DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent and Advocate, on behalf of STUDENT,[1]	)	**Case Number: 2012-0748**
Petitioners,	)	
v.	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	**Hearing Officer: Frances Raskin**

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. BACKGROUND

Petitioner 1 is the great-grandmother and guardian of a [redacted] student ("Student") with a disability who attends a nonpublic school ("Nonpublic School 3") where Petitioner unilaterally placed him at the outset of the 2012-2013 school year. Petitioner 2 shares educational decisionmaking rights with Petitioner 1. On October 25, 2012, Petitioners filed a due process complaint ("Complaint") against Respondent, the District of Columbia Public Schools ("DCPS"), alleging violations of IDEA.

On October 26, 2012, this Hearing Officer was assigned to preside over this case. On November 5, 2012, Respondent filed a response ("Response") to the Complaint.[2] Respondent filed its Response one day after the deadline established by IDEA.[3]

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[1] Personal identification information is provided in Attachment A.
[2] Respondent did not challenge the sufficiency of the Complaint.

On November 18, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties did not agree to start the forty-five day, due process hearing period on that date. Thus, the resolution period ended on November 24, 2012.

On November 28, 2012, this Hearing Officer held a prehearing conference in which Counsel for Petitioners and Counsel for Respondent participated. During the prehearing conference, both counsel agreed that the forty-five day, due process hearing timeline began on November 24, 2012. This Hearing Officer informed counsel that the end of the forty-five-day timeline, i.e., the deadline for the hearing officer determination ("HOD"), is January 8, 2013. During the prehearing conference, both parties agreed to schedule the due process hearing for December 19 and 21, 2012.

The due process hearing commenced on December 19, 2012, at 9:30 a.m. in room 2003. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits[4] and Respondent's proposed exhibits.[5] Petitioner presented three witnesses on her behalf, the educational advocate ("Advocate"), the Student, and the assistant educational director ("Assistant Director") of Nonpublic School 3. Respondent presented one witness, an expert in school psychology ("Expert").

The due process hearing reconvened at 9:20 a.m. on December 21, 2012. Respondent presented its last witness, a special education teacher ("Teacher"). After the parties presented oral closing arguments, the due process hearing concluded at 11:45 a.m. on December 21, 2012.

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[3] If the Local Education Agency ("LEA") has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. § 300.508(e).

[4] This Hearing Officer admitted into evidence Petitioner's exhibits 1-23, inclusive.

[5] This Hearing Officer admitted into evidence Respondent's exhibits 1-13, inclusive.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on February 23, 2012, when it unilaterally decided that, for the 2012-2013 school year, he would attend the DCPS School, a less restrictive placement than the nonpublic, special education day school ("Nonpublic School 2") he attended during the 2011-2012 school year, thereby failing to (1) comply with a November 30, 2010, hearing officer determination ("HOD") that required Respondent to conduct a more thorough review before determining his placement for the 2012-2013 school year; and (2) place the Student in his least restrictive environment because the DCPS School cannot implement his February 23, 2012, individualized education program ("IEP"), i.e., provide the "small, structured, therapeutic milieu that can address his academic challenges as well as his social emotional needs" or provide the 29 hours of specialized instruction outside the general education setting that this IEP requires.

B. Whether Respondent denied Petitioners their right to participate in the decisionmaking process regarding the provision of FAPE to the Student on February 23, 2012, by (1) unilaterally deciding that, for the 2012-2013 school year, the Student would attend the DCPS School, a less restrictive placement than the nonpublic, special education day school he attended during the 2011-2012 school year; (2) not allowing Petitioners to provide input or otherwise participate in the placement determination; (3) failing to include in the February 23, 2012, meeting a representative from the DCPS School to describe to Petitioners and the placement team the special education services available at the DCPS School; and (4) failing to conduct triennial evaluations of the Student, which would have provided Petitioners the data they required to make an informed decision regarding the Student's placement; and

C. Whether Respondent denied the Student a FAPE by failing to conduct the comprehensive psychological assessment, including a clinical assessment, that Petitioners requested at an April 2, 2012, multidisciplinary team ("MDT") meeting in order to determine the Student's level of academic and social emotional functioning and whether the DCPS School would be an appropriate placement for him.

Petitioners request relief in the form of an order that would require Respondent to reimburse them for the costs of their unilateral placement of the Student at the Nonpublic School beginning on August 27, 2012, through the end of the 2012-2013 school year, including transportation. Petitioners also seek an order that would require Respondent to fund an independent comprehensive psychological assessment and an independent functional behavioral assessment.

IV. FINDINGS OF FACT

1. The Student is a [redacted] young man who is eligible for special education services as a student with emotional disturbance.[6] He has a history of behavioral problems that interfere with his learning, including irritability, acting out aggressively, inattentiveness, having outbursts, poor self-control, difficulty following directions, noncompliance, becoming easily distracted, frustration, inappropriate touching, and disrespectful behavior.[7]

2. The Student was diagnosed with attention deficit hyperactivity disorder (ADHD) and a learning disability when he was in third grade.[8] As of June 2009, he experienced symptoms consistent with ADHD combined type and demonstrated increased oppositional behavior.[9] He has an inability to problem solve using effective reasoning strategies, which contributes to his emotional dysregulation and limited self-control.[10] He internalizes his problems when he feels a sense of limited control and in turn acts out aggressively.[11]

3. The Student's full-scale IQ is 93, which is in the average range.[12] He has sufficient verbal and nonverbal reasoning skills to meet grade level expectations.[13] Yet, during the 2011-2012 school year, when the Student was in the eighth grade, he performed in the classroom at about the sixth-grade level in math, the seventh-grade level in reading, and the third- to fourth-grade level in writing.[14]

4. The Student's academic skills are impacted by his mood and motivation.[15] He is easily frustrated, angered, and distracted when working on academics, and has not always been available to learn.[16] In the classroom, he has difficulty with tasks that he is not interested in completing, tasks that require sustained attention, and expressing his ideas in writing.[17]

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[6] Testimony of Student; Petitioner Exhibit 8 at 1 (May 31, 2012, Prior Written Notice); Petitioner Exhibit 12 at 1 (February 23, 2012, IEP).
[7] Petitioner Exhibit 10 at 3 (January 23, 2009, Psychological Evaluation Report).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Petitioner Exhibit 23 at 10-11.
[13] Petitioner Exhibit 23 at 14 (June 19, 2009, Confidential Cognitive, Educational, and Clinical Evaluation).
[14] Testimony of Expert; Petitioner Exhibit 10 a 2 (May 29, 2012, Data Evaluation Review).
[15] Petitioner Exhibit 10 at 5.
[16] *Id.*
[17] *Id.*

5. As such, the Student requires academic interventions that range from the third- to fourth-grade level for writing, and the fourth- to fifth-grade level in reading and mathematics.[18] He would benefit from having the work broken down into small segments with frequent breaks to target his academic deficits, as well as extended time and frequent check-ins to make sure he understands the work.[19] Without academic interventions, he would likely fall further behind his peers.[20]

6. Thus, the Student meets the criteria for ADHD and oppositional defiant disorder, in addition to his learning problems and poor interpersonal relationships.[21] His history of behavioral problems and ongoing academic difficulties indicate that he has an emotional disturbance.[22]

7. On November 30, 2010, a hearing officer issued an HOD that placed the Student at Nonpublic School 1 at public expense.[23] The hearing officer ordered that the Student would remain at Nonpublic School 1 at least until the conclusion of the 2011-2012 school year.[24] The Hearing Officer further ordered that, at the conclusion of the 2011-2012 school year, the Student's IEP team must review his IEP, his performance, and educational placement.[25] The hearing officer ordered that the IEP team must determine whether the Student's IEP and placement were enabling him to close the achievement gap between his then current academic performance and the expected grade-level performance at his then grade-level.[26]

8. In the November 30, 2010, HOD, the hearing officer ordered that, if the Student is not enrolled in Nonpublic School 1 at any time during the 2011-2012 school year, the Student's IEP team must determine a new placement for him that is a full-time, therapeutic, special education school with a student-teacher ratio of less than ten to one, that can provide the related services the Student needs to progress in the general education curriculum.[27]

9. In August 2011, Nonpublic School 1 closed.[28] On August 22, 2011, Respondent issued a prior written notice informing Petitioners that it would place the Student at Nonpublic School 2 at public expense for the remainder of the 2011-2012 school

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 3.
[22] *Id.* at 5.
[23] Petitioner Exhibit 20 at 13 (November 30, 2010, HOD).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Testimony of Advocate.

year.[29] Nonpublic School 2 is a small, therapeutic, special education day school.[30] At Nonpublic School 2, the Student does not have access to his nondisabled peers at any time during the school day.[31]

10. In November 2011, the Student was in eighth grade but receiving instruction on a second- to fourth-grade level.[32] In mathematics, he was at a fourth-grade instructional level,[33] although he is able to perform at the sixth-grade level.[34] In reading, he was at the third-grade instructional level, although he was able to perform at a seventh-grade level.[35] In written expression, he also was at a fourth-grade instructional level.[36] His difficulties sustaining attention and bouts of extremely low motivation greatly diminished his capacity to access the general education curriculum.[37]

11. On February 2, 2012, Counsel for Petitioners, writing on behalf of Petitioner 1, requested that Nonpublic School 2 convene a meeting to discuss her concerns about the Student's lack of academic progress, behavioral issues, and attendance.[38]

12. On February 23, 2012, Respondent convened a meeting in which Petitioners participated by telephone.[39] The Student's special education teacher, the school counselor, the IEP coordinator, and an LEA representative ("LEA Representative") also attended the meeting.[40] Because Respondent did not provide notice to Counsel for Petitioners, she did not attend the meeting.[41]

13. Between September 8, 2012, and February 23, 2012, the Student's academic performance and behavior had deteriorated and his inappropriate behaviors had increased.[42] He lacked motivation, shut down, and slept in class.[43] He had become more

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[29] *Id.*; Petitioner Exhibit 19 at 1. (August 22, 2011, Prior Written Notice).
[30] Petitioner Exhibit 19 at 1. A therapeutic school provides behavioral supports, employs behavioral technicians, and has de-escalation rooms where students can go to calm down. Testimony of Advocate.
[31] Testimony of Advocate.
[32] Petitioner Exhibit 18 at 3 (November 11, 2011, Meeting Notes).
[33] The term instructional level refers to the level of instruction the Student is receiving, not his actual performance level. Testimony of Teacher.
[34] Petitioner Exhibit 12 at 15 (February 23, 2012, Meeting Notes).
[35] Petitioner Exhibit 18 at 3.
[36] *Id.*
[37] Petitioner Exhibit 16 at 1 (November 11, 2011, Present Level of Performance).
[38] Petitioner Exhibit 13 at 1 (February 2, 2012, letter to principal of Nonpublic School 2).
[39] Petitioner Exhibit 12 at 15.
[40] Petitioner Exhibit 12 at 1 (February 23, 2012, IEP).
[41] Testimony of Advocate.
[42] *Id.*
[43] Petitioner Exhibit 12 at 16.

aggressive and defiant than during the first month and a half of the school year.[44] On average, the Student had physical altercations with school staff once or twice a month.[45] In one of these altercations, he ripped his teacher's shirt and dumped the teacher's food on the floor.[46] He also has shown aggression toward his peers, including throwing punches in a peer's face and wresting in class.[47]

14. The Student had not responded well to interventions designed to motivate him, which was to correlate his academics with skateboarding.[48] The IEP team decided that the Student requires frequent breaks, counseling services, and individual attention to ensure he stays focused and comprehends the instruction and assignments.[49] They also agreed to try new interventions, including one-to-one assistance in the classroom.[50]

15. During the February 23, 2012, meeting, the IEP team determined that the Student continued to be eligible for special education services as a student with an emotional disturbance.[51] They developed an IEP for the Student that provides that he is to receive twenty-nine hours per week of specialized instruction outside the general education setting and one hour per week of behavioral support services outside the general education setting.[52]

16. During the February 23, 2012, meeting, Petitioner 2 requested that Respondent change the Student's location of services, stating that he did not experience these behavioral difficulties while at Nonpublic School 1.[53] She requested that Respondent place the Student in a more restrictive environment than Nonpublic School 2.[54]

17. The IEP team did not entertain the request by Petitioner 2 to place the Student in a more restrictive environment.[55] Instead, the IEP team discussed the Student's ability to perform in a less restrictive environment.[56] The Student's teacher reported that, if the Student were motivated, he could access the grade-level curriculum.[57] Yet, Petitioner 2

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[44] *Id.*
[45] *Id.*
[46] Testimony of Advocate; Petitioner Exhibit 10 at 4.
[47] Petitioner Exhibit 10 at 4.
[48] Petitioner Exhibit 12 at 17.
[49] *Id.* at 18.
[50] *Id.* at 17.
[51] Petitioner Exhibit 12 at 1.
[52] *Id.* at 7.
[53] *Id.* at 18.
[54] *Id.*
[55] *Id.* at 19.
[56] *Id.*
[57] Petitioner Exhibit 12 at 16.

and the Student's teacher agreed that the Student should remain in Nonpublic School 2 for the remainder of the 2011-2012 school year.[58]

18. The LEA Representative then informed the IEP team that, for the 2012-2013 school year, the Student would be placed in an environment that was less restrictive than Nonpublic School 2.[59] The LEA Representative informed the IEP team that the Student would be in a program that focused on his behavior and that would provide all of his academic instruction outside the general education setting.[60] The LEA Representative then informed Petitioners that Respondent determined that the Student would attend the DCPS School for the 2012-2013 school year.[61]

19. No representative from the DCPS School attended the February 23, 2012, meeting.[62] No one else at the meeting provided a description of the programs offered by the DCPS School 2 or how it would implement the Student's IEP.[63]

20. On February 23, 2012, the LEA Representative issued a prior written notice ("PWN") that informed Petitioners that Respondent intended to place the Student at the DCPS School for the 2012-2013 school year.[64] The PWN did not provide an explanation of the reasons for the proposed action.[65] Petitioners objected to the proposed placement.[66]

21. On April 2, 2012, the Advocate, on behalf of Petitioners, sent a letter to the LEA Representative outlining Petitioner's concerns about and objections to the outcome of the February 23, 2012, IEP meeting.[67] In the letter, the Advocate explained that Petitioners disagreed with the LEA Representative's decision that the Student required a less restrictive environment.[68] The Advocate requested that Respondent reconsider its decision to place the Student at the DCPS School for the 2012-2013 school year, asking how Respondent had determined the Student required a less restrictive environment when the IEP team had informed Respondent that his behavior had increased in severity.[69]

22. In the April 2, 2012, letter, the Advocate requested that Respondent conduct a comprehensive psychological re-evaluation to determine the Student's current level of

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[58] Petitioner Exhibit 12 at 19.
[59] Testimony of Advocate; Petitioner Exhibit 12 at 19.
[60] *Id.*
[61] *Id.*
[62] Testimony of Advocate; Petitioner Exhibit 12 at 19.
[63] Testimony of Advocate.
[64] Petitioner Exhibit 12 at 14 (February 23, 2012, Prior Written Notice).
[65] *Id.* at 13.
[66] Testimony of Advocate.
[67] Petitioner Exhibit 11 at 1 (April 2, 2012, letter from Advocate to LEA Representative).
[68] *Id.*
[69] *Id.* at 1-2.

cognitive functioning.[70]. The Advocate also requested a clinical re-evaluation.[71] Finally, the Advocate requested that Respondent reconsider its decision to change the Student's placement to the DCPS School.[72]

23. By April 2012, the Student's grades had improved.[73] At the end of the first quarter of the 2011-2012 school year, the Student's grades in his core classes were mostly Ds.[74] By the end of the third quarter, the Student had earned a C in language arts, a C in reading, an A in science, and A in social studies, and a C in mathematics.[75]

24. Respondent convened another meeting of the Student's IEP team on April 26, 2012.[76] Petitioners attended the meeting, as did the Advocate, the Expert, and a DCPS progress monitor ("Monitor").[77] The IEP coordinator and the Student's special education teacher and counselor also attended the meeting.[78]

25. The purpose of the April 26, 2012, IEP team meeting was to discuss the Student's behavioral concerns and other issues.[79] The Student's attendance had been poor until spring break.[80] After returning to school, his attendance improved.[81] He had almost perfect attendance in the month since the end of spring break.[82]

26. At the time of the April 26, 2012, IEP team meeting, the Student was sleeping about a third of his time in class.[83] When the school staff awakened him, he often became aggressive.[84] He often was non-responsive, had mood swings, or was aggressive toward his teacher.[85] He distracted the class to avoid having to complete his schoolwork.[86] The Student also had poor personal hygiene.[87]

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[70] *Id.* at 1.
[71] *Id.*
[72] *Id.* at 2.
[73] Petitioner Exhibit 10 at 2.
[74] *Id.*
[75] *Id.*
[76] Testimony of Advocate; Petitioner Exhibit 9 (Advocate's Meeting Notes).
[77] Petitioner Exhibit 9 at 1.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Respondent Exhibit 6 at 22 (April 26, 2012, DCPS Meeting Notes).
[82] *Id.*
[83] Petitioner Exhibit 9 at 1.
[84] *Id.* at 4.
[85] *Id.* at 1.
[86] *Id.* at 3.
[87] *Id.* at 7.

27. At the April 26, 2012, meeting, the Progress Monitor informed the IEP team that DCPS planned to place the Student at the DCPS School.[88] For the 2012-2013 school year, the DCPS School would enroll only ninth and tenth graders.[89]

28. No representative from the DCPS School attended the April 26, 2012 meeting.[90] The Progress Monitor had never been to the DCPS School and was not familiar with what it offered.[91] Thus, there was no one present at the meeting to explain the DCPS School programs and how it would implement the Student's IEP.

29. The Progress Monitor informed the IEP team that the DCPS School would conduct a thirty-day review after the Student began attending the DCPS School 2 in August 2012.[92] She said the IEP team would then make any necessary changes to the Student's IEP.[93]

30. At the April 26, 2012, meeting, Petitioners objected to moving the Student to the DCPS School for the 2012-2013 school year.[94] The Advocate reiterated Petitioners' request that Respondent re-evaluate the Student.[95] The Expert responded that Respondent would be willing to conduct academic achievement testing but not the cognitive testing.[96] She stated that the Student did not need a comprehensive psychological assessment.[97] She agreed to conduct a data evaluation review in lieu of new formal assessments of the Student.[98]

31. On May 29, 2012, the Expert conducted a data evaluation review.[99] She reviewed meeting notes; the Student's February 23, 2012, and April 8, 2012, IEPs; his functional behavior plan and behavior implementation plan ("BIP") of February 23, 2012; his attendance records; and his report card for the third quarter of the 2011-2012 school year.[100] She reviewed the Student's June 2009 psychosocial history evaluation and comprehensive psychological evaluation.[101] She interviewed the Student, Petitioner 1, the

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[88] *Id.* at 5.
[89] Petitioner Exhibit 9 at 6.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Testimony of Advocate.
[96] Petitioner Exhibit 9 at 7.
[97] *Id.*
[98] *Id.*
[99] Petitioner Exhibit 10 at 1.
[100] *Id.*
[101] *Id.*

Student's teachers, and his school counselor.[102] She also conducted an observation of the Student.[103]

32. In her data evaluation review, the Expert noted that the Student refused to participate in many of the subtests on the June 2009 comprehensive psychological evaluation.[104] As a result, some of the assessment results were considered an underrepresentation of his true cognitive ability.[105]

33. The Student also refused to participate in tasks that involved time, math, and written language on the academic achievement portion of the 2009 comprehensive psychological evaluation.[106] As a result, the results reflecting his levels of academic performance were considered to be under-representations of his abilities.[107]

34. On May 31, 2012, the Student's IEP team reconvened to review the Expert's data evaluation review and discuss his transition to high school.[108] Petitioners attended the meeting, as did the Advocate.[109] The Progress Monitor, the Student's special education teacher, the special education coordinator, a social worker, and the Expert also attended the meeting.[110]

35. At the May 31, 2012, meeting, the Student's special education teacher reported that the Student continued to sleep in class.[111] He reported that, the day before the meeting, the Student was aggressive in class, threatened the teacher and had to be removed from class.[112]

36. At the May 31, 2012, meeting, the IEP team discussed the Student's IEP, noting that it provided twenty-nine hours per week of specialized instruction outside the general education setting and one hour per week of behavioral support services.[113] The IEP team agreed that the goals on the Student's IEP would not be changed.[114]

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[102] *Id.*
[103] *Id.*
[104] *Id.* at 2.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Testimony of Advocate; Petitioner Exhibit 6 at 1 (May 31, 2012, Advocate's Notes); Respondent Exhibit 3 at 8 (May 31, 2012, DCPS Meeting Notes).
[109] Petitioner Exhibit 6 at 1.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 3.
[114] Respondent Exhibit 3 at 11.

37. At the May 31, 2012, meeting, the Progress Monitor informed the IEP team that the DCPS School could meet the Student's needs.[115] The Progress Monitor promised to issue a PWN that day.[116] Petitioners and the Advocate objected to placing the Student in the DCPS School, stating that it didn't make sense considering his serious behavior problems.[117]

38. At the DCPS School, the Student would have opportunities to interact with his nondisabled peers.[118] He would be in a self-contained class with his disabled peers only for reading and writing and math.[119] He would be with nondisabled peers for the rest of his classes.[120]

39. The DCPS School does not have special education teachers for social studies or science.[121] The DCPS School also does not offer inclusion classes, i.e., general education classes co-taught by a special education teacher and general education teacher.[122] Thus, there would be no special education teacher present in the Student's social studies, science, and elective courses.[123]

40. The DCPS School is not a therapeutic environment.[124] In other words, it doesn't incorporate behavioral supports in the classroom[125] It also does not have on staff trained behavioral technicians to intervene in crisis situations[126] Finally, it does not have a de-escalation room or other place where students could go to calm down[127]

41. On July 9, 2012, Petitioners informed Respondent of their intent to remove the Student from DCPS and unilaterally place him at Nonpublic School 3 within ten business days.[128] The letter stated that Petitioners expected that the Student would begin attending Nonpublic School 3 in September 2012.[129] Petitioners decided to place the

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[115] Petitioner Exhibit 6 at 3.
[116] Petitioner Exhibit 6 at 3.
[117] *Id.*
[118] Petitioner Exhibit 9 at 6.
[119] Testimony of Advocate.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Testimony of Advocate.
[125] Petitioner Exhibit 9 at 6.
[126] Petitioner Exhibit 9 at 6.
[127] Petitioner Exhibit 9 at 6.
[128] Petitioner Exhibit 4 at 1 (June 9, 2012, letter to [redacted]).
[129] *Id.*

Student at Nonpublic School 3 because they believed that DCPS School 3 was unable to implement the Student's IEP.[130]

42. The Student began attending Nonpublic School 3 on September 1, 2012.[131] Nonpublic School 3 is a full-time, therapeutic, day program for students between the ages of five and twenty-one.[132] The Upper School, where the Student is placed, has a total of seventy students.[133] These students are divided into ten classrooms.[134] Students at Nonpublic School 3 do not interact with their nondisabled peers during the school day.[135]

43. Nonpublic School 3 has a school-wide behavior plan for all students.[136] It employs a full-time clinical psychologist who is available as needed to the students.[137] The clinical psychologists provide individual and group counseling to the Nonpublic School 3 students.[138] All Nonpublic School 3 students participate in group counseling conducted by school social workers.[139] The school also provides individual and group art therapy.[140]

44. Nonpublic School 3 employs caseworkers to manage the students' behavior plans.[141] It employs behavior counselors, who staff the school behavioral counseling center.[142] Students may request to go to the behavioral counseling center if they need time out of their classrooms.[143] Students also may be sent to the behavioral counseling center if they commit behavioral infractions.[144]

45. Nonpublic School 3 also provides crisis intervention.[145] The school's psychologists are available as needed.[146] The case managers serve as back up crisis

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[130] Testimony of Advocate.
[131] Petitioner Exhibit 5 at 3 (Student Attendance for 2012-2013 School Year).
[132] Testimony of Assistant Director.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*

counselors.[147] The school also provides behavioral support to students both in and outside the classroom.[148]

46. The classrooms at Nonpublic School 3 generally have three students to each teacher, although some students receive one-on-one instruction.[149] Students may earn credits toward a high school diploma.[150] All teachers at Nonpublic School 3 have Virginia state teaching certifications.[151]

47. The District of Columbia Office of State Superintendent of Education ("OSSE") has issued a certificate of approval to Nonpublic School 3.[152] OSSE has approved the school's tuition rates, which is $293 per day.[153] The school year runs from September to June, 180 days total.[154] Thus, the annual tuition at Nonpublic School 3 is $52,740.[155]

48. The Student is adjusting to the program at Nonpublic School 3.[156] He attends school regularly and does the work assigned to him in class.[157] He needs a lot of encouragement to participate in class and avoid becoming frustrated.[158]

49. The Student's progress behaviorally is inconsistent.[159] He receives assistance with his schoolwork in class as needed.[160] At Nonpublic School 3, the Student no longer gets into fights with his peers and teachers.[161] His behavior has improved dramatically as compared to the 2011-2012 school year.[162]

50. Whenever he needs social-emotional support, he sees the school psychologist.[163] The Student's sessions with the psychologist have helped him make progress behaviorally.[164] He has not gotten into trouble while at Nonpublic School 3.[165]

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[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Testimony of Advocate.
[161] Testimony of Student.
[162] Testimony of Advocate.
[163] Testimony of Student.
[164] *Id.*
[165] *Id.*

51. Academically, the Student is making progress at Nonpublic School 3.[166] He feels good about school and is motivated to learn.[167] His most recent report card consisted of As, Bs, Cs, and one D.[168]

52. The Nonpublic School has not received payment for the Student's tuition from the start of the 2012-2013 school year until the present.[169] The Nonpublic School also has not received payment for the costs of the Student's transportation to school.[170]

53. The Advocate provided credible testimony.. She recalled the discussions at each of the meetings she attended, as well as the follow-up to those meetings. Her recollections were corroborated by the meeting notes and other documents in evidence. She provided detailed testimony on the Student's functioning at Nonpublic School 2 and Nonpublic School 3. Finally, Respondent presented no testimony or documentary evidence that undermined the Advocate's testimony.

54. The Student provided credible testimony.. He was forthright about his behavioral challenges and academic limitations.

55. The Assistant Director provided credible testimony.. She testified in detail about the programs and services available at Nonpublic School 3. She also provided detailed testimony about the Student's performance at the school. She testified forthrightly that the Student continued to have behavioral challenges. Her testimony was supported by the documentary evidence.

56. The Expert provided credible testimony.. She generally corroborated the testimony of the Student and the Advocate regarding the Student's behavioral difficulties while at Nonpublic School 2. However, she was not credible when she testified that the only reason to conduct a comprehensive psychological re-evaluation of a student is when there has been a major change in the Student's life.

57. The Teacher provided credible testimony. His testimony about the Student's challenges and need for assistant was corroborated by the other witnesses who testified at the due process hearing. He also did not hesitate to admit he did not know or did not recall certain events.

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[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Testimony of Assistant Director.
[170] *Id.*

V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[171] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[172]

FAPE is defined as:

> Special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program.[173]

A school district need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only "trivial advancement."[174]

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.[175] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[176]

The burden of proof is properly placed upon the party seeking relief.[177] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[178] The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.[179] In other words,

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[171] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).
[172] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[173] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[174] *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).
[175] 34 C.F.R. § 300.513 (a)(2).
[176] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[177] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[178] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).
[179] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[180] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[181] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[182]

VI. DISCUSSION

A. Petitioners Proved that Respondent Denied the Student a FAPE by Placing Him in the DCPS School for the 2012-2013 School Year.

The IEP is "the centerpiece of the statute's education delivery system for disabled children."[183] An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[184] establishes annual goals related to those needs,[185] and provides appropriate specialized instruction and related services.[186] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[187]

Each LEA must ensure that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.[188] In order to implement the IEP, a team that includes the child's parents determines where the child should be placed based on the child's IEP.[189]

Placement decisions must be made in conformity with the child's IEP.[190] Thus, the

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[180] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).
[181] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[182] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[183] *Honig v. Doe*, 484 U.S. 305, 311 (1988).
[184] 34 C.F.R. § 300.320 (a) (1).
[185] 34 C.F.R. § 300.320 (a) (2).
[186] 34 C.F.R. § 300.320 (a) (4).
[187] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[188] 34 C.F.R. § 300.323 (c)(2). Public agency includes the state education agency, local education agencies ("LEAs"), educational service agencies ("ESAs"), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of a State that are responsible for providing education to children with disabilities. 34 C.F.R. § 300.33.
[189] 34 C.F.R. § 300.116.
[190] 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Reg. tit. 5-E § 3013 (2006); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988).

placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.[191] The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.[192]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[193] Educational placement refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the "bricks and mortar" of the specific school.[194]

The question of what constitutes a change in educational placement is, necessarily, fact specific and thus, "in determining whether a given modification in a child's school day should be considered a 'change in educational placement,'" the "touchstone" is whether the modification "is likely to affect in some significant way the child's learning experience."[195] In determining whether a "change in educational placement" has occurred, the LEA must determine whether the proposed change would substantially or materially alter the child's educational program.[196]

In determining whether the change in location would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.[197] In other words, if the proposed change substantially or materially affects the composition of the educational program and services provided the student, it is a change in placement.[198]

In contrast, a simple change in location is limited to the physical characteristics associated with a particular site. A transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location

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[191] *See Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (D.D.C. 2006).
[192] *Branham,* 427 F.3d at 12 (citing *Rowley,* 458 U.S. at 202). *See also* D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).
[193] *T.Y. v. N.Y. Dept. of Educ.,* 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[194] *Id.*
[195] *J.R. v. Mars Area Sch. Dist.,* 318 Fed. Appx. 113, 119 (3d Cir. Pa. 2009).
[196] *Letter to Fisher,* 21 IDELR 992 (Office of State Education Programs ("OSEP")), July 6, 1994).
[197] *Id.*
[198] *Letter to Flores,* 211 IDELR 233 (OSEP Aug. 18,1980); *Letter to Fisher,* 21 IDELR 992.

only.[199] Simple changes in the location of a building or facility are not generally viewed to be a change in placement where there are no significant changes in the educational program.[200]

The Student has attended nonpublic schools for the past three school years. During the 2011-2012 school year, the Student attended Nonpublic School 2, a full-time, therapeutic, special education, day school.

Between September 8, 2012, and February 23, 2012, the Student's academic performance and behavior had deteriorated and his inappropriate behaviors had increased. He lacked motivation, shut down, and slept in class. He had become more aggressive and defiant than during the first month and a half of the school year. On average, the Student had physical altercations with school staff once or twice a month. In one of these altercations, he ripped his teacher's shirt and dumped the teacher's food on the floor. He also has shown aggression toward his peers, including throwing punches in a peer's face and wresting in class.

The Student had not responded well to interventions designed to motivate him. Thus, on February 23, 2012, the IEP team decided that the Student requires frequent breaks, counseling services, and individual attention to ensure he stays focused and comprehends the instruction and assignments. They also agreed to try new interventions, including one-to-one assistance in the classroom.

During the February 23, 2012, meeting, the IEP team determined that the Student continued to be eligible for special education services as a student with an emotional disturbance. They developed an IEP for the Student that provides that he is to receive twenty-nine hours per week of specialized instruction outside the general education setting and one hour per week of behavioral support services outside the general education setting.

The LEA Representative then announced that Respondent planned to change the Student's placement and place him in the DCPS School for the 2012-2013 school year. The LEA Representative informed the IEP team that the Student would be in a program that focused on his behavior and that would provide all of his academic instruction outside the general education setting.

In reality, the DCPS School is not a therapeutic setting and would not be equipped to address the Student's serious behavioral concerns. Rather, the DCPS School is a public

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[199] *See*, e.g., *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1980).

[200] *Letter to Flores*, 211 IDELR 233. *See also A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.)

senior high school for general education students who do not need the intensive supports the Student requires. At the DCPS School, the Student would be placed in classes with his nondisabled peers, without special education support, for all of his subjects except for mathematics, reading, and writing.

Because the DCPS School could not provide the Student full-time, specialized instruction, outside the general education setting, it would be unable to implement his February 23, 2012, IEP. In other words, Respondent failed to make this placement decision in conformity with the Student's IEP.

Nor did the LEA Representative consider the Student's severe behavioral and academic needs before deciding on his placement for the upcoming year. If she had considered the Student's needs, she would have placed him in a school that could implement his IEP and provide the intensive behavioral supports he requires.

Thus, Petitioners proved that Respondent denied the Student a FAPE on February 23, 2012, by placing him in the DCPS School for the 2012-2013 school year.

B. Petitioners Proved that Respondent Denied Them a Meaningful Opportunity to Participate in the Determination of the Student's Placement for the 2012-2013 School Year.

IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.[201] Thus, Respondent must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.[202] Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").[203]

A student's educational placement is based on the IEP, which is revised annually.[204] The general rule is that placement should be based on the IEP.[205] The decision to place a student before developing an IEP on which to base that placement violates the IDEA regulations.[206] It also violates the spirit and intent of IDEA, which emphasizes parental involvement.[207] After the fact involvement is not enough.[208]

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[201] 20 U.S.C. §§ 1414(f), 1415(b).
[202] 34 C.F.R. §§ 300.116 (a), 300.501 (c)(1).
[203] *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).
[204] *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988).
[205] *Id.* at 259 (citing 34 C.F.R. § 300.552).
[206] *Id.*
[207] *Id.*
[208] *Id.*

However, school districts may engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting without affording the parents an opportunity to participate.[209] Thus, Respondent's consideration of educational programs for the Student prior to the February 23, 2012, meeting, in and of itself, did not violate the procedural requirements of the IDEA. However, the school district must have an "open mind" to at least give meaningful consideration to the parents' concerns and proposals at the IEP meeting.[210]

Here, at the February 23, 2012, IEP meeting, the LEA Representative announced Respondent's decision to place the Student at the DCPS School for the 2012-2013 school year. The LEA Representative did not provide the IEP team, much less Petitioners, any information about DCPS School 3, except to state that the Student would be in a program that focused on his behavior and that would provide all of his academic instruction outside the general education setting. Respondent failed to include a representative from the DCPS School in the meeting. As it turns out, this information was incorrect.

Additionally Respondent did not include the special education coordinator from the DCPS School, or any other representative of the school, in the meeting. By failing to include in the meeting an individual with the knowledge of the services the DCPS School could provide the Student, Respondent denied Petitioner's the opportunity to have a meaningful discussion about the appropriateness of DCPS School 2 for the Student.[211]

Thus, Petitioners proved that Respondent denied them a meaningful opportunity to participate in the determination of the Student's placement for the 2012-2013 school year.

C. Petitioners Proved that Respondent Denied the Student a FAPE by Failing to Conduct the Comprehensive Psychological Assessment Pursuant to Their April 2, 2012, Request.

An evaluation consists of procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.[212] A re-evaluation is defined as an evaluation conducted after the initial evaluation.[213]

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[209] *S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 2009) (citing 34 C.F.R. §§ 300.501 (b)(3)).
[210] *S.P.*, 554 F.3d at 253; *H.B. by Penny B. v Las Virgenes Unified Sch. Dist.*, 52 IDELR 193 (C.D. Cal. 2008).
[211] *Penny B.*, 52 IDELR 193, (finding that school district superintendent's statement that the IEP team would discuss how the student would be transitioned from the current private school placement to a public school showed predetermination in that the district was unwilling to consider the possibility of continuing the student's private school placement).
[212] 34 C.F.R. § 300.15.
[213] D.C. Mun. Reg. tit. 5-E § 3001.1.

A public agency must ensure that a re-evaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation, but not more than once a year unless the parent and public agency agree otherwise.[214] The parent has a right to request an assessment to determine whether the child continues to be a child with a disability, *and to determine the child's educational needs.*[215] The parent is not required to provide a reason for the re-evaluation and the LEA cannot condition the re-evaluation upon the parent providing a reason for requesting the reevaluation.[216]

Reevaluations should be conducted in a "reasonable period of time," and "without undue delay," as determined in each individual case.[217] As part of any reevaluation, the IEP team, and other qualified individuals,[218] must review existing evaluation data, and identify what additional data are needed, if any, to determine if the child continues to have a disability and to determine the educational needs of the child.[219] The IEP team also shall determine whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.[220] The IEP team need not convene a meeting to conduct this review.[221]

By February 23, 2012, the Student's academic performance and behavior had deteriorated and his inappropriate behaviors had increased. He lacked motivation, shut down, and slept in class. He had become more aggressive and defiant and had physical altercations with school staff once or twice a month. He also has shown aggression toward

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[214] 34 C.F.R. § 300.303 (a)(2).
[215] 34 C.F.R. § 300.305(d)(1)(ii).
[216] *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 86-87 (D.D.C. 2003); *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 264 (D.D.C. 2005).
[217] *Herbin*, 362 F. Supp. 2d at 259 (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).
[218] 34 C.F.R. § 300.305(a). These "other qualified professionals" include professionals, who may not be a part of the child's IEP team, in the group that determines whether additional data are needed to make an eligibility determination and determine the child's educational needs.
[219] 34 C.F.R. § 300.305(a)(2)(i)(B). *See also* D.C. Mun. Reg. tit. 5-E § 3005.4 (IEP team, including other qualified professionals, must determine, in the case of a reevaluation of a child, (1) whether the child continues to have a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum).
[220] 34 C.F.R. § 300.305 (a)(2)(iii)-(iv).
[221] 34 C.F.R. § 300.305 (b).

his peers. The Student also had not responded well to interventions designed to motivate him.

Despite its awareness of the Student's increasing academic and behavioral difficulties, at the February 23, 2012, IEP meeting, Respondent announced its intentions to place the Student in a lesser restrictive environment, namely a public high school. Petitioners objected to the change in placement.

On April 2, 2012, through the Advocate, Petitioners requested that Respondent conduct a comprehensive psychological re-evaluation, including a clinical re-evaluation, to determine the Student's current level of cognitive functioning. At the April 26, 2012, IEP meeting, the Advocate reiterated Petitioners' request that Respondent re-evaluate the Student. The Expert responded that Respondent would be willing to conduct academic achievement testing but not the cognitive testing. She stated that the Student did not need a comprehensive psychological assessment. She agreed to conduct a data evaluation review in lieu of new formal assessments of the Student.

The data evaluation review the Expert conducted revealed that the Student's most recent psycho-educational evaluation, conducted in 2009, may not have accurately represented his cognitive functioning due to the Student's refusal to complete several of the subtests that were part of the assessment. As a result, Respondent had no valid data on which to determine the Student's needs, develop an IEP, or determine his placement. For this reason alone, Respondent should have agreed to conduct another comprehensive psycho-educational evaluation, including the clinical assessment.

Thus, Petitioners proved that Respondent denied the Student a FAPE by failing to conduct a psycho-educational re-evaluation of the Student.

D. Petitioners Proved that They are Entitled To Reimbursement for Their Unilateral Placement of the Student at Nonpublic School 3 Through the End of the 2012-2013 School Year.

If an LEA has failed to make a basic floor of educational opportunity available to a student, and the parent subsequently unilaterally enrolls a child in private school, IDEA authorizes reimbursement for the cost of private education.[222] Reimbursement merely requires the school district to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it provided the student a FAPE.[223] Thus, a

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[222] *Burlington*, 471 U.S. at 369; 34 C.F.R. § 300.148 (if the parents of a child with a disability enroll the child in a private school without the consent of or referral by the LEA, a hearing officer may require the LEA to reimburse the parents for the cost of that enrollment if the hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate).
[223] *Id.* at 471 U.S. at 369-71; *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 38-39 (D.D.C. 2008); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1 (D.D.C. 2006) (private school tuition

hearing officer may grant reimbursement of private school tuition only when a school district fails to provide a FAPE *and* the private-school placement is appropriate.[224] Reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State.[225]

Parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if the LEA violated IDEA, the private school placement was appropriate, and the cost of the private education was reasonable.[226] When a 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.[227] In other words, in making the equitable determination of whether a parent is entitled to reimbursement, and the amount of reimbursement to which the parent is entitled, this Hearing Officer must examine the actions of each party.[228]

An award of tuition reimbursement may be reduced or denied if, at the most recent IEP meeting that the parent attended prior to removing the student, the parent failed to inform the LEA that she disagreed with the placement proposed by the LEA and intended to enroll the student in a private school at public expense.[229] Alternatively, the tuition reimbursement may be reduced or denied if the parent failed to give written notice to LEA of her intent to unilaterally place the student in a nonpublic school at least ten business days prior to the removal of the child from the public school.[230] Finally, a hearing officer may deny or reduce the reimbursement to the parent if she finds that the parent's actions were unreasonable.[231]

Here, as discussed above, Respondent issued a prior written notice informing Petitioner that the Student would attend the DCPS School for the 2012-2013 school year. As discussed above, the DCPS School would not be able to implement the Student's February 23, 2012, IEP, or otherwise provide him a FAPE. Petitioner's objected to the

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reimbursed when school district failed to complete student's IEP prior to the start of the school year).

[224] *Burlington,* 471 U.S. 359, 369; *Florence County School Dist. Four v. Carter,* 510 U.S. 7, 12-13 (1993). The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act. 471 U.S. at 369.

[225] *Carter,* 510 U.S. 7.

[226] *Holland v. District of Columbia,* 71 F.3d at 425 (citing *Carter,* 510 U.S. at 15).

[227] *Forest Grove School Dist. v. T.A.,* 129 S. Ct. 2484, 2496 (2009).

[228] *Burlington,* 471 U.S. at 373 (finding that equitable considerations are relevant to fashioning relief).

[229] 34 C.F.R. § 300.148 (d)(1)(i).

[230] 34 C.F.R. § 300.148 (d)(1)(ii).

[231] 34 C.F.R. § 300.148 (d)(3).

proposed placement at the February 23, 2012, meeting, as well as in a lengthy letter drafted by their Advocate on April 2, 2012.

As a result, Petitioners had to choose between placing the Student in a school that could not provide him a FAPE or placing him in a nonpublic school and seeking reimbursement. Petitioners provided more than adequate notice to Respondent of their intention to place the Student at Nonpublic School 3.

Nonpublic School 3 is an appropriate placement for the Student. It is a full-time, therapeutic, day program. It has a school-wide behavior plan for all students. It employs a full-time clinical psychologist who is available as needed to the students. The clinical psychologists provide individual and group counseling to the Nonpublic School 3 students. All Nonpublic School 3 students participate in group counseling conducted by school social workers.

Nonpublic School 3 employs caseworkers to manage the students' behavior plans. It employs behavior counselors, who staff the school behavioral counseling center. It also provides crisis intervention. The school also provides behavioral support to students both in and outside the classroom.

The classrooms at Nonpublic School 3 generally have three students to each teacher, although some students receive one-on-one instruction. Students may earn credits toward a high school diploma. The Student receives assistance with his schoolwork in class as needed.

Thus, the Nonpublic School provides the intensive behavioral supports and individualized academic instruction that the Student requires to make progress on his IEP goals. As a result, the Student is adjusting to the program at Nonpublic School 3. He attends school regularly and does the work assigned to him in class.

Although the Student needs a lot of encouragement to participate in class and avoid becoming frustrated, he is making academic progress. He feels good about school and is motivated to learn. His most recent report card consisted of As, Bs, Cs, and one D.

The Student's behavior also has improved dramatically as compared to the 2011-2012 school year. Whenever he needs social-emotional support, he sees the school psychologist. The Student's sessions with the psychologist have helped him make progress behaviorally. He has not gotten into trouble while at Nonpublic School 3. The Student no longer gets into fights with his peers and teachers.

Finally, Nonpublic School 3 is the Student's least restrictive environment. The Student's IEP, developed by the IEP team on February 23, 2012, provides that he is to receive all of his academic instruction and related services outside the general education setting. Moreover, it identifies his placement as Nonpublic School 2. In terms of the

continuum of placements, there is no distinction between Nonpublic School 2 and Nonpublic School 3.[232]

Thus, this Hearing Officer finds that Nonpublic School 3 is an appropriate placement for the Student. For this reason, Petitioners are entitled to reimbursement of the costs of the Student's tuition and transportation for the 2012-2013 school year.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this, the eighth day of January 2013, hereby:

ORDERED that, on or before January 31, 2013, Respondent shall reimburse Nonpublic School 3 for the costs of the Student's tuition and related services from the beginning of the 2012-2013 school year at Nonpublic School 3 through the end of the 2012-2013 school year;

IT IS FURTHER ORDERED that, on or before January 31, 2013, Respondent shall reimburse Nonpublic School 3 for the costs of the Student's transportation to and from Nonpublic School 3 from the beginning of the 2012-2013 school year through the date Respondent begins providing transportation services to the Student;

IT IS FURTHER ORDERED that, on or before January 31, 2013, Respondent shall begin providing the Student transportation services to and from Nonpublic School 3 through the end of the 2012-2013 school year; and

IT IS FURTHER ORDERED that Petitioner shall obtain an independent, comprehensive, psychological assessment, including a clinical assessment, at public expense, at a cost not to exceed the DCPS and OSSE cost guidelines for independent assessments; and

IT IS FURTHER ORDERED that, on or before February 13, 2013, Petitioners shall provide a copy of the independent comprehensive psychological assessment report to Respondent.

By: */s/ Frances Raskin*
Frances Raskin
Hearing Officer

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[232] Nonpublic School 3 is a more restrictive placement than the DCPS School. For the reasons discussed above, this Hearing Officer finds that the DCPS School is not an appropriate placement for the Student, in part because it is not a sufficiently restrictive placement.

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

Distributed to:

Counsel for Petitioner
Counsel for Respondent
Student Hearing Office