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

Parents, on behalf of STUDENT, [1]	)	**Case Number: 2012-0476**
Petitioners,	)	
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	**Hearing Officer: Frances Raskin**

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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

Petitioners are the guardians of a -year-old student ("Student") with a disability. On July 6, 2012, Petitioners filed a due process compliant ("Complaint") against Respondent District of Columbia Public Schools ("DCPS") alleging violations of the Individuals with Disabilities Education Act ("IDEA").

On July 10, 2012, this Hearing Officer was assigned to preside over this case. On July 16, 2012, Respondent filed a timely response to the Complaint.[2]

On July 19, 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 thirty-day resolution period ended on August 5, 2012.

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

On August 16, 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 August 6, 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 September 19, 2012.

During the prehearing conference, the parties agreed to schedule the due process hearing for 9:30 a.m. on September 11, 2012. On August 16, 2012, this Hearing Officer issued a prehearing conference summary and order.

The due process hearing commenced on September 11, 2012. At the outset of the hearing, this Hearing Officer entered into evidence Petitioners' proposed exhibits,[3] as well as Respondent's proposed exhibits.[4] Petitioner A testified and presented three witnesses on his behalf: the Student's former special education teacher ("Teacher"), a school psychologist ("Psychologist"), and an admissions director ("Admissions Director") from a nonpublic school ("Nonpublic School"). Respondent presented one witness, a school social worker ("Social Worker").

After the parties presented oral closing arguments, the due process hearing concluded at 3:15 p.m. on September 11, 2012.

III. ISSUE PRESENTED.

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

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on March 26, 2012, by developing an individualized educational program ("IEP") that fails to provide him the 32.5 hours per week of specialized instruction and behavioral support services that he requires to access the curriculum.

B. Whether Respondent denied the Student a FAPE on March 26, 2012, by failing to provide a dedicated aide, which Respondent promised to provide in lieu of the therapeutic environment[5] that Petitioners informed the IEP team that he requires; and

C. Whether Respondent denied the Student a FAPE on March 26, 2012, by failing to provide an appropriate placement, i.e., specifying that he would receive instruction in large, general education classes for part of his school day instead of receiving

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[3] This Hearing Officer admitted into evidence Petitioners' exhibits 5, 8, and 9-12 inclusive. Neither party objected to the admission of the other party's exhibits.
[4] This Hearing Officer admitted into evidence Respondent's exhibits 1-15, inclusive.
[5] Petitioners assert that the Student needs constant behavioral support in a school that has full-time staff to address his behavioral difficulties and provide behavioral support when he requires it.

all of his instruction in the small, structured setting and intensive behavioral and academic supports that he requires to access the curriculum.

At the outset of the due process hearing, Petitioners withdrew issue B.

Petitioners request relief in the form of an order that would require Respondent to place the Student at public expense at nonpublic school for the remainder of the 2012-213 school year. Petitioners also seek compensatory education in the form of tutorial services.

IV. FINDINGS OF FACT

1. The Student is years old and in the grade at a public senior high school ("DCPS School").[6] Until March 26, 2012, he was eligible for specialized instruction and related services as a student with multiple disabilities, i.e., (1) learning disabled and (2) other health impaired due to attention deficit hyperactivity disorder ("ADHD").[7]

2. The Student has well below average general cognitive abilities, attentional deficits, anxiety, depressive tendencies, self-regulation, and social skills.[8] These difficulties lie at the core of the Student's substandard academic achievement.[9]

3. The Student's general cognitive ability is 74, which is in the borderline range of functioning and above that of about four percent of students his age.[10] His verbal reasoning abilities are within the borderline range and above about eight percent of students his age.[11] His nonverbal reasoning abilities also are within the borderline range and are above only five percent of his same-age peers.[12] His verbal and nonverbal memory are commensurate.[13] Overall, his composite memory, which is in the borderline range, is equivalent to his overall intellectual functioning.[14]

4. In reading, the Student's ability to decode and pronounce individual letters and words is in the first percentile, which is well below the average range.[15] His ability to read a printed passage, define words using contextual clues, fill in missing parts, determine main ideas and related details, and respond to literal and inferential questions is below the

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[6] Testimony of Petitioner A; Petitioners Exhibit 5 at 1 (January 26, 2012, Comprehensive Psycho-educational Re-evaluation).
[7] Respondent Exhibit 4 at 13 (March 26, 2012, Prior Written Notice – Identification).
[8] Petitioners Exhibit 5 at 12.
[9] *Id.*
[10] Petitioners Exhibit 5 at 7.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 7.

first percentile and well below the average range.[16] During the 2011-2012 school year, the Student performed at the second grade level in broad reading.[17]

5. In mathematics, the Student's understanding of the mechanics of addition, subtraction, multiplication, and divisions, as well as their application to whole numbers, decimals, fractions, percentages, measurements, time, and money is in the second percentile and well below the average range.[18] His ability to use math mechanics to solve real-life problems is in the third percentile, which is in the low average range.[19] During the 2011-2012 school year, he performed in the fourth- to fifth-grade level in mathematics.[20]

6. In written language, the Student's spelling of single words presented verbally is below the first percentile and well below the average range.[21] His proficiency in capitalization and punctuation, sentence assembly, and sentence structure, and sentence syntax is below the first percentile of his same age peers and well below average.[22] During the 2011-2012 school year, the Student performed at the second grade level in written expression.[23]

7. The Student's social emotional development and adjustment is hindered by attention deficits, poor self-regulation, and inadequate social skills.[24] He exhibits mild symptoms of ADHD and intellectual disability in school and at home.[25] His symptoms of anxiety, depression, anger, conduct problems, and autistic syndrome behavior occur only within the school setting and are within the mild critical range.[26] He lacks social skills, and has difficulty controlling his behavior and understanding and complying with rules.[27]

8. The Student's behavior is his primary academic impediment.[28] He requires a behavior implementation plan ("BIP") that is fully implemented in the classroom to address his bad behavior, poor judgment, and absences from class.[29] He has difficulty staying in his seat and remaining focused during class.[30] He is very playful, which can distract other

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[16] *Id.* at 7-8.
[17] Respondent Exhibit 3 at 10 (January 27, 2012, MDT Notes); Respondent Exhibit 8 at 32 (January 24, 2012, Summary and Score Report of Woodcock Johnson III Normative Update Tests of Achievement ("Woodcock Johnson")).
[18] *Id.* at 8.
[19] *Id.*
[20] Respondent Exhibit 3 at 10; Respondent Exhibit 8 at 32.
[21] Petitioners Exhibit 5 at 8.
[22] *Id.*
[23] Respondent Exhibit 3 at 10; Respondent Exhibit 8 at 32.
[24] Petitioners Exhibit 5 at 14.
[25] *Id.* at 13.
[26] *Id.* at 12.
[27] Testimony of Psychologist.
[28] *Id.*
[29] *Id.*
[30] Testimony of Social Worker.

children and prevent the Student from paying attention during class.[31] He can be oppositional, although often in a playful manner.[32] He talks to other children in class.[33]

9. The Student should be placed in inclusion classes for his core academic subjects so that he will learn from his nondisabled peers and model their behavior.[34] These inclusion classrooms should have no more than twelve students to each teacher as the Student requires one-on-one attention and behavioral supports[35]

10. During the 2011-2012 school year, the DCPS School did not offer inclusion classes with a low enrollment of twelve or fewer students.[36] The small classrooms at the DCPS School were all special education classes, comprised mostly of learning disabled children.[37]

11. The Student should not be placed in a full-time, out of general education program for students with emotional disturbance where he would have no access to his nondisabled peers.[38] In such an environment, he would model his behavior on the other students and, as a result, his social emotional functioning would decline. He would learn negative behaviors from the other students and, in turn, his behavior will worsen .[39]

The 2011-2012 School Year

12. By February 24, 2012, the Student was on track to earn a failing grade in his fluency skills class.[40] This was a special education class with about twenty-one students.[41] The Student had exhibited poor behavior and had failed to complete class assignments.[42]

13. By February 24, 2012, the Student was on track to fail his advisory class.[43] This was a special education class with sixteen or seventeen students and one teacher.[44] He exhibited poor behavior and had failed to complete assignments.[45]

14. By February 24, 2012, the Student also was on track to fail algebra I and English I, both of which were general education classes with twenty to twenty-two

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Testimony of Psychologist.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Testimony of Psychologist.
[39] *Id.*
[40] Petitioners Exhibit 10 at 1 (February 24, 2012, Report to Parents on Student Progress).
[41] Testimony of Social Worker; testimony of Teacher.
[42] Testimony of Social Worker.
[43] Petitioners Exhibit 10 at 1 (February 24, 2012, Report to Parents on Student Progress).
[44] Testimony of Teacher.
[45] Petitioners Exhibit 10 at 1.

students.[46] In algebra I, the Student failed to do his homework and did not complete class assignments.[47] In English I, the Student had excessive tardiness and failed to complete class assignments.[48] Although the Student received co-teaching assistance from a special education teacher in both classes,[49] he had difficulty comprehending the material.[50]

15. By February 24, 2012, the Student was on track to pass his developmental reading, with a B minus, and his basic skills, and application skills classes, with B grades.[51] Each of these classes was a special education class with about eight or nine students.[52] In the Student's art class, which was a general education class without special education support, the Student was on track to receive a C plus.[53]

16. By March 26, 2012, the Student had made progress school year toward only one of the two the mathematics goals on his IEP.[54] He had made progress on all three reading goals on his IEP.[55] In written expression, the Student had made progress on only one of the three writing goals on his IEP.[56] He had made progress on his emotional, social, and behavioral development goal.[57]

17. By March 26, 2012, the Student had struggled during the 2011-2012 school year in his English I class.[58] The Student had difficulty comprehending the work.[59] The Teacher provided the Student special education assistance, including by using scaffolding, graphic organizers, and sentence starters.[60] The Teacher also provided him third or fourth-grade level work packets to combat his deficits.[61] Yet, the Student didn't do the work.[62]

18. In the English I class, the Student's behavior hampered his potential progress and he failed to complete assignments.[63] He rarely reflected a positive attitude toward school or the class subject.[64] He had four absences and had been late to class fifteen times.[65]

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[46] Testimony of Teacher, testimony of Social Worker; Petitioners Exhibit 10 at 1.
[47] Petitioners Exhibit 10 at 1.
[48] *Id.*
[49] Testimony of Teacher.
[50] Testimony of Psychologist.
[51] Petitioners Exhibit 10 at 1.
[52] Testimony of Social Worker.
[53] *Id.*
[54] Respondent Exhibit 6 at 20 (June 13, 2012, IEP Progress Report – Annual Goals).
[55] *Id.* at 21.
[56] *Id.* at 21-22.
[57] *Id.*
[58] Respondent Exhibit 7 at 26 (March 21, 2012, Student Progress Report).
[59] Testimony of Teacher.
[60] *Id.*
[61] Respondent Exhibit 1 at 1.
[62] *Id.*
[63] Respondent Exhibit 7 at 26; Respondent Exhibit 10 at 1.

19. By March 26, 2012, the Student was failing his algebra I class.[66] He had failed to complete his assignments in algebra I because he had not attended class regularly.[67] He had seventeen absences over the school year, and had been late thirteen times.[68]

20. By March 2012, the Student had made minimal progress behaviorally in the classroom during the 2011-2012 school year.[69] He performed well when working one-on-one with his teacher when he was in the mood to work one-on-one.[70] He constantly joked and distracted other students.[71] At times, he lacked judgment and self-control.[72]

21. By March 26, 2012, the Student had exhibited behavioral difficulties during the 2011-2012 school year in his fluency skills class, which was a special education class.[73] He lacked initiative, was very playful, and distracted his peers.[74] When redirected, he became easily frustrated and refused to complete his assignments.[75] He worked well when he received one-on-one attention.[76]

22. On March 26, 2012, Respondent convened a meeting of the Student's individualized educational program ("IEP") team to review and revise his IEP.[77] Petitioner B and Counsel for Petitioners attended the meeting.[78] The special education coordinator at the DCPS School, the School Psychologist, the Teacher, and the Social Worker also attended the IEP meeting.[79] At the March 26, 2012, meeting, the IEP team decided to change the Student's eligibility classification to emotionally disturbed.[80]

23. During the March 26, 2012, meeting, the Teacher informed the IEP team that the Student was struggling in his English I class.[81] She provided the IEP team the Student's February 24, 2012, report card, which showed that he was failing the English 1 class.[82]

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[64] Respondent Exhibit 7 at 26.
[65] Respondent Exhibit 9 at 37 (Attendance Summary 15 August 2011 – 26 March 2012).
[66] Respondent Exhibit 7 at 1.
[67] Respondent Exhibit 7 at 30.
[68] Respondent Exhibit 9 at 36.
[69] Respondent Exhibit 1 at 1 (March 26, 2012, MDT Notes).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Respondent Exhibit 7 at 24 (March 26, 2012, Student Progress Report); testimony of Social Worker.
[74] *Id.*
[75] Respondent Exhibit 7 at 24.
[76] *Id.*
[77] Respondent Exhibit 1 at 1.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

24. At the March 26, 2012, meeting, the Student's algebra teacher informed the IEP team that the Student misses two out of every three of her classes.[83] The algebra teacher stated that the Student should not be in her class because is unable to perform the work.[84] She added that the Student does not receive enough one-on-one attention to guide him through the assignments because she must attend to all of the students in the classroom.[85]

25. At the March 26, 2012, IEP meeting, the Psychologist informed the IEP team that, because the Student functions at a fourth-grade level in mathematics, he is unable to perform in an algebra class.[86] Both the Psychologist and the algebra teacher agreed that the Student needed more one-on-one attention, not a more restrictive setting.[87]

26. At the March 26, 2012, IEP meeting, the IEP team revised the Student's IEP to provide him fifteen hours of specialized instruction.[88] They determined that the Student was eligible for extended school year services and that he required a dedicated aide.[89] Finally, the IEP team agreed to provide the Student compensatory education.[90]

27. On March 30, 2012, Respondent authorized Petitioners to obtain compensatory education in the form of thirty-five hours of specialized instruction, i.e., tutoring, for the Student at public expense.[91] On June 19, 2012, Counsel for Petitioners informed Respondent that the Student had not completed the hours of tutoring that Respondent had authorized and would not complete them in the future.[92]

28. By the end of the 2011-2012 school year, the Student had passed each of his classes, with the exception of algebra I and English I.[93] It was not surprising that he failed these two classes because they were too advanced for him.[94] Additionally, these classes had at least twenty students, while the Student requires small inclusion classrooms with no

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[82] *Id.*
[83] Respondent Exhibit 1 at 2.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Respondent Exhibit 1 at 1; Respondent Exhibit 10 at 48 (March 27, 2012, IEP cover page and signatures of IEP team participants). Neither party disclosed the Student's March 26, 2012, IEP or his prior IEP.
[89] *Id.* at 2.
[90] *Id.*
[91] Respondent Exhibit 12 at 49 (March 30, 2012, tutoring authorization letter).
[92] Respondent Exhibit 14 at 51 (June 19, 2012, emails between Counsel for Petitioners and DCPS personnel).
[93] Petitioners Exhibit 9 at 1 (July 19, 2012, DCPS Transcript). He received a C in basic skills, a B in art and design foundations, a B in application skills, a C in fluency skills, a C in developmental reading, and a D in advisory. *Id.*
[94] Testimony of Psychologist.

more than twelve students and two adults, either a teacher and a co-teacher or a teacher and a classroom aide.[95]

29. The Student's ability to pass his special education and art classes are the result of his decision to change his behavior.[96] He started self-monitoring his behavior, didn't act out as much as in the past, and completed his schoolwork.[97] Additionally, the Student's uncle provided a tutor outside of school, which was helpful to the Student.[98]

30. The Student enrolled in summer school for the 2012 summer.[99] He took algebra I and English I and passed both courses with Ds.[100]

The Nonpublic School

31. The Nonpublic School is a full-time, special education day school in Washington, DC.[101] The Nonpublic School's total enrollment is forty-five students.[102] There are no nondisabled students enrolled in the Nonpublic School.[103] Most of the Students at the Nonpublic School are emotionally disturbed.[104]

32. Students at the Nonpublic School may earn DCPS high school diplomas or certificates of completion.[105] The Nonpublic School has a certificate of approval from the Washington, D.C., Office of State Superintendent of Education ("OSSE").[106] The tuition is $39,773 per year, including ESY and related services.[107]

33. At the Nonpublic School, the Student would be in small classes with a total of six to eight students, one teacher, and a teacher's aide.[108] The Student would receive one-to-one instruction from the classroom teacher or aide.[109]

34. At the Nonpublic School, the Student would transition between classes every eighty minutes.[110] The Nonpublic School teachers use integrated technology in the

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[95] *Id.*
[96] Testimony of Teacher.
[97] *Id.*
[98] *Id.* The DCPS School has an after-school tutoring program on Monday through Thursday of each week. *Id.* However, the Student did not avail himself of this tutoring. *Id.*
[99] *Id.*; testimony of Social Worker.
[100] *Id.*
[101] Testimony of Admissions Director.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*

classrooms, including smart boards for math concepts, iPads, and a computer program called odyssey.[111] In English, a reading teacher would pull the Student out of the classroom for one-on-one instruction in reading and written language and to work on decoding and fluency skills.[112]

35. At the Nonpublic School, the Student would have access to licensed clinical social workers throughout the school day.[113] He would receive individual counseling from these social workers and participate in a weekly group for young men.[114] The Student also would receive grief counseling.[115]

36. The Nonpublic School has a school-wide behavior modification system.[116] Students earn points for complying with the behavior modification system, including by appearing promptly to class, completing assignments, wearing their uniforms, and behaving appropriately.[117] Each student's behavior is assessed and graded every half hour during the school day.[118] At the end of the day, each student receives a final tally of the points she earned that day.[119] Students may use these points to earn rewards or to join an activity.[120]

37. All of the witnesses at the due process hearing testified credibly. Each witness testified forthrightly about the Student's behavioral challenges and how his behavior interfered with his academic progress. Each witness also recognized the difficulties the Student had in his algebra and English classes, and that this was partly due to his cognitive profile and low academic achievement. None of the witnesses gave testimony that undermined the testimony of another witness.

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."[121] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *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)).

provided be sufficient to confer some educational benefit upon the handicapped child.[122] FAPE is defined as:

[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)."[123]

In deciding whether Respondent provided a student a FAPE, the inquiry is limited to (a) whether Respondent complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.[124] Under this second "substantive" prong, 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."[125]

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.[126] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[127]

The burden of proof is properly placed upon the party seeking relief.[128] Petitioners must prove the allegations in the due process complaint by a preponderance of the evidence.[129] 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.[130] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[131]

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[122] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[123] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[124] *Rowley,* 458 U.S. at 206-207.
[125] *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).
[126] 34 C.F.R. § 300.513 (a)(2).
[127] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[128] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[129] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).
[130] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[131] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 267 (1994).

Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[132] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[133]

VI. DISCUSSION

A. Petitioners Proved that Respondent Denied the Student a FAPE on March 26, 2012, by Developing an IEP That Was Not Reasonably Calculated to Provide Him Academic Benefit.

The IEP is "the centerpiece of the statute's education delivery system for disabled children."[134] An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[135] establishes annual goals related to those needs,[136] and provides appropriate specialized instruction and related services.[137] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[138]

A local education agency ("LEA"), such as DCPS, must ensure that the IEP team reviews a student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved.[139] The LEA must ensure that the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals; and the results of any reevaluation or information about the child provided to, or by, the parents.[140]

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.[141] An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the

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[132] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[133] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[134] *Honig v. Doe*, 484 U.S. 305, 311 (1988).
[135] 34 C.F.R. § 300.320 (a) (1).
[136] 34 C.F.R. § 300.320 (a) (2).
[137] 34 C.F.R. § 300.320 (a) (4).
[138] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[139] 34 C.F.R. § 300.324 (b)(1).
[140] *Id.*
[141] 34 C.F.R. § 300.324 (a).

child's involvement and progress in the general education curriculum.[142]

The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[143] IDEA does not require that the services provided maximize each child's potential.[144]

On March 26, 2012, Respondent held a meeting of the Student's IEP team to review and revise his IEP. This meeting was held near the end of the third of four advisory periods in the 2011-2012 school year. Thus, the IEP team had ample evidence of the Student's lackluster academic performance that year, including his progress reports, the January 24, 2012, Woodcock Johnson that showed he functioned far below his grade level, the January 26, 2012, report on his comprehensive psychoeducational re-evaluation that showed the Student's cognitive abilities were very low, and the reports of his teacher on his lack of progress in their classes.

These reports all showed that the Student's most notable difficulties were in mathematics, reading, and written expression. As the Woodcock Johnson revealed, and the psychoeducational re-evaluation discussed, the Student functioned on a fourth- to fifth-grade level in mathematics. By March 26, 2012, the Student had made progress school year toward only one of the two the mathematics goals on his IEP.

As the Woodcock Johnson revealed, and the psychoeducational re-evaluation discussed, the Student functioned on a second grade level in reading and written expression. Yet, remarkably, he was making progress on all three reading goals on his IEP. In written expression, however, the Student had made progress on only one of the three writing goals on his IEP.

At the March 26, 2012, meeting, the Teacher informed the IEP team that the Student was struggling in the inclusion English I class. He had difficulty comprehending the work. The Teacher provided him specialized instruction in this class, including by using scaffolding, graphic organizers, and sentence starters. She also provided him third or fourth-grade level work packets to combat his deficits. Yet, the Student didn't do the work. Perhaps it was because he was simply unable to perform one to two grade levels higher than his ability.

As a result, the Student acted out in his English I class and failed to complete assignments. He rarely reflected a positive attitude toward school or the class subject. He had four absences and had been late to class fifteen times.

At the March 26, 2012, meeting, the Student's algebra teacher informed the IEP team that the Student failed to complete his assignments or attend class regularly. He missed two out of every three classes.

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[142] 34 C.F.R. § 300.320 (a) (1); 5 D.C. Mun. Reg. § 3007.2 (a).
[143] *Rowley,* 458 U.S. at 201 (1982).
[144] *Id.* at 198.

The algebra teacher informed the IEP team that the Student should not be in her class because is unable to perform the work. She added that the Student does not receive enough one-on-one attention to guide him through the assignments because she must attend to all of the students in the classroom.

Finally, the Psychologist informed the IEP team that, because the Student functions at a fourth-grade level in mathematics, he is unable to function in an algebra class. Both the Psychologist and the algebra teacher agreed that the Student needed more one-on-one attention, not a more restrictive setting.

As the Teacher informed the IEP team on March 26, 2012, the Student was on track to fail algebra I and English I, both of which were general education classes with twenty to twenty-two students. Yet, the IEP team failed to revise the Student's IEP to provide him additional assistance in his English 1 and algebra classes, or the smaller class with one-to-one assistance that the Psychologist recommended. As a result, at the end of the 2011-2012 school year, the Student had earned failing grades in his English I and algebra courses.

Thus, Petitioners proved that Respondent denied the Student a FAPE on March 26, 2012, by failing to develop an IEP that was reasonably calculated to provide him academic benefit.[145] In other words, Petitioners proved that Respondent denied the Student a FAPE by failing to revise his IEP to reflect that he requires specialized instruction in all of his core academic courses, classrooms with no more than fourteen students, and one-to-one assistance in these classes.

B. Petitioners Failed to Prove that Respondent Denied the Student a FAPE on March 26, 2012 by Failing to Provide Him an Appropriate Placement.

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.[146] 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.[147]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[148] Educational placement refers to the general educational program,

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[145] Although this Hearing Officer framed this issue in terms of the hours of specialized instruction, Petitioners proved that Respondent failed to develop an IEP on March 26, 2012, that was reasonably calculated to provide the Student

[146] 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.

[147] 34 C.F.R. § 300.116.

[148] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

such as the classes, individualized attention, and additional services a child will receive, rather than the "bricks and mortar" of the specific school.[149]

Placement decisions must be made in conformity with the child's IEP.[150] Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.[151] 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.[152]

In determining the appropriate placement for a child, preference given to the least restrictive environment and the appropriate schools nearest the child's home.[153] In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.[154] A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.[155] Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.[156]

Further, mainstreaming of children eligible for special education services under the IDEA is not only a laudable goal but is also a requirement of the Act.[157] If no public school can accommodate the student's needs, the government is required to place the student in an appropriate private school and pay the tuition.[158]

Here, Petitioners established, through the uncontroverted testimony of the Psychologist, that the Student would suffer harm if he were to be placed in a separate day school for students with emotional disturbance, or even in segregated classes for the entirety of his school day. Petitioners established that the Student needs to be in an

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[149] *Id.*
[150] 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).
[151] *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).
[152] *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).
[153] *Id.*
[154] *Id.* at § 300.116 (d).
[155] *Id.* at § 300.116 (e)
[156] 34 C.F.R. § 300.116 (c).
[157] *Roark*, 460 F. Supp.2d at 43 (quoting *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989)); *Rowley*, 458 U.S. at 201 (The Act requires participating States to educate handicapped children with nondisabled children whenever possible.).
[158] 20 U.S.C. § 1412(a)(10)(B)(I); *see also Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

environment where he can model the behavior of his typically developing peers, i.e., inclusion classes for at least part of his school day. In other words, Petitioners established that the Student need not be removed from education in his age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Petitioners presented no evidence to show that the Student requires a more restrictive placement than the DCPS School offers, other than smaller class sizes for his core academic subjects. While the Nonpublic School offers small classrooms, a school-wide behavioral support system, group counseling, and other services that may be ideal for the Student, Petitioners failed to prove that this would be the Student's least restrictive environment.

Thus, this Hearing Officer finds that the DCPS School can provide the Student the basic floor of opportunity, provided that it places him in smaller inclusion classes for his core academic courses, that IDEA requires. For this reason, this Hearing Officer finds that Petitioners failed to prove that Respondent denied the Student a FAPE by failing to place him in a segregated program for emotionally disturbed students.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this 19th day of September hereby

ORDERED that, within fifteen school days, Respondent shall convene a meeting of the Student's IEP team to review and revise the Student's IEP, in accordance with this HOD, to provide that, for all of his core academic subjects, the Student shall receive specialized instruction, including one-on-one instruction as needed, in inclusion classes with no more than twelve students per class; and

IT IS FURTHER ORDERED that Respondent shall receive an additional day to comply with this Order for every day of delay caused by Petitioners, their counsel, or their educational advocate.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by this 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 Petitioners
Counsel for Respondent
Student Hearing Office