DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Guardian, on behalf of STUDENT, [1]	)	
Petitioner,	)	
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	**Hearing Officer: Frances Raskin**

OSSE
STUDENT HEARING OFFICE
2012 SEP 12 PM 4:04

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the guardian of a ·year-old student ("Student") with a disability who attends a senior high school in the District of Columbia. On June 28, 2012, Petitioner filed a due process compliant ("Complaint") against Respondent District of Columbia Public Schools ("DCPS") alleging violations of the IDEA.

On June 29, 2012, this Hearing Officer was assigned to preside over this case. On July 6, 2012, Respondent filed a timely response to the Complaint.[2]

On July 12, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties did not agree to terminate the thirty-day resolution session before the thirtieth day. Thus, the resolution period ended on July 28, 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 July 26, 2012, this Hearing Officer held a prehearing conference in which Counsel for Petitioner and Counsel for Respondent, participated. During the prehearing conference, the parties agreed that the forty-five day, due process hearing timeline began on July 29, 2012.[3] The parties agreed to schedule the due process hearing for 9:30 a.m. on August 29, 2012. On August 3, 2012, this Hearing Officer issued a prehearing conference summary and order ("Prehearing Order").

The due process hearing commenced on August 29, 2012. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits,[4] as well as Respondent's proposed exhibits.[5] Petitioner testified and presented four witnesses on his behalf: the Student's former special education teacher for reading and social studies ("Teacher 1"), another of the Student's former special education teachers ("Teacher 2"), a school psychologist ("Psychologist"), and an admissions director ("Admissions Director") from a nonpublic school ("Nonpublic School"). Respondent presented one witness, a special education specialist ("SES").

After the parties presented oral closing arguments, the due process hearing concluded at 1:40 p.m. on August 29, 2012.

III. ISSUE PRESENTED.

This Hearing Officer certified the following issue for adjudication at the due process hearing: Whether Respondent denied the Student a free, appropriate, public education ("FAPE") in May 2012 by failing to provide her an appropriate placement for the 2012-2013 school year.

Petitioner requests relief in the form of an order that places the Student in a nonpublic school at public expense, or a public school that provides a small, therapeutic environment outside the general education setting and would provide constant supervision of the Student, for the 2012-2013 school year.

IV. FINDINGS OF FACT

1. The Student is years old and in the grade.[6] She has oppositional defiant disorder[7] and meets the criteria for classification as a child with

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[3] Both counsel agreed to hold the prehearing conference on July 26, 2012, even though the resolution session had not yet ended.

[4] This Hearing Officer admitted into evidence Petitioner's exhibits 1-5, inclusive. Neither party objected to the admission of the other party's exhibits.

[5] This Hearing Officer admitted into evidence Respondent's exhibits 1-3, inclusive.

[6] Testimony of Petitioner; Petitioner Exhibit 1 at 1-2 (February 10, 2012, IEP).

[7] Petitioner Exhibit 2 at 10 (2 at 1 (July 6, 2011, Confidential Comprehensive Psychological Evaluation).

emotional disturbance.[8] She also has a mild intellectual disability.[9] She is eligible for special education services as a student with multiple disabilities.[10]

2. The Student's full-scale IQ is 58, which is below the first percentile of her same-age peers.[11] Her IQ score, however, does not provide an accurate representation of her cognitive abilities because her verbal reasoning abilities are far better developed than her nonverbal reasoning abilities.[12]

3. The Student's verbal comprehension[13] abilities and processing speed[14] are in the fourth percentile of her same-age peers and in the borderline range.[15] Her perceptual reasoning[16] abilities and working memory[17] are below the first percentile and in the extremely low range.[18]

4. In July 2011, the Student's academic skills were in the very low range as compared to her same-age peers in broad math, broad written language, and reading.[19] Her academic functioning was below the first percentile in broad math, the first percentile in reading, to the second percentile in written expression.[20] In general, her academic skills were about five years below the level expected of someone her age.[21] The Student's pattern of cognitive deficits and low academic functioning reveals that she has global cognitive deficits.[22]

5. The Student's adaptive behavior in school, i.e., her communication, daily living, and social skills combined, are in the low range of functioning in comparison to

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[8] Petitioner Exhibit 3 at 5 (August 22, 2011, Review of Independent Psychological Evaluation).
[9] Petitioner Exhibit 4 at 4 (September 29, 2011, Adaptive Functioning Evaluation Report).
[10] Petitioner Exhibit 1 at 1 (February 10, 2012, IEP); Respondent Exhibit 1 at 1 (same).
[11] Petitioner Exhibit 2 at 4.
[12] *Id.* Making sense of complex verbal information and using verbal abilities to solve novel problems are a relative strength for the Student. *Id.* She has a less well-developed ability to process complex visual information by forming spatial images of part-whole relationships and/or by manipulating the parts to solve novel problems without using words. *Id.*
[13] Verbal comprehension is a measure of verbal reasoning and concept formation. *Id.*
[14] Processing speed refers to a person's ability to process simple or routine visual material without making errors.
[15] *Id.* at 4.
[16] Perceptual reasoning is a measure of nonverbal reasoning ability. *Id.*
[17] Working memory refers to a person's ability to sustain attention, concentrate, and exert mental control. *Id.*
[18] *Id.* at 4.
[19] *Id.* at 6-7.
[20] *Id.*
[21] *Id.* at 9.
[22] *Id.*

other students her age, which demonstrates marked impairment.[23] Her communication skills are better than only one percent of students her age, which demonstrates a mild deficit in this area and indicates that she struggles with expressive and written communication.[24] Her daily living skills in the school setting are better than only 0.4 percent of her same-age peers, which demonstrates a mild deficit in daily living and self care skills.[25] Her daily living skills are comparable to children between two and six years old.[26] Her socialization skills are below the first percentile of her same-age peers, which suggests that she has moderate deficits in coping with changes in her school environment.[27] Her interpersonal skills are comparable to children between the ages of one and two years old.[28]

6. The Student has been diagnosed with attention deficit hyperactivity disorder ("ADHD") and takes medication to control her ADHD symptoms.[29] Consistent with her ADHD diagnosis, the Student has difficulty attending and limited alertness to academic tasks due to her heightened alertness to environmental stimuli.[30]

7. The Student has a history of behavioral problems in school.[31] She is disrespectful, untruthful, and defiant toward school staff.[32] She has demonstrated an inability to build and maintain satisfactory interpersonal relationships with peers and teachers.[33] Her chronic oppositional behavior and extreme impulsivity make her unavailable for learning most of the time, as do her failure to comprehend social mores and expectations.[34]

The 2011-2012 School Year

8. During the 2011-2012 school year, when she was in eighth grade at DCPS School 1, the Student performed on the fifth- to seventh-grade level on her reading and writing assignments.[35] With the aid of a calculator, she performed on a sixth grade level on

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[23] Petitioner Exhibit 4 at 1, 3.
[24] *Id.* at 3.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 4.
[28] *Id.*
[29] Petitioner Exhibit 2 at 1.
[30] *Id.* at 9.
[31] Petitioner Exhibit 2 at 9.
[32] *Id.*
[33] *Id.*
[34] Petitioner Exhibit 3 at 5.
[35] Testimony of Teacher 2.

pre-algebra assignments and on a seventh-grade level on geometry assignments.[36] However, the Student's performance depended on her mood.[37]

9. She received all of her instruction in math, reading, writing, social studies, and other core academic subjects in a self-contained classroom with eight emotionally disturbed students.[38] In her elective classes — music, physical education, computer technology, and creative writing — the Student was in a general education classroom with no special education support.[39]

10. At the start of the 2011-2012 school year, the Student exhibited few behavioral difficulties.[40] Around November 2011, her behavior declined.[41] She exhibited enuresis and often refused to complete assignments.[42] She would sit quietly, refusing to work despite prompting from her teachers, but she did not disrupt the class or interfere with other students.[43] Throughout the course of the day, she would walk away when adults tried to redirect her.[44] The following day, she often would come to class and finish the assignment she had not completed the previous day.[45]

11. During the 2011-2012 school year, the Student often decided she did not want to attend a particular class on a particular day, often after she had a conflict with a staff member or another student in the lunchroom.[46] Instead of going to class, she would sit in the school principal's office or go see her guidance counselor.[47] Her guidance counselor would discuss with her the importance of attending class and then return her to the classroom.[48]

12. Throughout the 2011-2012 school year, the Student sought negative attention from male students.[49] During breaks between classes, she often slapped male students, hit them in the back, or pushed them.[50] She would then run so that the boys

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[36] *Id.*
[37] Testimony of Teacher 2.
[38] *Id.*
[39] *Id.*; testimony of Teacher 1.
[40] Testimony of Teacher 1.
[41] *Id.*
[42] Testimony of Teacher 1, 2.
[43] Testimony of Teacher 1.
[44] *Id.*; testimony of Petitioner.
[45] Testimony of Teacher 1.
[46] *Id.*; testimony of Petitioner.
[47] Testimony of Teacher 1.
[48] *Id.*
[49] Testimony of Teacher 1, Teacher 2.
[50] *Id.*

would chase her.[51] When the boys returned the hits and punches, the Student would start a fight, hitting, punching and calling the other students names.[52]

13. About six weeks before the end of the 2011-2012 school year, the Student began to exhibit promiscuous behavior toward male students.[53] In one instance, the Student engaged in sexual behavior with a male student.[54] When interviewed by police officers, the Student asserted the sexual act was nonconsensual, while the male student gave a conflicting account.[55] In a text message the she later sent to a female student, the Student asserted that the sexual interaction was consensual.[56]

14. After this incident, Respondent assigned an aide to the Student to accompany her during transitions between classes and during lunch.[57] This aide also accompanied the Student during her elective classes and assisted her with assignments in the self-contained classroom.[58] At the start of the school day, school staff also met the Student at the front door of the school and escorted her to class.[59]

15. Respondent also instituted a behavior contract that required the Student to take regular bathroom breaks and finish her assignments.[60] The Student responded well to the aide's one-to-one attention and followed her schedule of bathroom breaks.[61] Yet her oppositional behavior and negative interactions with male students continued.[62] She often would run away from the aide or other school staff.[63] At least once a week, she walked out of class when another student irritated her or her teacher asked her to do something she did not want to do.[64]

16. On February 10, 2012, Respondent convened a meeting for an annual review of the Student's performance and to develop an individualized educational program ("IEP") for her.[65] Petitioner and Counsel for Petitioner attended the meeting.[66] Teacher 1 and the

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[51] *Id.*
[52] Testimony of Teacher 2.
[53] Testimony of Teacher 2.
[54] Testimony of Teacher 2, Petitioner.
[55] Testimony of Teacher 2.
[56] *Id.*
[57] Testimony of Teacher 1.
[58] *Id.*, testimony Petitioner.
[59] Testimony of Teacher 2.
[60] Testimony of Teacher 1.
[61] Testimony of Teacher 1.
[62] Testimony of Teacher 2.
[63] *Id.*
[64] Testimony of Teacher 1; Petitioner.
[65] Petitioner Exhibit 1 at 1; Respondent Exhibit 1 at 1.
[66] *Id.*

Student's general education teacher also attended the meeting.[67] Also present was an individual to interpret the results of the Student's evaluations.[68]

17. At the February 10, 2012, meeting, the participants developed an IEP for the Student.[69] They developed annual goals in the areas of mathematics, reading, written expression, and emotional, social and behavioral development.[70] They determined that the Student should receive eight hours per week of specialized instruction in written expression, nine hours per week of specialized instruction in mathematics, and nine hours per week of specialized instruction in reading, all outside the general education setting.[71] They agreed that she also should receive one hour per week of behavioral support services outside the general education setting.[72] They agreed that this was the Student's least restrictive environment.[73]

18. At the February 10, 2012, meeting the participants agreed that the Student should receive extended school year ("ESY") services from June 19, 2012, through August 12, 2012.[74] They developed ESY goals in the areas of mathematics and reading, and determined that she should receive two hours per day of specialized instruction outside the general education setting.[75]

19. After conducting a functional behavior analysis[76] of the Student, on May 7, 2012, Respondent developed a behavior implementation plan ("BIP") for her.[77] Respondent developed the BIP to address the Student's history of aggressive deviant, disrespectful, and oppositional behavior toward peers and staff, as well as her failure to notify staff when she needs to use the toilet and history of urinary incontinence.[78] In developing the BIP, Respondent anticipated it would help the Student decrease and eventually refrain from physically and verbally aggressive behavior; use behavior support strategies and interventions to improve her social skills and understanding of social cues; communicate with peers and staff respectfully; seek supportive services from staff when upset, frustrated, and/or angry, and to discuss potential issues that could result in a physical altercation, as well as notify staff when she needed to use the toilet. [79]

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Petitioner Exhibit 1 at 1-4; Respondent Exhibit 1 at 2-5.
[71] Petitioner Exhibit 1 at 5; Respondent Exhibit 1 at 6.
[72] *Id.*
[73] Petitioner Exhibit 1 at 6; Respondent Exhibit 1 at 7.
[74] Petitioner Exhibit 1 at 8, Respondent Exhibit 1 at 9.
[75] *Id.*
[76] Respondent Exhibit 2 at 10 (Functional Behavior Analysis)
[77] Respondent Exhibit 3 at 15 (May 7, 2012, Behavior Implementation Plan).
[78] *Id.*
[79] *Id.*

20. In the May 7, 2012, BIP, Respondent included positive behavior supports that her teachers and school staff were to implement.[80] These positive supports included giving the Student a morning pep talk about acceptable behavior and school expectations; giving her redirection when she is not in her seat; giving her frequent bathroom breaks; and developing a behavior contract.[81] The BIP includes a list of rewards that require the Student's teachers and school staff to provide positive praise when the Student behaves appropriately and completes assignments; allow the Student to use the computer for fifteen to twenty minutes, where appropriate, after she completes assignments and exhibits positive behavior; and provide the Student clear and concise rules and expectations for her behavior and reward her when she complies.[82] Finally, the BIP requires the Student's teachers and school staff to impose consequences for noncompliance including giving her verbal warnings, calling her guardian, developing a behavior contract, and placing her on in-school and out-of-school suspension.[83] Nonetheless, the Student's aggressive, oppositional, sexually inappropriate, and defiant behavior continued through the end of the 2011-2012 school year.[84]

The May 2012 "Placement" Meeting

21. In May 2012, Respondent convened a "placement" meeting to discuss the school the Student would attend the following school year.[85] At the outset of the meeting, the school special education coordinator announced that the Student would attend DCPS School 2 for the 2012-2013 school year.[86] Petitioner, Teacher 1, Teacher 2, and the Psychologist objected, stating that DCPS School 2 would not be an appropriate school for the Student.[87]

22. Teacher 2 coaches football and has visited DCPS School 2 many times.[88] At DCPS School 2, male students often exhibit aggression toward each other and toward female students, there are many fights, and students roam the halls.[89] Students smoke cigarettes and marijuana on school grounds.[90]

23. At the May 2012 meeting, Teacher 2 expressed concern that the Student would not make social-emotional progress at DCPS School 2.[91] He expressed concern that, because DCPS School 1 is a feeder school for DCPS School 2, the Student would be familiar

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 15-16.
[84] Testimony of Teacher 2.
[85] Testimony of Teacher 1, Teacher 2, and Petitioner.
[86] Testimony of Petitioner.
[87] *Id.*
[88] Testimony of Teacher 2.
[89] *Id.*
[90] *Id.*
[91] *Id.*

with many of the students at DCPS School 2, which could result in a continuation of her aggressive and promiscuous behavior.[92] Additionally, the Student may be exposed to older students, including eighteen and nineteen year olds, at DCPS School 2.[93]

24. At the May 2012 meeting, Teacher 2 expressed his belief that DCPS School 2 would be inappropriate for the Student even if she were to be assigned a dedicated aide because she has a history of running away from her previous aide.[94] He stated that, due to the large size of DCPS School 2, the Student would find places to hide and it would be difficult to find her.[95]

25. Although the SEC did not identify any other possible schools the Student could attend for the 2012-2013 school year, Teacher 2 suggested that another public high school, DCPS School 3, would be more appropriate for the Student.[96] He explained that DCPS School 3 has a smaller student population and no male students older than sixteen.[97] Additionally, DCPS School 3 is close to the Student's home.[98] He also suggested that Respondent should place the Student in any high school other than DCPS School 2 because she wouldn't know fewer of the students at those schools that at DCPS School 2.[99]

26. At the May 2012 meeting, Teacher 1 expressed concern that DCPS School 3 would not be appropriate for the Student because of her behavioral difficulties.[100] At the time, the Student was still exhibiting enuresis.[101] She continued to walk away from staff and ignore their attempts to redirect her.[102] She also expressed concern due to the Student's difficulties with peer interactions and promiscuous behavior.[103]

27. The Student requires small, structured classes until she demonstrates that she can comply with teacher directives and stay focused on assignments.[104] She also explained that the Student should have minimal transitions between classes until she shows that she can transition safely between classes.[105] Teacher 1 suggested at the May 2012 meeting that DCPS place the Student at DCPS School 4 or DCPS School 5 because, in general, they have smaller classes and fewer transitions between classes than DCPS School

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Testimony of Teacher 1.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

2.[106] DCPS School 4 and 5 also are better managed than DCPS School 2.[107] Additionally, the Student would know fewer of the students at DCPS School 4 and 5 than at DCPS School 2.[108]

28. Teacher 1 explained that DCPS Schools 4 and 5 have self-contained programs for emotionally disturbed Students.[109] The Student would have few transitions between classes.[110] If she wandered off, her travels would be limited by the self-contained nature of these programs.[111] She recommended DCPS School 4 in part because it offers social skills training that focuses on interpersonal skills, which would benefit the Student.[112] Her primary concern was for the Student's safety due to her social immaturity.[113]

29. When the May 2012 meeting adjourned, the SEC had not informed the participants of the school the Student would attend the following school year.[114]

30. The Student is currently attending DCPS School 2.[115] Within DCPS School 2, the Student attends classes in a segregated academy for emotionally disabled students with academic and behavioral difficulties that prevent them from participating in general education classes.[116] All of the classes in the academy are small with a low student-teacher ratio.[117] The Student's classroom in the academy at DCPS School 2 has eight students, one special education teacher, and a teacher's aide.[118] There are at least two adults in each classroom.[119]

31. The academy is in the basement of DCPS School 2.[120] In order to reach the general education population at DCPS School 2, academy students must pass through doors manned by security guards.[121]

32. Students transition between classes within the academy at DCPS School 2.[122] During transitions, adult staff, security guards, and hall monitors provide the students

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Testimony of SES.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

constant monitoring and redirection.[123] If a student absconds from a classroom, one of the adults will immediately follow the student.[124]

33. Students in the academy at DCPS School 2 wear colored shirts as part of their uniform, which distinguish them from the other students in the school.[125] This enables school security personnel, who are posted next to the doors of the academy, to recognize the academy students and prevent them from entering the general population at DCPS School 2.[126] Thus, the student would have no contact with her nondisabled peers while she is enrolled in the academy at DCPS School 2.[127]

34. DCPS School 2 can implement the Student's February 10, 2012, IEP.[128] The Student has no contact with her nondisabled peers in the academy at the DCPS School 2.[129] The only other DCPS School that is able to provide the Student the structure and segregation she requires, and implement her IEP, is DCPS School 6.[130]

35. On August 21, 2012, the Nonpublic School sent the Student a letter of acceptance for the 2012-2013 school year.[131] The Nonpublic School is a full-time, special education day school in Washington, DC.[132] The Nonpublic School serves students with ADHD, intellectual disability, and learning disabilities.[133] The Nonpublic School's enrollment is sixty-four students in grades nine through twelve.[134] There are no nondisabled students enrolled in the Nonpublic School.[135]

36. Students at the Nonpublic School may earn DCPS high school diplomas or certificates of completion.[136] The Nonpublic School has a certificate of approval from the Washington, D.C., Office of State Superintendent of Education ("OSSE").[137] All of the

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Petitioner Exhibit 5 (August 21, 2012, letter from Admissions Director to Counsel for Petitioner).
[132] Testimony of Admissions Director.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* In issuing a certificate of authority to the Nonpublic School, OSSE has determined that the Nonpublic School tuition is reasonable. During the due process hearing, Respondent did not contest the reasonableness of the Nonpublic School tuition. Thus, this Hearing Officer finds that the cost of attending the Nonpublic School is reasonable.

teachers at the Nonpublic School have certifications to teach special education as well as a certification in an academic content area.[138]

37. At the Nonpublic School, the Student would be in small classes with four other students, one teacher, and a teacher's aide.[139] The Student would receive one-to-one instruction from the classroom teacher or aide.[140] The Nonpublic School could implement the Student's February 10, 2012, IEP.[141]

38. At the Nonpublic School, the Student would transition between classes every eighty minutes.[142] There would be no opportunity for her to wander off or skip class because her classes are along a single hallway that is constantly monitored by teachers and other school staff.[143] If she refused to go to class, she would meet with her counselor.[144] The Nonpublic School would make certain that the Student is accompanied by school staff at all times.[145]

39. At the Nonpublic School, the Student would have access to licensed clinical social workers throughout the school day.[146] She would receive individual counseling from these social workers and participate in a weekly group for young women.[147] The young women's group focuses on teaching the students social skills and self-respect and improving their behavior.[148] It also teaches the students how to prevent pregnancy and sexually transmitted diseases.[149]

40. The Nonpublic School has a school-wide behavior modification system.[150] Students earn points for complying with the behavior modification system, including by appearing promptly to class, completing assignments, wearing their uniforms, and behaving appropriately.[151] Each student's behavior is assessed and graded every half hour during the school day.[152] At the end of the day, each student receives a final tally of the

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138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* At the Nonpublic School, the bathrooms and gymnasium are locked at all times. *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*

points she earned that day.[153] Students may use these points to earn rewards such as movie tickets, t-shirts, and mp3 players.[154]

41. Petitioner gave credible testimony with the exception his opinion about the Student's academic functioning at DCPS School 1. His testimony was inconsistent with the testimony of Teacher 1 and Teacher 2, who have more experience in the field of education and more interaction with the Student in the school setting. All of the witnesses Petitioner presented. In all other respects, Petitioner's testimony was credible, including his testimony about the Student's behavioral difficulties at DCPS School 1, Respondent's efforts to address her behavioral difficulties, and the May 2012 "placement" meeting.

42. Teacher 1 and Teacher 2 provided credible testimony regarding the Student's behavioral difficulties during the 2011-2012 school year, Respondent's efforts to address her difficulties, and the May 2012 "placement" meeting. However, this Hearing Officer finds that Teacher 1 and Teacher 2, while raising legitimate concerns about the school environment and behavior of the students at DCPS School 2, did not testify credibly about the appropriateness of DCPS School 2 for the Student. Teacher 1 and Teacher 2 apparently were unaware of the academy at DCPS School 2, which appears to address all of the concerns they raised at the May 2012 meeting.

43. The SES gave credible testimony about the academy at DCPS School 2. The SES was responsible for monitoring DCPS School 2 for six months of the 2011-2012 school year and thus had firsthand knowledge of the programs it offered. Because Petitioner did not present witnesses with knowledge of the academic programs at DCPS School 2, the testimony of the SES was uncontroverted.[155]

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."[156] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[157] FAPE is defined as:

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[153] *Id.*

[154] *Id.*

[155] Petitioner did not provide any testimony about the Student's classroom environment at DCPS School 2. Nor does it appear that Petitioner, Teacher 1, or Teacher 2 visited DCPS School 2 during the 2011-2012 or 2012-2013 school year. Petitioner presented no testimony to rebut the testimony of the SES.

[156] *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)).

[157] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

[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)."[158]

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.[159] 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."[160]

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.[161] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[162]

The burden of proof is properly placed upon the party seeking relief.[163] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[164] 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.[165] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[166]

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[158] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[159] *Rowley,* 458 U.S. at 206-207.
[160] *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).
[161] 34 C.F.R. § 300.513 (a)(2).
[162] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[163] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[164] 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).
[165] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[166] *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,[167] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[168]

VI. DISCUSSION

Petitioner Failed to Proved that Respondent Denied the Student a FAPE by Failing to Provide Her an Appropriate Placement for the 2012-2013 School Year.

The IEP is "the centerpiece of the statute's education delivery system for disabled children."[169] An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[170] establishes annual goals related to those needs,[171] and provides appropriate specialized instruction and related services.[172] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[173]

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.[174] 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.[175]

Placement decisions must be made in conformity with the child's IEP.[176] Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.[177] The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's

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[167] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[168] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[169] *Honig v. Doe*, 484 U.S. 305, 311 (1988).
[170] 34 C.F.R. § 300.320 (a) (1).
[171] 34 C.F.R. § 300.320 (a) (2).
[172] 34 C.F.R. § 300.320 (a) (4).
[173] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[174] 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.
[175] 34 C.F.R. § 300.116.
[176] 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).
[177] *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

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.[178]

In determining the appropriate placement for a child, preference given to the least restrictive environment and the appropriate schools nearest the child's home.[179] 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.[180] 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.[181] 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.[182]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[183] 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.[184]

The question of what constitutes a change in educational placement is, necessarily, fact specific and thus, "in determining whether a given modification in a child's school day should be considered a 'change in educational placement,'" the "touchstone" is whether the modification "is likely to affect in some significant way the child's learning experience."[185] In determining whether a "change in educational placement" has occurred, the LEA must determine whether the proposed change would substantially or materially alter the child's educational program.[186]

In determining whether the change in location would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative

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[178] *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).
[179] *Id.*
[180] *Id.* at § 300.116 (d).
[181] *Id.* at § 300.116 (e)
[182] 34 C.F.R. § 300.116 (c).
[183] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[184] *Id.*
[185] *J.R. v. Mars Area Sch. Dist.*, 318 Fed. Appx. 113, 119 (3d Cir. Pa. 2009).
[186] *Letter to Fisher*, 21 IDELR 992 (Office of State Education Programs ("OSEP")), July 6, 1994).

placements.[187] In other words, if the proposed change substantially or materially affects the composition of the educational program and services provided the student, it is a change in placement.[188]

In contrast, a simple change in location is limited to the physical characteristics associated with a particular site. A transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location only.[189] Simple changes in the location of a building or facility are not generally viewed to be a change in placement where there are no significant changes in the educational program.[190] Additionally,

In the District of Columbia, special education placements shall be made in the following order or 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 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.[191]

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.[192]

Here, the Student requires small, structured classes until she demonstrates that she can comply with teacher directives and stay focused on assignments. She requires a self-contained program for emotionally disturbed Students. She should be in a location where, if she wanders off, her travels would be limited by the self-contained nature of the program. Most importantly, adults must monitor the Student's activities at all times so that she does not have an opportunity to engage in inappropriate interactions with other students.

Currently, the Student attends classes in a segregated academy, within DCPS School 2, for emotionally disabled students with academic and behavioral difficulties that prevent

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[187] *Id.*

[188] *Letter to Flores*, 211 IDELR 233 (OSEP Aug. 18,1980); *Letter to Fisher*, 21 IDELR 992.

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

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

[191] D.C. Code § 38-2561.02.

[192] 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).

them from participating in general education classes. This academy can provide the Student the twenty-six hours per week of specialized instruction and one hour per week behavioral support services outside the general education environment required by her February 10, 2012, IEP.

All of the classes in the academy are small with a low student-teacher ratio. The Student's classroom in the academy at DCPS School 2 has eight students, one special education teacher, and a teacher's aide. There are at least two adults in each classroom. If the Student absconds from her classroom, one of the adults will immediately follow her.

The academy is segregated from the general education population at DCPS School 2, and thus the Student would have no contact with her nondisabled peers of any age. Although the students in the academy transition between classes, adult staff, security guards, and hall monitors provide constant monitoring and redirection during these transitions.

Petitioner failed to prove that Respondent changed the Student's placement from the placement required by the February 10, 2012, IEP. Petitioner further failed to prove that the academy at DCPS School 2 could not implement the Student's IEP or otherwise was an inappropriate placement or location of services for the Student.

This Hearing Officer finds that the academy at the DCPS School 2 is an appropriate location of services for the Student. The DCPS School provides the same level of security, the same small classes, and the intense monitoring that would be provided at the Nonpublic School. Additionally, because DCPS School 2 is close to the Student's house and is a public school, pursuant to the D.C. Code,[193] it is the Student's least restrictive environment.

Thus, Petitioner failed to prove that Respondent changed the Student's placement when it placed her in the academy at DCPS School 2 or otherwise denied the Student a FAPE.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this 11th day of September hereby ordered that the Complaint is dismissed with prejudice.

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

[193] See D.C. Code § 38-2561.02, cited herein.

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).