive profile – with most of her ability scales clustered in the average to high average range, while her ability to maintain attention (particularly where auditory information is presented) was found to be in the severely impaired range. *P-14, p. 15.* The evaluator found to present with "severe executive functioning issues" and deficits in her auditory and visual/perceptual processing that affect her comprehension of conceptual material in all academic subjects. *Id., p. 20.* Emotionally, the Student's perception of how she is perceived by others was noted as a source of stress, which causes her to be overwhelmed, and contributes to her anxiety. *Id.; accord P-11; P-16.*
4. Also in September 2008, the Student was evaluated by an audiologist and an occupational therapist. *P-15.* The evaluation found that the Student has significant difficulty filtering out unnecessary information in the presence of background noise *(i.e.* figure-ground), and that she gets overloaded if there is too much sensory *(i.e.* both auditory and visual) information to process at once. *P-15; Private School SLP Test.* The Student's auditory processing deficits severely compromise her ability to learn in a general education classroom where information is presented orally, and at a pace that is too rapid. *Id.; Ed. Consult. Test..* In addition, her visual processing abilities were found

to be below average, further compromising her ability to take in information in a large group setting. *Id.*

5. Following these evaluations, in November 2008, the Student was found to be eligible under the IDEA as a child with a disability (specifically, SLD), and she began to receive special education in an general education (inclusion) setting. However, the Student continued to struggle academically and also began to display problematic behaviors in school that year. *See P-11; Parent Test. Spec. Ed. Teacher Test.*
6. As a result of these difficulties, Petitioner made the decision to educate the Student at Private School for the 2009-10 school year. In April 2009, in conjunction with her proposed enrollment at Private School, the Student received a comprehensive speech-language evaluation, which revealed significant deficits in her auditory processing, comprehension, and attention. *See P-13; Private School SLP Test.; Parent Test.*
7. During the 2009-10 school year at Private School, the Student received full-time specialized instruction, integrated speech and language therapy, additional intensive language therapy, and integrated occupational therapy.
8. At the end of the 2009-10 school year, Petitioner contacted DCPS through the ES to request an IEP for the Student for the 2010-11 SY. Petitioner provided copies of the Student's current evaluations and her written program and progress reports from Private School. *See Parent Test.; ES SEC Test.* The evaluations included a comprehensive speech/language assessment (*P-13*) and a diagnostic evaluation prepared by Petitioner's educational consultant (*P-10*).
9. During the 2010 summer, Petitioner participated in at least two meetings with the MDT/IEP Team from ES to review the updated information and begin to develop an IEP. *Parent Test.; ES SEC Test.*
10. On or about August 25, 2010, DCPS convened a meeting of the Student's IEP Team to complete an IEP for the 2010-11 school year. Although the 2010-11 school year had already started that week, and the Student could no longer attend ES given her grade level, the meeting was held at ES. Petitioner and her educational consultant participated in the meeting. No one from MS participated in that meeting.
11. The IEP developed at the 08/25/2010 meeting provided for special education and related service in a combination (inclusion/pull-out) setting. Specifically, the IEP provided: (a)

20 hours of specialized instruction (in Reading, Math, and Written Expression) in a General Education setting; (b) two hours per week of specialized instruction (in Reading and Written Expression) in an Outside General Education setting; (c) 45 minutes per week of speech/language services in a General Education setting; (d) 45 minutes per week of speech/language services in an Outside General Education setting; and (e) 60 minutes per week of behavioral support services in an unspecified setting. *P-2, p.11.*

12. The goals and objectives of the 08/25/2010 IEP were adapted from the Private School "IEP" document developed for the Student in its full-time special education program. *ES SEC Test.* The speech-language section was transferred over verbatim. *DCPS SLP Test.*
13. At the 08/25/2010 meeting, DCPS and the IEP Team proposed to implement the IEP at MS, where the Student would spend most of her day in general education classes with specialized instruction delivered on an "inclusion" basis. MS utilizes primarily an inclusion model, and class sizes generally range from 25 to 30 students. *MS SEC Test.* Petitioner disagreed with placement of the Student at MS, and she informed the Team that she wanted DCPS to place and fund the Student at Private School.
14. Also on August 25, 2010, DCPS issued a Prior Written Notice ("PWN") stating that DCPS offers a full-time placement for the Student at MS, effective immediately. *R-10.*[3] DCPS refused Petitioner's request for a "separate segregated school setting as violating [Student's] right to the Least Restrictive Environment." *Id.* DCPS further explained that Student "was enrolled in DCPS at [ES] through 2008-09 and showed continual progress. Supports for learning can be provided for her in a gen. ed. setting with pull-out for skill development per IEP." *Id.*
15. On or about August 26, 2011, Petitioner through counsel sent a letter to DCPS through the SEC at ES. *R-3.* The letter confirmed in writing that Petitioner rejected the proposed IEP and placement as described at the 08/25/2010 meeting. *Id.* Petitioner asserted that the Student needed a full-time, self-contained special education program, and was unable to obtain educational benefit in an inclusion environment such as that proposed at MS. *Id.* Accordingly, the letter made clear that the Student would return to Private

[3] The program at ES ends with the 5th grade, with its students typically transitioning to middle school for 6th grade. The Student was at that time entering the 6th grade; and MS was her neighborhood middle school.

School for the 2010-11 school year, and that it was Petitioner's intention for such placement to be at public expense. *Id.* The letter added, however, that Petitioner "remains open-minded to having [Student] return to an appropriate public school placement, and will take [SEC] up on your suggestion of contacting the acting principal at [MS] to schedule an observation and/or follow-up meeting." *Id.*

16. On or about September 10, 2010, DCPS responded to the 08/26/2010 letter, stating that "DCPS does not agree to bear the cost of a private placement in this case." *R-4.*
17. Despite the disagreement about placement and/or location of services, the IEP Team invited Petitioner to visit MS, and she did so in the early fall. *Parent Test.* Petitioner also had several informal discussions with the special education staff at MS during the winter of the 2010-11 school year. *Id.* As a result of that visit/observation and those informal discussions, Petitioner decided that the school setting/placement offered by DCPS was not appropriate for the Student. She felt that the large class sizes (25-30) and fast-paced presentation of material – combined with the fact that the SEC said that only "inclusion" services were available at the MS – made it extremely unlikely that MS could meet her daughter's needs. *Id.*
18. The Student continued to attend Private School at Petitioner's expense through the end of the 2010-11 school year. The cost to Petitioner exceeded $36,000, inclusive of related services. *Parent Test.; Private School Director Test.*
19. As of August 25, 2010, the Student had a severe mixed receptive/expressive language disorder, which included an auditory processing disorder (particularly in the areas of auditory comprehension, auditory attention, and difficulty with background noise). She also had severe executive functioning issues, as well as deficits in visual/perceptual processing and pragmatic (social) language. *See P-2; P-13; P-14, p. 20; Private School SLP Test.* These language-based learning disabilities significantly impact the Student's ability to attend to or understand verbally presented instruction in the classroom, process directions, and recall complex information. Such impacts have generally become more severe as she has advanced into middle school, where the pace of language has accelerated and become too rapid for her to access the curriculum in a meaningful way without direct intervention by a special education teacher trained in auditory processing dysfunction. *See Private School SLP Test; Ed. Consult. Test.;* Tr.I:167-179; *P-13.*

20. In order to make adequate educational progress, the Student generally requires a small classroom environment, with multi-sensory special education instruction, frequent breaks to sustain her attention, and speech-language intervention. *See P-14; P-13; P-10; Private School SLP Test.; Ed. Consult. Test.*
21. Based on her unique needs that result from the foregoing disabilities, the 08/25/2010 IEP is not reasonably calculated to provide meaningful educational benefit to the Student; and the proposed MS program is not an appropriate educational placement for the Student.
22. The Private School is a proper placement for the Student. It is an OSSE-approved, non-public, special education school serving students with above average cognitive abilities and language-based learning disabilities. *See Private School Director Test.; Parent Test.* She has been in a class of approximately 12 students, with a special education teacher, two classroom assistants, integrated speech/language and OT services, and social skills/behavioral support. She also receives certain "multi-sensory" instruction viewed as important to her success. Many students at Private School have significant language, executive function, attention, and organizational issues similar to the Student's. *Id.* Teachers are also trained in auditory-processing and able control for background noise.
23. On or about March 25, 2011, DCPS convened a resolution meeting in this case. *R-5.* DCPS reaffirmed that it was not willing to offer reimbursement for Petitioner's unilateral placement of the Student at Private School for the 2010-11 school year. *R-6.*

V. 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). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate IEP or propose an appropriate placement. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G.* v. *District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw* v. *District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

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

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

As noted, Petitioner claims that DCPS denied the Student a FAPE by: (1) failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) at an MDT/IEP team meeting held on or about August 25, 2010; and (2) failing to provide the Student with an appropriate educational placement for the 2010-11 School Year, based on the 08/25/2010 IEP. Specifically, Petitioner alleges that the 08/25/2010 IEP and placement proposed for the Student were inappropriate in that: (a) the Student requires instruction in small, self-contained special education classes due to her deficits in auditory processing, comprehension, and attention; (b) inclusion classes have proven to be ineffective, both academically and behaviorally, for the Student; (c) the IEP fails to provide the Student with sufficient, direct, special education instruction; and (d) the IEP/placement were determined without the input of the DCPS neighborhood middle school ("MS) staff or anyone with specific knowledge of the special education program at the school. *See Complaint,* ¶ 15.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on these claims.[4]

Applicable Law

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

[4] In this particular case, the "placement" claim and the "inappropriate IEP" claim are necessarily intertwined. *Cf. Gellert v. DCPS,* 435 F. Supp. 2d 18 (D.D.C. 2006). Petitioner alleges that the Student requires an IEP and placement in a setting wholly outside general education, with full-time specialized instruction in a self-contained classroom with a small student-teacher ratio. Thus, if the IEP is inappropriate, the school placement is also likely to be inappropriate; and vice versa. This is not a case where an IEP is deemed to provide an appropriate program, but the particular school location is alleged to be unable to implement the IEP or to be otherwise ill-suited to the Student's unique IEP needs.

(D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982). [5] The IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. *Deal v. Hamilton County*, 392 F.3d at 862 (citing *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)). The determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood*, 172 F.3d at 248. At a minimum, an IEP "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Educ. v. Rowley*, 458 U.S. at 204; *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005).

The issue of whether an IEP is appropriate under the foregoing standards is a question of fact for determination by a hearing officer. *See, e.g., S.H.* v. *State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 709 F. Supp. 2d 57 (D.D.C. 2010), slip op. at 20.

In determining the educational placement of a child with a disability, DCPS must place a student with a disability in "an appropriate special education school or program" in accordance with the IDEA. D.C. Code 38-2561.02. *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"); *T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) ("Once developed, the IEP is then implemented through an appropriate placement in an educational setting suited to the student's needs"). Among other things, DCPS must ensure (*inter alia*) that the placement decision is "based on the child's IEP," and that it is in conformity

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

with LRE provisions. 34 C.F.R. § 300.116.[6] "If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991).

Analysis

In this case, the August 25, 2010 IEP (*P-2*) contained goals and objectives that had been crafted by the teachers and service providers from the Private School (*P-20*), with the input of Dr. Laura Solomon (Petitioner's educational consultant) and the Private School SLP, both of whom testified at the due process hearing. DCPS adopted the content of the Private School "IEP" without objection, in apparent recognition of the significance of the Student's special education needs. *See DCPS SLP Test.* There is no disagreement with the content of the IEP. *ES SEC Test.* Where the parties disagree is over the proposed setting/placement of inclusion classes. Petitioner contends that this proposal is at odds with the Student's demonstrated need for small class sizes and a quiet, relatively distraction-free learning environment. *See Petitioner's Closing Argument, pp. 11-14; Suggs v. D.C.,* 679 F. Supp. 2d 43 (D.D.C. 2010) ("IEP may not be reasonably calculated to provide benefits if, for example ...a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties."); *Gellert v. DCPS,* 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006) (same).

The Hearing Officer concludes that Petitioner proved this claim by a preponderance of the evidence. The evidence demonstrates convincingly that the Student has a severe mixed receptive/expressive language disorder, which includes an auditory processing disorder (particularly in the areas of auditory comprehension, auditory attention, and difficulty with background noise). She also has severe executive functioning issues, as well as deficits in visual/perceptual processing and pragmatic (social) language. As a result, she has significant difficulties processing auditory and visually presented information, and she has a propensity to shut down when overwhelmed. *P-13; P-14; Testimony of Private School SLP, Spec. Ed. Teacher, Educ. Consult, and Parent.* This all points to the inappropriateness of an inclusion model for this Student, where she would receive virtually all of her specialized instruction within

[6] *See, e.g., Deal v. Hamilton County*, 392 F.3d 840, 859 (6th Cir. 2004) ("placement may only be considered to have been based on the child's IEP when the individual characteristics, including demonstrated response to particular types of educational programs, are taken into account."); *Polk v. Central Susquehanna Intermediate Unit,16*, 853 F. 2d at 177-178.

a large classroom setting with as many as 25-30 students. Moreover, all of the professional recommendations were opposed to such setting as meeting the unique needs of this student.

For example, Petitioner presented the testimony of an expert in speech-language pathology with extensive experience working in a variety of school settings. This expert had evaluated the Student (*P-21; P-20:7*), observed her in school (both in class and in transitions), observed her in therapy, provided therapy, and spoken extensively with her colleague who had completed the Comprehensive Speech and Language Assessment. *P-13*; *Private School SLP Test.* She expressed several compelling reasons to support her opinion that the Student would not be successful in a general education middle school classroom given her "complex linguistic profile." [7] The Hearing Officer finds her testimony to be highly credible, and DCPS presented no credible expert testimony to rebut these opinions and conclusions. Essentially the same concerns were also noted in the September 2008 psychological evaluation, which DCPS accepted without qualification, *see P-14,* and in the testimony and report of the educational consultant.

The evidence further shows that the Student has a history of problematic experiences with an inclusion setting during her fourth grade year at ES, where she was unsuccessful academically and also declined in her social/emotional functioning (*e.g., P-16*). *Cf. N.S. v. District of Columbia,* 709 F. Supp. 2d. 57, 72 (D.D.C. 2010) ("parents were justifiably skeptical that an inclusion program with no prescribed pullout services would be adequate to meet N.S.'s education needs when he had failed to make significant progress during the previous year at Murch without pullout services.") In addition, there is some evidence to suggest that adoption of such setting/placement in this Student's IEP may have been "driven [at least in part] by the school's needs rather than [the Student's]." *N.S. v. District of Columbia, supra; see ES SEC Test. (cross examination); DCPS SLP Test.*

[7] According to this expert, the Student "has a very significant auditory processing deficit and it includes many aspect [sic] of auditory processing, it's immediately evident when you look at the concepts and following directions subtest where she scored below 99 percent of the other kids her age...And so this is a ***very rare score*** and of, you know, ***tremendous concern***." Tr.I:164 (emphasis added). She went on to explain that, "the ability to follow oral directions in the classroom is absolutely critical in every single aspect of learning." *Id. See also* Tr.I:176-177 ("she is in great danger of shutting down when she becomes overwhelmed, auditorily overwhelmed or overwhelmed with the amount of text that she has to linguistically process.').

C. Requested Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, Petitioner requests the Hearing Officer to order DCPS to:

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

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

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner, as of August 25, 2010, when the Student's IEP was developed. The Hearing Officer further concludes that the parental placement at Private School appears to be proper, as the Student has received educational benefit from this program. She appears to have made significant progress, both academically and behaviorally, with the support of that program. *See, e.g., Findings, ¶ 22.* Moreover, the placement aligns very well with the recommendations made by virtually all of the Student's evaluators, as noted above. It 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*, 427 F.3d at 12. Indeed, the goals and objectives in DCPS' proposed IEP were lifted "verbatim" from the Private School IEP. *DCPS SLP Test., Tr. III:94.*

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 Petitioner,[8] the notice provided to DCPS, and its opportunity to evaluate the Student – the Hearing Officer concludes that DCPS should reimburse Petitioner for the full cost of the Private School program, including tuition and transportation, for the 2010-11 school year.

[8] For the reasons discussed in Petitioner's Closing Argument, the Hearing Officer agrees that the evidence shows that Petitioner acted in good faith in connection with development of the IEP and the possibility of public school placement. *See,.e.g., Sudbury Pub. Schools v. Mass Dept of Educ.,* 110 LRP 75237 (D. Mass. 2010); *Kitchelt v. Weast*, 341 F. Supp. 2d 553, 556 n. 1 (D. Md. 2004).

VI. ORDER

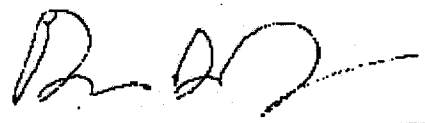
Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Within 30 days of this Order, DCPS shall reimburse Petitioner for the full cost of the Student's enrollment at the **Private School** [9] for the 2010-11 school year.

2. DCPS shall maintain the Student's current educational placement at Private School unless and until either (a) DCPS is able to provide an appropriate placement for her within the public school system or an alternative private school, following the procedures specified in IDEA, or (b) the parties agree otherwise.

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

IT IS SO ORDERED.



Dated: July 5, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

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