DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., Second Floor
Washington, DC 20002

Parent, on behalf of STUDENT,[1]	)	Case Number:
Petitioner,	)	Hearing Dates: August 3, 2011, Room 2003 August 10, 2011, Room 2003
v.	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Officer: Frances Raskin
Respondent.	)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), and its implementing regulations at 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title 38 of the District of Columbia Code, Subtitle VII, Chapter 25, and Title 5-E of the District of Columbia Municipal Regulations.

II. BACKGROUND

Petitioner is the parent of a year-old student ("Student") with a disability who attends a non-public school in Springfield, Virginia ("Non-Public School"). On April 22, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

This Hearing Officer was appointed to preside over this case on June 10, 2011. Respondent DCPS filed a timely response to the Complaint ("Response") on June 20, 2011.[2]

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

On June 28, 2011, the parties participated in a resolution meeting. At the meeting, the parties agreed that no agreement was possible and that they would proceed to a due process hearing. Thus, the June 29, 2011, was the first day of the due process hearing period.

On July 11, 2011,[3] this Hearing Officer held a prehearing conference in which Roberta Gambale, counsel for Petitioner, and Tanya Chor, counsel for Respondent, participated. This Hearing Officer held a second prehearing conference on July 20, 2011, so that Petitioner could provide further clarification of the claims raised in the Complaint.

During the prehearing conference on July 11, 2011, the parties agreed to schedule the due process hearing for August 3, 2011. On July 21, 2011, this Hearing Officer issued a prehearing conference summary and order. In the prehearing order, this Hearing Officer certified the following issues for adjudication:

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to develop an individualized educational program ("IEP") on December 7, 2010, that included a full description of the Student's least restrictive environment ("LRE") and a transition plan that reflected the Student's interests and needs and addressed his need for independent living skills; and

B. Whether DCPS denied the Student a FAPE by failing to offer an appropriate placement for the 2011-2012 school year.[4]

On August 1, 2011, Respondent convened an IEP meeting in which Petitioner and her educational advocate ("Advocate") participated. At this IEP meeting, the parties resolved the issue regarding the Student's transition plan.

The due process hearing commenced at 9:30 a.m. on August 3, 2011. At the outset of the hearing, in the absence of any objections, this Hearing Officer entered the parties' respective five-day disclosures into evidence.[5]

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[3] This was the first date that both counsel were available for the prehearing conference. The prehearing conference was scheduled for July 7, 2011, but counsel for DCPS requested that it be rescheduled because she was double-booked for the date and time of the prehearing conference. The prehearing conference then was scheduled for July 8, 2011, but rescheduled because counsel for Petitioner was driving at the time of the prehearing conference and unable to reference the documents in this case. The prehearing conference was again rescheduled for July 11, 2011.

[4] In the Complaint, Petitioner also had alleged that DCPS denied the Student a FAPE by failing to provide him extended school year services for the 2011 summer. As relief for this claim, Petitioner had requested compensatory education. The parties resolved this claim prior to the prehearing conference.

[5] This Hearing Officer entered into evidence Petitioner's Exhibits 1-20 and Respondent's exhibits 1-3 and 5-14. This Hearing Officer did not admit Petitioner's Exhibit 21, which was a curriculum vita for a witness who did not testify at the due process hearing. Respondent withdrew its Exhibit 4 after this Hearing Officer informed counsel for Respondent that this document pertained to another student. Thus, this Hearing Officer instructs the Student Hearing

After the parties provided opening statements, Petitioner testified and called two witnesses, the Advocate, a clinical psychologist from the Non-Public School ("Psychologist"), the Non-Public School Assistant Educational Director ("Assistant Director"), the Student's former math teacher at the Non-Public School ("Math Teacher"), and the Student's social worker at the Non-Public School (Social Worker"). Respondent then presented one witness, the special education coordinator ("SEC") at the school in which DCPS proposed placing the Student for the 2011-2012 school year ("DCPS School"). The due process hearing was then continued to August 10, 2011.

On August 10, 2011, the SEC concluded her testimony. DCPS also presented the testimony of progress monitor/local education agency representative ("Progress Monitor"). The parties then presented oral closing arguments, and the due process hearing concluded on August 10, 2011.

IV. ISSUES PRESENTED

A. Whether DCPS denied the Student a FAPE by failing to offer an appropriate placement for the 2011-2012 school year; and

B. Whether DCPS denied the Student a FAPE by failing to develop an IEP for the Student on December 7, 2010, that included a full description of his LRE.

Petitioner requests relief in the form of an order requiring DCPS to fund the Student's enrollment at the Non-Public School for the 2011-2012 school year, and revise the Student's IEP to provide a more descriptive statement of his LRE.

V. FINDINGS OF FACT

1. The Student's general intellectual ability is 70, which is in the borderline range when compared to other students his age.[6] This cognitive score suggests that he will perform non-verbal and verbal tasks at a less developed level when compared to most of his same-aged peers.[7]

2. The Student's verbal ability is in the extremely low range.[8] Verbal ability is a measure of the Student's language development.[9] Verbal ability reflects an individual's

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Office to remove Respondent Exhibit 4 from the record in this case. Similarly, Petitioner Exhibit 4, page 2, contains information regarding another student. In the certified record, this Hearing Officer has redacted the other student's name from this exhibit.

[6] Petitioner Exhibit 13 at 7 (May 17, 2010, Comprehensive Psychological Evaluation). The general intellectual ability score is a broad measure of general intelligence similar to an IQ score. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

comprehension of individual words and fund of verbal knowledge.[10]

3. The Student's thinking ability is in the average range.[11] Thinking ability is a measure of the Student's ability to retrieve information from long-term memory in order to complete cognitive tasks.[12]

4. The Student's cognitive efficiency is in the extremely low range.[13] The cognitive efficiency domain is a measure of an individual's ability to process both verbal and non-verbal stimuli automatically.[14]

5. The Student has deficiencies in all academic areas, which will impact his ability to succeed in the classroom.[15]

6. His performance in broad reading is equivalent to the fifth grade, third month reading level, which is in the low average range of functioning as compared to his same-age peers.[16] Broad reading refers to the Student's decoding skills, reading comprehension, and reading speed.[17] The Student previously was diagnosed with dyslexia.[18]

7. In broad written language, the Student's performance is equivalent to a student in the sixth month of second grade, which is in the extremely low range.[19] Broad written language refers to the Student's writing fluency, ability to write cohesive sentences and spell, and the quality of his written expression.[20]

8. The Student's performance in broad math is equivalent to a student in the eighth month of the second grade, which is in the extremely low range.[21] Broad math refers to the Student's number sense and ability to solve mathematic problems.[22]

9. The Student's emotional difficulties impact his availability for learning, and his ability to get up in the morning and attend school.[23] He has a complex system of behaviors and emotions that impede his success academically and socially.[24] He may misattribute the benign

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 16.
[16] Petitioner Exhibit 13 at 8.
[17] *Id.*
[18] *Id.*
[19] Petitioner Exhibit 13 at 8-9.
[20] *Id.*
[21] Petitioner Exhibit 13 at 8.
[22] *Id.*
[23] Testimony of Clinical Psychologist.
[24] Petitioner Exhibit 13 at 16.

intentions of others, which may lead to withdrawal and social isolation.[25] He has few, if any, friends, and feels poorly about himself, his academic limitations, and his family situation.[26]

10. The Student suffers from dysthymic disorder, which is a form of depression.[27] The Student's anxiety is a product of his depression.[28] In addition to dysthymic disorder and anxiety, the Student suffers from adjustment disorder, disruptive behavior disorder, ADHD combined type, and learning disorder not otherwise specified.[29]

11. The Student recently began taking an antidepressant, for his depression.[30] The Student previously took another antidepressant, Wellbutrin, which Petitioner suggested because she takes this medication.[31] After he started taking his school attendance declined.[32]

12. The Student has a sleep disorder and often is awake until very late at night.[33] He was prescribed medication to help him sleep but stopped taking it after it made him ill.[34] Petitioner takes a prescription medication to help her sleep because of the tragedy the family has experienced over the past few years, including the death of the Student's father in 2001.[35] Petitioner also has difficulties managing the Student at home.[36]

13. The Student experiences difficulties with attention, distractibility, and hyperactivity, both at home and at school.[37] This impedes his academic success.[38] He has difficulty focusing and retaining information.[39] He fails to give close attention to details or make careless mistakes in school work, often cannot sustain attention, does not follow through on instructions, has trouble organizing tasks, is easily distracted by external stimuli, and often is forgetful in his daily activities.[40] He talks excessively, fails to complete assignments, and is impulsive.[41] These

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[25] *Id.*
[26] *Id.* at 3, 14, 16-17.
[27] *Id.* at 16. The Student's family also has experienced instability. *Id.* The family was homeless in early 2010. *Id.*
[28] Petitioner Exhibit 13 at 17; Respondent Exhibit 13 at 107 (February 23, 2010, Contact Details).
[29] Petitioner Exhibit 13 at 17.
[30] Testimony of Petitioner.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Petitioner Exhibit 13 at 16.
[38] *Id.*
[39] *Id.* at 17.
[40] *Id.* at 16.
[41] *Id.*

behaviors are maladaptive and inconsistent with his developmental level.[42]

14. The Student meets the criteria for emotional disturbance ("ED"), other health impairment, and specific learning disability.[43] He is sensitive to the judgments of other students and adults and worries about other their perceptions of him.[44] His attitude toward school and teachers is poor, which affects his motivation and ability to attend school regularly.[45] The Student also has difficulty adjusting to new environments due to his low motivation and depression.[46] In part, acceptance of any new school environment would require him to engage in and accept the school's program.[47]

15. The Student requires behavioral support in the form of counseling and academic support in the form of specialized instruction in all academic subjects throughout the school day.[48] His current IEP, developed in December 2010, provides that he is to receive twenty-six hours per week of specialized instruction outside the general education setting.[49] The IEP also provides that he is to receive sixty minutes per week of behavioral support services outside the general education setting.[50]

16. The Student's IEP contains a section entitled Least Restrictive Environment ("LRE"), which states that he is to receive twenty-six hours per week of specialized instruction to address deficits in the areas of reading, math, and written expression.[51] The LRE section also states that the Student is to receive sixty minutes per week of behavioral support services, i.e., psychological counseling, to address his self-awareness, and ability to regulate emotions, follow rules and regulations, and interact positively with peers and adults.[52]

17. The Student began attending the Non-Public School on September 7, 2010.[53] A hearing officer placed the Student in the Non-Public School in a hearing officer determination ("HOD") issued on November 12, 2011.[54]

18. The Non-Public School provides specialized instruction, outside the general

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[42] *Id.*
[43] Petitioner Exhibit 13 at 16-17.
[44] Petitioner Exhibit 13 at 17.
[45] *Id.*
[46] Petitioner Exhibit 1 at 3 (June 7, 2011, Advocate's Meeting Notes); Testimony of Petitioner, Clinical Psychologist.
[47] Testimony of Clinical Psychologist.
[48] *Id.*
[49] Petitioner Exhibit 7 at 9.
[50] *Id.*
[51] *Id.* at 10. On May 10, 2011, DCPS revised the Student's IEP to provide him extended school year services. Petitioner Exhibit 6 at 13 (May 10, 2011, IEP). DCPS did not convene a meeting of the Student's IEP team to effectuate these changes but instead made them in consultation with Petitioner. *Id.* at 1. DCPS made no other changes to the IEP. Stipulation of parties.
[52] *Id.*
[53] Stipulation of parties.
[54] Petitioner Exhibit 19 at 11 (November 12, 2010, HOD).

education setting, for the entirety of the school day to all students.[55] There are 104 the elementary, middle, and high school students enrolled in the Non-Public School.[56] There are no nondisabled students enrolled in the Non-Public School.[57]

19. The Non-Public School is a therapeutic environment with a staff that includes a clinical psychologist, art therapist, and behavioral counselors who spend time with students who are sent from the classroom to the school's behavior counseling center ("BCC").[58] Students are sent to the BCC when they are in crisis or are having difficulties.[59]

20. The Non-Public School provides its students all related services required by their IEPs.[60] The Non-Public School also provides group counseling to all students although not required by their IEPs.[61] During group counseling, the students work on social skills, which is an area of concern for the Student.[62] The Student receives individual and group counseling at the Non-Public School.[63]

21. The Non-Public School places no more than ten students in each classroom.[64] The student-teacher ratio at the Non-Public School ranges from one-to-one to ten-to-two.[65] Each teacher provides differentiated instruction and implements multisensory approaches to instruction to assist students with learning disabilities.[66] The Non-Public School also provides transition services and job training to students whose IEPs contain transition plans.[67]

22. The Student has difficulty transitioning to new environments such as the Non-Public School.[68] He requires a lot of time to get used to new settings, and tends to withdraw from others as a result of his anxiety.[69]

23. At the Non-Public School, the Student has had difficulty relating to his peers.[70] He was unmotivated to institute peer contact.[71] He has low self-esteem and social deficits.[72] He

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Testimony of Assistant Director.
[59] *Id.*
[60] *Id.*
[61] *Id.*; testimony of Clinical Psychologist.
[62] Testimony of Assistant Director.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Testimony of Petitioner, Clinical Psychologist.
[69] *Id.*
[70] Testimony of Clinical Psychologist.
[71] *Id.*
[72] *Id.*

typically waits for others to initiate conversation with him, which caused him anxiety.[73] He has had a difficult time dealing with peers due to his low self-esteem.[74]

24. At the Non-Public School, the Student had a pattern of somatic complaints.[75] When adults confronted him about his inappropriate behavior, he would respond with complaints of a stomachache or headache.[76]

25. The Student often refused to eat breakfast or lunch at the Non-Public School, although it was available to him.[77] When he doesn't eat during the school day, the Student is not able to participate in academic activities.[78] He experienced problems with peers and avoided interactions in social settings when he felt overwhelmed.[79] By the end of the school year, the Student was more withdrawn than when he started at the Non-Public School.[80]

26. During the 2010-2011 school year, the Student performed well when working independently on writing tasks.[81] He relied on the teacher to interpret writing prompts beyond his ability and required monitoring to stay on task.[82] However, his interest in reading faded.[83] He reported to class later and later as the school year progressed and had significant attendance issues.[84] He was unfocused, tended to retreat into his own thoughts, and became preoccupied with drawing during class, which prevented him from completing classroom assignments.[85] His inability to stay focused on the classroom activities impeded his overall skill development.[86]

27. The Student earned two Ds in his English class in the first two quarters of the 2010-2011 school year.[87] In the third quarter, he earned an F.[88]

28. In math class at the Non-Public School, the Student required constant supervision to perform.[89] He performed at the equivalent of a student between the second- and third-grades.[90]

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[73] *Id.*
[74] *Id.*
[75] Petitioner Exhibit 7 at 8; testimony of Progress Monitor.
[76] *Id.*
[77] Petitioner Exhibit 3 at 3.
[78] *Id.*
[79] Petitioner Exhibit 2 at 3 (June 7, 2011, Non-Public School Meeting Notes).
[80] Petitioner Exhibit 2 at 3 (June 7, 2011, Non-Public School Meeting Notes).
[81] Petitioner Exhibit 7 at 6.
[82] *Id.*
[83] Petitioner Exhibit 7 at 4 (December 7, 2010, IEP). The parties stipulated that the December 7, 2010, IEP is the Student's operative IEP. DCPS subsequently added Extended School Year ("ESY") and transition services but did not otherwise amend this IEP.
[84] *Id.*
[85] *Id.* at 4-5.
[86] *Id.*
[87] Petitioner Exhibit 16 at 1 (Non-Public School Quarterly Grade Report Card).
[88] *Id.* The parties did not disclose the Student's final report card for school year 2010-2011.
[89] Petitioner Exhibit 7 at 2.
[90] Testimony of Math Teacher.

If left unsupervised, he rushed through his work, drew cartoon caricatures, or talked with his classmates.[91] As the class progressed to new skills over the school year, the Student's interest in school lagged and his work suffered.[92] He also exhibited behavior problems in the classroom, including failing to stay on task, talking excessively, and refusing to work on the assignments.[93] The Student's math grades deteriorated over the 2010-2011 school year from Cs in the first and second quarters to a D in the third quarter.[94]

29. In general, throughout the 2010-2011 school year, the Student did not prepare for class, slept during class, and failed to turn in his homework assignments.[95] His progress was impeded in part by his depression.[96]

30. During the 2010-2011 school year, the Student's grades steadily declined in five of seven courses.[97] By the end of the school year, the Student had not earned enough credits to progress to the tenth grade.[98]

31. The Student made some progress on the social-emotional goals in his IEP.[99] He made progress in implementing coping strategies when experiencing frustration. He also improved his ability to identify issues and discuss his problems.[100] However, there were periods when the Student was so depressed that he was not able to implement coping strategies his depression interfered with his ability for learning.[101]

32. The Student also made some progress in group therapy.[102] When he first started in group therapy, he was very quiet, kept to himself, and avoided social interactions.[103] He had difficulty expressing his opinion and anxiety in social settings.[104] By the end of the 2010-2011 school year, he was more comfortable with his peers and in social setting.[105] He also was more willing to share his opinion and challenge the opinions of his peers when he did not agree.[106]

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[91] Petitioner Exhibit 7 at 2.
[92] *Id.*
[93] *Id.*; testimony of Math Teacher.
[94] Petitioner Exhibit 16 at 1.
[95] Petitioner Exhibit 4 at 2 (June 7, 2011, Case Manager's Multidisciplinary Team Meeting Notes).
[96] Testimony of Clinical Psychologist.
[97] Petitioner Exhibit 4 at 2.
[98] Testimony of Progress Monitor. The Student earned only 4.5 credits in school year 2010-2011, his ninth grade year. *Id.* Pursuant to DCPS guidelines, Students must earn six credits to be promoted to the tenth grade. *Id.*
[99] Testimony of Clinical Psychologist.
[100] *Id.*
[101] *Id.*
[102] Testimony of Social Worker.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

33. The Student was often absent from or late to school.[107] During the 2010-2011 school year, the Student missed seventy-seven days of school, although five of the absences were due to transportation problems.[108] These absences had a significant impact on the Student's ability to make academic progress.[109]

34. The Student often was absent because he was not ready when the school bus arrived.[110] It may be that he wished to escape from certain schoolwork and activities and his ailments may have been more prone to emerge at those times.[111]

35. The Student's poor attendance was a manifestation of his depression.[112] At times, he presented with low energy and low motivation.[113] The Student is also self-conscious about his low academic performance.[114] He often withdraws and refuses to interact with others or work on his assignments.[115] At times, school was overwhelming that he preferred to stay at home where there were fewer interactions with others and fewer demands placed on him.[116]

36. On June 7, 2011, DCPS convened a meeting of the Student's IEP team to discuss the Student's placement and location of services for the upcoming school year.[117] Petitioner and the Advocate attended the meeting.[118]

37. At the June 7, 2011, meeting, the Clinical Psychologist shared his opinion that the Student required a therapeutic setting due to his major depressive disorder, i.e., depressed mood, low motivation, sleep disorder, and feelings of helplessness.[119] The Clinical Psychologist expressed his opinion that the Student should remain at the Non-Public School because he

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[107] Petitioner Exhibit 7 at 8; Petitioner Exhibit 10 at 2-3 (June 14, 2010, Advocate's meeting notes). During the 2009-2010 school year, the Student attended a public school for students with disabilities ("Prior School"). Petitioner Exhibit 13 at 1.
[108] *Id.*; Petitioner Exhibit 3 at 1 (June 7, 2011, DCPS Meeting Notes). There are 180 days in the school year. Testimony of Clinical Psychologist. The Student missed over 200 days of school in the past two school years, including 59 days missed during ESY. Testimony of Progress Monitor.
[109] Testimony of Clinical Psychologist.
[110] Petitioner Exhibit 3 at 2; Testimony of Petitioner.
[111] Petitioner Exhibit 13 at 18.
[112] Testimony of Clinical Psychologist, Assistant Director.
[113] Testimony of Clinical Psychologist.
[114] Testimony of Petitioner.
[115] *Id.*; Testimony of Clinical Psychologist.
[116] Testimony of Clinical Psychologist.
[117] Petitioner Exhibit 2 at 1; Petitioner Exhibit 3 at 1.
[118] *Id.* at 1; Petitioner Exhibit 1 at 3.
[119] Testimony of Clinical Psychologist. Therapeutic settings provide support, individual psychotherapy, and other related services to students. *Id.* They are settings where staff addresses each student's emotional issues and how these issues may impact a student's ability to learn. *Id.* A therapeutic setting generally includes a behavioral support center where students may take a breaks if needed. *Id.* Therapeutic settings also monitor student behavior and reward students for compliance and positive behaviors. *Id.*

needed the level of care and therapeutic intervention that it provides.[120]

38. At the June 7, 2011, meeting, the IEP team determined that, for the 2011-2012 school year, the Student would continue to receive twenty-six hours per week of specialized instruction, in a small classroom setting, outside the general education environment.[121] The IEP team agreed that the Student also requires a therapeutic program.[122] The IEP team determined that the Student would continue to receive and one hour per week of counseling outside the general education setting in the 2011-2012 school year.[123]

39. At the meeting, the DCPS Progress Monitor offered to place the Student at the DCPS School for the 2011-2012 school year.[124] The Progress Monitor stated that, due the Student's poor attendance and academic regression, the Non-Public School was an inappropriate location of services for the Student.[125] The Progress Monitor voiced his opinion that the Student did not want to attend the Non-Public School as evidenced by his refusal to participate in the Non-Public School program.[126] The Progress Monitor then informed the IEP team that, because the DCPS School could implement the Student's IEP, he believed it would be an appropriate setting.[127] The Progress Monitor came to this conclusion after investigating several other possible schools for the Student, including the Non-Public School.[128]

40. At the June 7, 2011, meeting, the DCPS Progress Monitor provided Petitioner a prior written notice informing her that the Student would attend the DCPS School for the 2011-2012 school year.[129] In the notice, the Progress Monitor stated that one of the factors on which it based its decision was that the Student's poor attendance record at the Non-Public School.[130] The Progress Monitor also considered the reports of the Student's teachers and his failure to make academic progress at the Non-Public School.[131]

41. The Advocate objected to the decision of the Progress Monitor to return the Student to a DCPS public school.[132] The Advocate expressed her concern that the DCPS School could not provide the Student specialized instruction in all classes outside of the general education setting, or a therapeutic program for emotionally disturbed students.[133]

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[120] *Id.*
[121] Petitioner Exhibit 3 at 3; Petitioner Exhibit 7 at 9; Testimony of Advocate.
[122] Petitioner Exhibit 7 at 9; Testimony of Advocate.
[123] Petitioner Exhibit 7 at 9; Testimony of Advocate.
[124] Petitioner Exhibit 1 at 3.
[125] Testimony of Progress Monitor.
[126] Petitioner Exhibit 1 at 3. During his school counseling sessions, the Student expressed that he was not a fan of the Non-Public School. Petitioner Exhibit 3 at 3.
[127] Petitioner Exhibit 3 at 3.
[128] Testimony of Progress Monitor.
[129] Petitioner Exhibit 5 (June 7, 2011, Prior Written Notice).
[130] *Id.*; Testimony of Progress Monitor.
[131] *Id.*
[132] Testimony of Progress Monitor, Advocate.
[133] Testimony of Advocate.

42. The DCPS School can implement the Student's IEP, including his transition plan.[134] The Student would be placed in a cluster program for students with ED and require specialized instruction outside the general education setting for the entire school day.[135] Each classroom in this cluster program has nine students, one teacher certified in both special education and a general education subject matter, and one teacher's aide.[136] There are nine students, ranging from the ninth to the twelfth grades, in the ED cluster program.[137]

43. Students in the ED cluster program are exposed to their nondisabled peers entering and leaving the school building, while transitioning between classes, and in the school cafeteria.[138] However, a student may request to eat lunch in the ED cluster classroom with the classroom teacher.[139]

44. The DCPS School provides crisis intervention to its students.[140] A student's classroom teacher and a social worker would facilitate any such crisis intervention.[141] The school also has a wellness center that provides social-emotional services to students.[142] The wellness center is staffed by three social workers.[143] These social workers deliver counseling services to students.[144] They also implement therapeutic interventions for students who require them.[145]

45. The DCPS School would develop a behavior intervention plan ("BIP"), facilitated by the student's teacher and a social worker, to address his behavioral difficulties.[146] If dictated by his IEP, a student's social-emotional needs would be addressed through counseling sessions with a social worker.[147]

46. If the Student continues to have poor attendance, the DCPS School would include attendance goals in his BIP.[148] Additionally, a truancy officer would contact Petitioner.[149] In extreme cases, DCPS Roving Leaders would implement interventions including calling parent and visiting home.[150]

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[134] Testimony of SEC.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

47. About 500 students will attend the DCPS School in the 2011-2012 school year.[151] Students with disabilities make up one-third of the student population.

48. On August 1, 2011, DCPS convened a meeting of the Student's IEP team to revise the goals in the Student's transition plan.[152] Petitioner and the Advocate attended the meeting.[153] Petitioner agreed with the transition goals the IEP team developed at the meeting.[154]

49. Petitioner provided credible testimony at the due process hearing. Her testimony was consistent with the documentary evidence and was uncontroverted by any of Respondent's witnesses. She was forthright about the Student's academic difficulties and social limitations. She also was forthright about her difficulties managing the Student at home.

50. The Educational Advocate provided credible testimony. She has both a bachelor's and a master's degree in special education and previous experience teaching students with learning disabilities as well as students with emotional disturbance.[155] She easily recalled the details of the meetings she attended, the content of the Student's IEP, and his difficulties in school. Although the Advocate's viewpoint differed from that of the DCPS witnesses, she was an equally credible witness. Her testimony was uncontroverted.

51. The Clinical Psychologist provided insight into the Student's disabilities and testified forthrightly about the Student's difficulties in the Non-Public School. He admitted that the Student had not made meaningful progress at the Non-Public School, due to his excessive absences, and refrained from asserting that the Student must remain there to make academic progress.[156] Thus, the Clinical Psychologist was an unbiased, credible, and knowledgeable witness.

52. The Assistant Director testified forthrightly about the Student's difficulties in the Non-Public School. She also provided in-depth testimony about the services that the Non-Public School provides. While stating that the Student may have difficulty transitioning to a new school, she did not testify that the Student would not make progress at the DCPS School. Thus, she was a credible witness.

53. The Math Teacher testified forthrightly about the Student's performance in her class and his lack of academic progress. She limited her testimony to her personal knowledge of the Student's performance in math, and shared insight into his difficulties. Thus, she was a credible witness.

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[151] *Id.*
[152] Stipulation of parties.
[153] *Id.*
[154] *Id.*
[155] Testimony of Advocate.
[156] The Clinical Psychologist testified that, at the June 7, 2011, IEP meeting, he recommended that the Student stay at the Non-Public School. Yet, in his testimony, he did not advocate that the Student remain at the Non-Public School or that the Student would be harmed if he were to attend the DCPS School. He testified only that the Student requires a therapeutic setting and may not fare well in a setting where he interacts with nondisabled peers.

54. The Social Worker's testimony was limited to her personal knowledge of the Student's performance in group counseling and admitted that he made limited progress. Thus, she was a credible witness.

55. The DCPS Special Education Coordinator provided in-depth information about the ED cluster program at the DCPS School and the services available to students with disabilities. She admitted that she had no knowledge of the Student and had not seen his IEP. She testified forthrightly, even when challenged about the appropriateness of the DCPS School for the Student. Thus, she was a credible witness.

56. The DCPS Progress Monitor was sympathetic to the Student's struggles and his desires to make friends. He provided forthright testimony about the limitations of the special education programs at other DCPS Schools, and whether they could implement the Student's IEP. He had extensive knowledge of the Student's difficulties at the Non-Public School and provided in-depth testimony about his attempt to find an appropriate program for the Student. While the Progress Monitor may have discounted the role depression played in the Student's difficulties during the 2010-2011 school year, overall, he was a credible witness.

VI. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[157] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[158] It "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[159]

Each local education agency ("LEA") is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[160] In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable him/her to receive educational benefits.[161] The IEP is the centerpiece of special education delivery system.[162]

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.[163] In

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[157] 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).
[158] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.
[159] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[160] 34 C.F.R. § 300.101.
[161] *Rowley* at 206-207.
[162] *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[163] 20 U.S.C. § 1415 (f)(3)(E)(ii).

other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[164]

The burden of proof is properly placed upon the party seeking relief.[165] A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[166] 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.[167] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[168] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[169] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[170]

VII. DISCUSSION

A. Petitioner Failed to Prove that DCPS Denied the Student a FAPE by Failing to Provide Him an Appropriate Educational Placement for the 2011-2012 School Year.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[171] establishes annual goals related to those needs,[172]

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[164] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *See also C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective") (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a "substantive deprivation" of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).

[165] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

[166] 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).

[167] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

[168] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).

[169] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

[170] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

[171] 34 C.F.R. § 300.320 (a) (1).

[172] 34 C.F.R. § 300.320 (a) (2).

and provides appropriate specialized instruction and related services.[173] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[174]

The IDEA requires that 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.[175] Special classes separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[176]

In other words, a student's IEP must be implemented in the student's LRE.[177] In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.[178] 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.[179]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[180] "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.[181]

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.[182]

In the District of Columbia, special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with IDEA: (1) DCPS schools, or District of Columbia public charter schools

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[173] 34 C.F.R. § 300.320 (a) (4).
[174] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[175] 34 C.F.R. § 300.116 (c).
[176] 34 C.F.R. § 300.114 (a)(2)(ii).
[177] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[178] 34 C.F.R. § 300.116 (d).
[179] *Id.* at (e).
[180] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[181] *Id.*
[182] *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia.[183]

Here, the Student enrolled in the Non-Public School on September 7, 2011. A hearing officer subsequently ordered DCPS to fund the Student's enrollment in the Non-Public School following a due process hearing on October 21, 2010.

During his time at the Non-Public School, the Student's academic performance steadily declined. His social-emotional functioning also declined and he often withdrew from social contact. He refused to complete his academic assignments. By the end of the year, he had failed two classes and failed to earn sufficient credits to progress to the tenth grade.

The Student's lack of progress was due in part to his failure to attend school for more than one third of the school year. Yet, the Non-Public School failed to meaningfully address the Student's attendance problems. The Non-Public School did not work with the parent to increase his attendance, requesting additional services such as family therapy from DCPS, develop a BIP to address the Student's truancy, or implement interventions to foster his school attendance. Although the Student's reluctance to attend school was a manifestation of his disability, the Non-Public School failed to develop additional IEP goals to address his attendance problems. Instead, the Non-Public School allowed the Student to fail two of his classes and regress academically, socially, and emotionally.

Thus, it would be unwise to requiring the Student to attend the Non-Public School for another academic year may further exacerbate his academic and social emotional deficits. Moreover, Petitioner presented no evidence to rebut the testimony of the DCPS witnesses that the DCPS School can implement the Student's IEP and meet his social-emotional needs. Petitioner also failed to prove that the Student would be harmed by being exposed to his non-disabled peers during transitions between classes and during lunch in the cafeteria. Finally, Petitioner failed to present any evidence to rebut the Progress Monitor's testimony that the Student told him that he wants to attend his neighborhood school because he does not like the Non-Public School.

In other words, Petitioner failed to prove by a preponderance of the evidence that the DCPS School is not the Student's LRE. Petitioner also failed to prove the DCPS School would be an inappropriate placement or location of services for the Student. Thus, Petitioner failed to prove, by a preponderance of the evidence, that DCPS denied the Student a FAPE by placing him in the DCPS School for the 2011-2012 school year. Petitioner proved only that the Non-Public School denied the Student a FAPE during the 2010-2011 school year. Thus, Petitioner is not the prevailing party on this claim.

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[183] D.C. Code § 38-2561.02.

B. Petitioner Failed to Prove that DCPS Denied the Student a FAPE by Failing to Revise the LRE Statement in His IEP.

Petitioner presented no testimony on this issue, other than the Advocate's testimony that she raised this issue at a meeting in June 2010.[184] In other words, Petitioner failed to produce any evidence that DCPS denied the Student a FAPE by failing to revise the LRE statement in his IEP. Thus, Petitioner is not the prevailing party on this claim.

C. Remedy: the Student Requires Additional Services to Achieve Academic and Social-Emotional Progress.

The evidence at the due process hearing overwhelmingly showed that the Student has significant emotional problems that interfere with his attendance and participation in school. The testimony of Petitioner's witnesses and the Progress Monitor established that the Student has developed a pattern of avoiding school so he would not have to fact the prospect of his shortcomings, academic difficulties, and awkward social interactions. The Student's IEP fails to address his truancy and school avoidance, even though it has impeded his ability to progress to the next grade.

Petitioner failed to address this issue in her request for relief and in the evidence she presented at the due process hearing. Instead, she focused solely on keeping the Student in the Non-Public School for another year, despite that he had regressed in almost every area during the previous school year.

It is evident that the Student requires additional assistance outside of school to access the curriculum, make social emotional progress, and prepare for life after high school. In other words, the Student requires community services designed to ensure he gets sufficient sleep at night, is properly nourished, gets to school on time, completes his homework, has social and recreation opportunities, and follows a regular routine.

Thus, DCPS must revise the Student's IEP to include weekly family counseling, and to provide the Student a community aide in the form of a trained mentor, social worker, or similar service provider. DCPS shall add measurable goals to the Student's IEP to address his behavioral and social difficulties in the areas outlined below. DCPS also shall ensure that the service provider:

1. Arrives at the Student's home every morning in sufficient time before school to ensure the Student gets out of bed, gets dressed for school, and eats a healthy breakfast.

2. Ensures that the Student arrives at the school building on time, with his homework in hand. The service provider shall walk the Student to class, if necessary.

3. Meets the Student at school at the end of the school day, accompanies the Student to his home, ensures he eats a healthy snack, and assists the Student with completing his

[184] Because Petitioner could have raised this issue in the prior due process complaint, an argument could be made that this claim is barred by the doctrine of claim preclusion.

homework.

4. Ensures that the Student eats a healthy dinner, by providing nutritional counseling to Petitioner if necessary.

5. Ensures that the Student follows an appropriate personal hygiene routine and gets to bed at a reasonable hour. The service provider shall make all reasonable efforts to ensure that the Student gets at least eight hours of sleep per night. If necessary, the service provider shall assist Petitioner in obtaining treatment for the Student's sleep disorder.

6. Ensures that the Student engages in therapeutic recreation at least twice a week, including on weekends, for at least two to three hours per session, not including transportation.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 23rd day of August 2011, it is hereby:

ORDERED that Respondent shall amend the Student's IEP to include the goals for the 2011-2012 school year in accordance with the "Remedy" section of this HOD; and

IT IS FURTHER ORDERED that Respondent shall engage a community service provider to provide services throughout the 2011-2012 school year in accordance in the "Remedy" section of this HOD; and

IT IS FURTHER ORDERED that the Complaint is **DISMISSED WITH PREJUDICE.**

By: /s/ *Frances Raskin*
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that 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:

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Student Hearing Office
DCPS