

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

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

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<b>Parent, on behalf of STUDENT,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</b>	)	
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Frances Raskin</b>

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**I. JURISDICTION**

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3001, *et seq.*

**II. BACKGROUND**

Petitioner is the parent of a \_\_\_\_\_ year-old student ("Student") with a disability. On July 24, 2012, Petitioner filed a due process complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging violations of IDEA. On July 25, 2012, this Hearing Officer was assigned to preside over this case.

On August 6, 2012, Respondent DCPS filed a response to the Complaint ("Response").<sup>2</sup> Respondent filed its Response three days after the deadline established by IDEA.<sup>3</sup>

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<sup>1</sup> Personal identification information is provided in Attachment A.  
<sup>2</sup> Respondent did not challenge the sufficiency of the Complaint.

On August 7, 2012, the parties participated in a resolution meeting but did not resolve the Complaint.<sup>4</sup> The parties did not agree to start the forty-five day, due process hearing period on that date. Thus, the resolution period ended on August 23, 2012.

On August 31, 2012, this Hearing Officer held a prehearing conference in which Counsel for Petitioner and Counsel for Respondent participated. During the prehearing conference, both counsel agreed that the forty-five day, due process hearing timeline began on August 23, 2012.

During the prehearing conference, both counsel agreed to schedule the due process hearing for 9:30 a.m. on September 26, 2012. This Hearing Officer informed counsel that the end of the forty-five-day timeline and the deadline for the hearing officer determination ("HOD") is October 7, 2012. On August 31, 2012, this Hearing Officer issued a Prehearing Conference Summary and Order.

The due process hearing commenced on September 26, 2012. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits<sup>5</sup> and those proposed by Respondent.<sup>6</sup> Petitioner testified and presented two witnesses on her behalf, her educational advocate ("Advocate"), and the head of school ("Head of School") of the nonpublic school ("Nonpublic School") the Student currently attends.

Respondent called one witness, a DCPS resolution specialist ("Resolution Specialist"). After the parties presented oral closing arguments, the due process hearing concluded at 12:45 p.m. on September 26, 2012.

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

<sup>4</sup> During the prehearing conference, counsel for Petitioner informed this Hearing Officer that, at the resolution meeting, Respondent provided Petitioner a copy of the Student's updated behavioral intervention plan ("BIP"). Counsel for Petitioner asserted that Petitioner would withdraw her claim that Respondent had failed to develop a BIP for the Student.

<sup>5</sup> This Hearing Officer admitted Petitioner's exhibits 1-30, inclusive, and Respondent's exhibits -4 and 6-14, inclusive. This Hearing Officer did not admit Respondent's Exhibit 5 as it was duplicative of Respondent's Exhibit 2.

<sup>6</sup> Neither party objected to the admission of the other party's exhibits. The parties agreed that, for duplicative exhibits, this Hearing Officer would refer only to Petitioner's exhibits in this HOD.

### **III. ISSUES PRESENTED.**

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

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") by failing to reevaluate him between July 24, 2010 and November 18, 2010;

B. Whether Respondent denied the Student a FAPE by failing to timely review his independent comprehensive psychological, speech-language, and vocational reevaluations, and his independent functional behavioral assessment within thirty days of November 30, 2011, the date Petitioner provided a copy of the last of the reevaluation reports to Respondent;

C. Whether Respondent denied the Student a FAPE by failing to provide him an appropriate individualized educational program ("IEP") between November 18, 2010, and February 13, 2012; and

D. Whether Respondent denied the Student a FAPE by failing to implement the Student's IEP from February 13, 2012, through May 3, 2012, when Petitioner unilaterally placed the Student in the Nonpublic School.

Petitioner requests relief in the form of an order that places the Student at the Nonpublic School at public expense for the 2012-2013 school year. Petitioner also seeks an order that requires Respondent to provide the Student compensatory education in the form of reimbursement of the costs of the Student's enrollment at the Nonpublic School between May 3, 2012, and the end of July 2012. Petitioner further requests that this Hearing Officer order Respondent to hold a meeting to review the Student's progress at the Nonpublic School within thirty calendar days of the issuance of this HOD.

### **IV. FINDINGS OF FACT**

1. The Student is a sixteen-year-old, young man who is eligible for specialized instruction and related services as a student with multiple disabilities, specifically a specific learning disability and attention deficit hyperactivity disorder ("ADHD").<sup>7</sup> He currently attends the Nonpublic School, which is located in Washington, D.C.<sup>8</sup>

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<sup>7</sup> Testimony of Advocate; Petitioner Exhibit 11 at 13 (July 25, 2011, Confidential Comprehensive Psychological Evaluation); Petitioner Exhibit 13 at 1 (February 13, 2012, IEP).

<sup>8</sup> Testimony of Petitioner, Head of School.

2. The Student's IQ is likely in the low average range and at the thirteenth percentile of typically developing children his age.<sup>9</sup> Collectively, his cognitive abilities range from the extremely low to average range.<sup>10</sup>

3. His nonverbal reasoning skills are significantly better developed than verbal skills.<sup>11</sup> His ability to work under time constraints is significantly below his same-age peers.<sup>12</sup> His processing speed is exceptionally low, specifically as it relates to the rapidity with which he can mentally process simple or routine information without making errors.<sup>13</sup> The Student's significant weakness in the speed of processing routine information may make the task of comprehending novel information more time consuming and difficult for him.<sup>14</sup>

4. In July 2011, when he was fifteen years old, the Student's academic skills were comparable to his IQ.<sup>15</sup> He was significantly behind his same-age and grade peers in math, reading, and writing, and his performance was even lower on timed tasks.<sup>16</sup> Collectively, his overall academic skills were at the sixth-grade level and equivalent to a twelve-year-old, typically developing student.<sup>17</sup> His low academics were commensurate with his sub-average range of intellectual functioning.<sup>18</sup>

5. In 2011, the Student performed three years below the level expected for his age in broad reading, equivalent to a twelve-year-old student in the seventh month of sixth grade, which was low average range and better than only fifteen percent of his same-age peers.<sup>19</sup> His strongest ability was in decoding words and using phonetics.<sup>20</sup> In this area, he performed at the equivalent of a thirteen-year-old student in the fourth month of eighth grade, which was in the average range and above thirty-three percent of his same age peers.<sup>21</sup> In contrast, his reading fluency under timed conditions was equivalent to a student

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<sup>9</sup> Petitioner Exhibit 11 at 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* While the Student's verbal reasoning abilities are in the borderline range and above only six percent of his same-age peers, his nonverbal reasoning abilities are in the average range and above about thirty percent of his peers. *Id.* at 6-7.

<sup>12</sup> *Id.* The Student's working memory, i.e., ability to sustain attention, concentrate, and exert mental control, is in the borderline range and above only six percent of his same-age peers. *Id.* at 7.

<sup>13</sup> *Id.* The Student's processing speed is extremely low and below the first percentile of his same-age peers.<sup>13</sup>

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 8. Broad reading refers to a cluster of skills, including reading, decoding, reading speed, and the ability to comprehend connected discourse while reading. *Id.*

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

aged nine years and ten months in the fifth month of fourth grade, which was in low range and above only five percent of his same age peers.<sup>22</sup> His reading fluency under untimed conditions was equivalent to a student aged eleven years and six months in the first month of sixth grade, which was in the low average range and above only twenty-two percent of his same age peers.<sup>23</sup>

6. The discrepancy between the Student's average performance in decoding words and using phonetics and below average performance in reading fluency shows that, although he possesses basic reading skills and is able to decode words, he experiences greater difficulties with understanding words in a contextual format.<sup>24</sup> His abilities are further compromised when he performs tasks under timed conditions.<sup>25</sup>

7. In July 2011, in spelling, the Student performed at the equivalent of a fourteen-year-old student in the fifth month of eighth grade, which was in the average range and exceeded thirty-eight percent of his same-age peers.<sup>26</sup> His performance in writing fluency was equivalent to an eight-year-old student in the seventh month of second grade, which was in very low range and exceeded less than one percent of his same-age peers.<sup>27</sup> His poor performance in writing fluency suggests that he experiences great difficulties in putting words together to formulate a sentence within a time constraint.<sup>28</sup>

8. In July 2011, the Student's lowest achievement was in mathematics.<sup>29</sup> In calculation, he performed at the equivalent of a student who was ten years old and in the seventh month of fourth grade, which was in the low range and above only four percent of his same-age peers.<sup>30</sup> In math fluency, the Student performed at the equivalent of an eight-year-old student in the ninth month of second grade, which was in the very low range and below the first percentile of his same-age peers.<sup>31</sup> In applied problems, he performed at the equivalent of a twelve-year-old student in the sixth month of third grade, which was in the low range and at the third percentile of his same-age peers.<sup>32</sup> His poor performance in math indicates that he experiences profound difficulties in understanding and solving basic math problems, as well as applying learned mathematical concepts to arithmetic problems that require more analytical reasoning.<sup>33</sup>

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<sup>22</sup> *Id.* at 8, 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 8, 10.

<sup>27</sup> *Id.* at 8-10.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.* at 9.

9. The Student's communication abilities are in the overall severe range.<sup>34</sup> His receptive language abilities, expressive language abilities, language memory, and core language are all below average and in the severe range.<sup>35</sup>

10. The Student's ability to recall and reproduce sentences of varying length and syntactic complexity is below average, within the severe range and above only one percent of his same-age peers.<sup>36</sup> His ability to formulate compound and complex sentences, given grammatical constraints, is below average, in the moderate range and above only two percent of his same age peers.<sup>37</sup> The Student's ability to understand and express relationships between words that share a variety of functional and conceptual relationships is below average, in the moderate range, and above only two to five percent of his same-age peers.<sup>38</sup>

11. The Student's ability to analyze words for their meaning features, define words by referring to class relationships and shared meanings, and describe meanings that are unique to a reference or instance is below average, in the mild range, and above only nine percent of his peers.<sup>39</sup> His ability to interpret sentences that make comparisons, identify location or direction, specify time relationships, include serial order, is below average, in the severe range, and above only one tenth of one percent of his same-age peers.<sup>40</sup>

12. The Student's ability to understand spoken paragraphs, i.e., listen to paragraphs of increasing length and complexity, comprehend the material, and answer several questions presented verbally, is below average, in the severe range, and above only one-tenth of one percent of his same-age peers.<sup>41</sup> He has difficulty understanding the main idea, the details, and sequencing of events of a spoken paragraph and then infer and predict.<sup>42</sup>

13. The Student's communication deficits impact his ability to access the general education curriculum.<sup>43</sup> He requires speech-language therapy in individual and group sessions, as well as integrated in the classroom.<sup>44</sup> His speech and language pathologist should collaborate with his classroom teacher.<sup>45</sup>

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<sup>34</sup> Petitioner exhibit 9 at 5 (October 25, 2011, Speech and Language Evaluation).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 4-5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### ***The 2009-2010 School Year***

14. During the 2009-2010 school year, the Student attended DCPS School 1.<sup>46</sup> DCPS School 1 is a full-time, special education day school for students with learning disabilities and other health impairments such as ADHD.<sup>47</sup> The Student attended DCPS School 1 from first grade through the end of his eighth grade year.<sup>48</sup> During the 2009-2010 school year, the Student was eligible for specialized instruction and related services as a student with multiple disabilities.<sup>49</sup>

15. On January 7, 2010, while the Student was attending DCPS School 1, Respondent convened a meeting of the Student's IEP team.<sup>50</sup> Petitioner participated in the meeting, as did a school social worker, a speech-language pathologist, and a special education teacher.<sup>51</sup>

16. At the January 7, 2010, IEP, meeting, the Student's IEP team developed an IEP for the Student that included annual goals in the areas of reading, mathematics, written expression.<sup>52</sup> The IEP also included annual goals in the areas of emotional, social, and behavioral development.<sup>53</sup> It provided that the Student was to receive 26.5 hours per week of specialized instruction outside the general education setting to address his deficiencies in reading, math, and written expression.<sup>54</sup> It further provided that the Student was to receive related services in the form of thirty minutes per week of speech-language pathology to improve his receptive and expressive language skills and thirty minutes per week of behavioral support services to address his social emotional needs, including his need to improve his social emotional skills and attention to his classroom tasks.<sup>55</sup> Petitioner signed the IEP and indicated her agreement with its contents.<sup>56</sup>

17. At the January 7, 2010, IEP meeting, Petitioner requested that Respondent reevaluate the Student because the Student was graduating from DCPS School 1 in a few months.<sup>57</sup> At the meeting, Petitioner executed a form that indicated that she gave her consent for Respondent to conduct reevaluations of the Student to determine whether he

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<sup>46</sup> Testimony of Petitioner, Advocate.

<sup>47</sup> Testimony of Advocate.

<sup>48</sup> Testimony of Petitioner.

<sup>49</sup> Petitioner Exhibit 4 at 8 (January 7, 2010, IEP).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2-5.

<sup>53</sup> *Id.* at 5-7.

<sup>54</sup> *Id.* at 8-9.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1.

<sup>57</sup> Testimony of Petitioner, Advocate.

continued to be eligible for special education and to determine his educational needs.<sup>58</sup> The IEP team agreed that the Student should be reevaluated.<sup>59</sup>

18. Respondent generally evaluates students before they graduate from DCPS School 1 and enter high school to determine if their educational needs have changed.<sup>60</sup> Respondent conducted an educational achievement evaluation of the Student in May 2010.<sup>61</sup> Respondent did not conduct any other evaluations of the Student before he graduated from DCPS School 1 or during the 2010 summer.<sup>62</sup>

### ***The 2010-2011 School Year***

19. In September 2010, the Student began the ninth grade at Charter School 1.<sup>63</sup> During the 2010-2011 school year, the Student was enrolled in earth science, algebra concepts I, language and composition, world history I, algebra I, music, and English I general education classes.<sup>64</sup> By the end of the first quarter of the 2010-2011 school year, the Student had failing grades in all of these classes.<sup>65</sup> The Student had a passing grade in only one class, college prep advisory.<sup>66</sup>

20. The Student had failed all but one of his classes by the end of the first advisory of the 2010-2011 school year because Charter School 1 had been unable to implement his January 7, 2010, IEP.<sup>67</sup> Out of concern that the Student did not understand his schoolwork, Petitioner questioned Charter School 1 whether the Student was in special education classes or whether his schedule was comprised of general education classes.<sup>68</sup> Some of the Student's teachers were unaware that the Student had an IEP.<sup>69</sup>

21. On November 18, 2010, Respondent convened a meeting at Charter School 1.<sup>70</sup> Petitioner attended the meeting, as did the Student, the Charter School special education director, a special education teacher, and a school social worker.<sup>71</sup>

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<sup>58</sup> Petitioner Exhibit 5 at 1 (January 7, 2010, Consent for Initial Evaluation/Reevaluation).

<sup>59</sup> Testimony of Petitioner.

<sup>60</sup> Testimony of Advocate.

<sup>61</sup> Petitioner Exhibit 6 at 2 (November 18, 2010, IEP) (referencing May 21, 2010, Woodcock Johnson III test of achievement).

<sup>62</sup> Testimony of Petitioner, Advocate.

<sup>63</sup> Testimony of Petitioner.

<sup>64</sup> Petitioner Exhibit 20 at 1 (March 30, 2011, 2010-2011 Q3 Report Card); Petitioner Exhibit 21 at 1 (Quarter 1 Bi-Weekly (sic) Progress Report).

<sup>65</sup> Petitioner Exhibit 20 at 1; Petitioner Exhibit 21 at 1.

<sup>66</sup> *Id.*

<sup>67</sup> Testimony of Advocate.

<sup>68</sup> Testimony of Petitioner.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; Petitioner Exhibit 7 at 1 (November 18, 2010, IEP Meeting Notes).

<sup>71</sup> Petitioner Exhibit 7 at 1.

22. At the November 18, 2010, meeting, the representatives of Charter School 1 informed Petitioner that, based on the Student's May 2010 educational achievement test, the Student required only fifteen hours per week of specialized instruction in an inclusion setting.<sup>72</sup> The representatives of Charter School 1 informed Petitioner that the Student required specialized instruction in only three of his seven general education classes.<sup>73</sup> This was a significant reduction from the 26.5 hours of specialized instruction that the Student's January 7, 2010, IEP, required that he receive outside the general education environment.<sup>74</sup> Petitioner did not consent to the reduction in the Student's specialized instruction hours.<sup>75</sup>

23. At the November 18, 2010, meeting, the representatives of Charter School 1 prepared a new IEP for the Student.<sup>76</sup> They developed annual goals in mathematics, reading, and written expression.<sup>77</sup> Even though a speech-language pathologist did not attend meeting, the Charter School 1 representatives developed speech and language goals for the November 18, 2010, IEP.<sup>78</sup> They also developed annual goals in the area of emotional, social, and behavioral development.<sup>79</sup>

24. At the end of the third quarter of the 2010-2011 school year, the Student was failing all of his classes except English 1.<sup>80</sup> In English I, his grade was reduced ten percent due to his excessive absences.<sup>81</sup> The Student was often late to school but had missed only seven full days of school by the end of the third quarter of the 2010-2011 school year.<sup>82</sup> By the end of the school year, the Student had failed the ninth grade.<sup>83</sup>

25. In June 2011, in response to a due process complaint that Petitioner had filed, Respondent authorized Petitioner to obtain independent educational evaluations at public expense.<sup>84</sup> Respondent authorized Petitioner to obtain an independent comprehensive psychological evaluation, and independent functional behavioral assessment ("FBA"), an independent speech and language evaluation, and an independent vocational assessment.<sup>85</sup> In the letter authorizing the independent evaluations,

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<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> Testimony of Advocate; Petitioner Exhibit 4 at 8.

<sup>75</sup> Testimony of Petitioner.

<sup>76</sup> Petitioner Exhibit 6 at 1 (November 18, 2010, IEP).

<sup>77</sup> *Id.* at 2-6.

<sup>78</sup> *Id.* at 8-9.

<sup>79</sup> *Id.* at 9-10.

<sup>80</sup> Petitioner Exhibit 20 at 1.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Testimony of Petitioner, Advocate.

<sup>84</sup> Petitioner Exhibit 8 at 1 (June 14, 2011, letter from CCM to Petitioner).

<sup>85</sup> *Id.*

Respondent stated that the evaluators should fax the completed evaluations to the DCPS Compliance Case Manager ("CCM").<sup>86</sup>

26. During 2011 summer and fall, Petitioner obtained the independent assessments of the Student.<sup>87</sup> On August 10, 2011, Petitioner provided the CCM a copy of the independent vocational evaluation of the Student.<sup>88</sup> On October 28, 2011, Petitioner provided a copy of the independent speech and language assessment to the CCM.<sup>89</sup> On November 30, 2011, Petitioner provided copies of the Student's FBA and comprehensive psychological assessment to the CCM.<sup>90</sup>

### ***The 2011-2012 School Year***

27. At the beginning of the 2011-2012 school year, the Student enrolled in Charter School 2 to repeat the ninth grade.<sup>91</sup> At the end of the first advisory, the Student had failed all of his classes.<sup>92</sup> Petitioner asked the Charter School 2 to provide the Student daily after-school tutoring and to send work packets home with him for weekends.<sup>93</sup> Charter School 2 denied Petitioner's request.<sup>94</sup>

28. On February 13, 2012, Respondent convened a meeting of the Student's IEP team.<sup>95</sup> Petitioner participated in the meeting, as did the Student and counsel for Petitioner.<sup>96</sup> A special education coordinator ("SEC"), two of the Student's special education teachers, a school psychologist, a speech-language pathologist, a local educational agency ("LEA") representative of DCPS, and the Resolution Specialist also attended the meeting.<sup>97</sup> The purpose of the meeting was to review the Student's comprehensive psychological, functional behavioral, speech and language, and vocational assessments.<sup>98</sup>

29. At the February 13, 2012, meeting, the Student's special education teachers reported that the Student was functioning at the third-grade level academically.<sup>99</sup> They

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<sup>86</sup> *Id.*

<sup>87</sup> Testimony of Advocate; Petitioner Exhibit 9; Petitioner Exhibit 10 (July 26, 2011, Functional Behavioral Analysis); Petitioner Exhibit 11; Petitioner Exhibit 12 (July 5, 2011, Vocational Evaluation Level I).

<sup>88</sup> Testimony of Advocate.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Testimony of Petitioner.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Petitioner Exhibit 14 (February 13, 2012, Meeting Participants and MDT Notes).

<sup>96</sup> Petitioner Exhibit 14 at 1.

<sup>97</sup> *Id.* at 1-2.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.* at 3.

discussed the fact that the Student was having a great deal of difficulty academically.<sup>100</sup> He had trouble focusing in class, was not engaged in his schoolwork, and did not complete the tasks assigned to him.<sup>101</sup> He had started avoiding class, arriving late, and remaining in the hallways during the time he was to be in class.<sup>102</sup> The SEC reported that the Student was continuing to experience academic failure.<sup>103</sup>

30. The IEP team then reviewed the Student's evaluations.<sup>104</sup> The IEP team determined that he remained eligible for specialized instruction and related services as a student with multiple disabilities.<sup>105</sup> The IEP team then developed an IEP for the Student.<sup>106</sup> They updated the Student's present levels of performance to reflect the data in the independent assessments and revised the annual goals to better fit the Student's specific needs.<sup>107</sup> The team developed speech and language goals as well as counseling and emotional goals.<sup>108</sup> The team agreed that that it would develop a behavior intervention plan.<sup>109</sup>

31. At the February 13, 2012, meeting, the IEP team determined that the Student required 26 hours per week of specialized instruction outside the general education setting to address his deficiencies in reading, math, and written expression.<sup>110</sup> They agreed that he also required sixty minutes per week of speech-language pathology and thirty minutes per week of behavioral support services.<sup>111</sup> The SEC then informed the IEP team that Charter School 2 could not implement the February 13, 2012, IEP.<sup>112</sup>

32. At the February 13, 2012, meeting, Respondent did not propose a location of services to implement the Student's IEP.<sup>113</sup> The Resolution Specialist informed the IEP team that she would determine the Student's location of services and provide this information to the Charter School 1 SEC.<sup>114</sup>

33. Two weeks after the IEP meeting, on February 27, 2012, Counsel for Petitioner sent a letter to Respondent stating that Petitioner intended to unilaterally enroll

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 3-7.

<sup>105</sup> Petitioner Exhibit 14 at 7.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 7-8.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 8.

<sup>110</sup> Petitioner Exhibit 13 at 5, 6 (February 13, 2012, IEP).

<sup>111</sup> *Id.*

<sup>112</sup> Petitioner Exhibit 14 at 8.

<sup>113</sup> *Id.* at 8-9.

<sup>114</sup> *Id.* at 9.

the Student in the Nonpublic School for the remainder of the 2011-2012 school year.<sup>115</sup> In the letter, Counsel for Petitioner explained that Petitioner decided to enroll the Student in the Nonpublic School because Respondent had failed to provide the Student an appropriate IEP, placement, and location of services.<sup>116</sup> Counsel for Petitioner informed Respondent that Petitioner requested that Respondent fund the cost of the Student's tuition at the Nonpublic School and his transportation to and from the Nonpublic School.<sup>117</sup>

34. On March 13, 2012, Respondent issued a prior written notice ("PWN") informing Petitioner that the Student was to attend DCPS School 2 for the remainder of the 2011-2012 school year.<sup>118</sup> The PWN provided no explanation of why Respondent believed that DCPS School 2 would be appropriate for the Student or whether it could implement the February 13, 2012, IEP.<sup>119</sup>

35. On March 20, 2012, the Resolution Specialist emailed Petitioner and Counsel for Petitioner.<sup>120</sup> In the email, the Resolution Specialist stated that she had spoken to the SEC of DCPS School 2.<sup>121</sup> The Resolution Specialist stated that the SEC had informed her that DCPS School 2 could implement the Student's IEP and provide him Carnegie units so that he could earn a diploma.<sup>122</sup>

36. DCPS School 2 would not have been able to implement the Student's IEP.<sup>123</sup> The only students to whom DCPS School 2 can provide twenty-six hours per week of specialized instruction outside the general education setting are students with intellectual disabilities.<sup>124</sup> DCPS School 2 cannot provide this level of support to a student with a specific learning disability.<sup>125</sup> Thus, since the Student does not have an intellectual disability, DCPS School 2 would place the Student in inclusion classes for most of the school day.<sup>126</sup> The Student would receive electives such as art and music in general education classes with no special education support.<sup>127</sup>

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<sup>115</sup> Petitioner Exhibit 15 at 1 (February 27, 2012, letter from Counsel for Petitioner to Respondent).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Respondent Exhibit 6 at 1 (March 13, 2012, PWN).

<sup>119</sup> *Id.*

<sup>120</sup> Respondent Exhibit 11 at 1 (March 20, 2012, email from Resolution Specialist to Petitioner, Counsel for Petitioner).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Testimony of Advocate.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* Inclusion classes are general education classrooms, with general education and special education students, co-taught by a general education teacher and a special education teacher. *Id.*

<sup>127</sup> *Id.*

### ***The Nonpublic School***

37. The Student began attending the Nonpublic School in April 2012.<sup>128</sup> During the fourth quarter of the 2011-2012 school year, he made academic progress at the Nonpublic School.<sup>129</sup> He raised his grade in English I from a D to a C.<sup>130</sup> He raised his grade in math from a C to a B.<sup>131</sup> And he raised his grade in social studies from a D to a C.<sup>132</sup> Nonetheless, due to his low academic performance during the first three quarters of the 2011-2012 school year at Charter School 2, the Student finished the school year with a 1.66 grade point average.<sup>133</sup>

38. On July 24, 2012, Counsel for Petitioner sent a letter to Respondent stating that Petitioner intended to unilaterally enroll the Student in the Nonpublic School for the remainder of the 2012-2013 school year.<sup>134</sup> In the letter, Counsel for Petitioner explained that Petitioner decided to enroll the Student in the Nonpublic School because Respondent had failed to provide the Student an appropriate IEP, placement, and location of services.<sup>135</sup> Counsel for Petitioner informed Respondent that Petitioner requested that Respondent fund the cost of the Student's tuition at the Nonpublic School and his transportation to and from the Nonpublic School.<sup>136</sup>

39. The Student is currently repeating ninth grade for the third time during the 2012-2013 school year.<sup>137</sup> He is attending the Nonpublic School pursuant to Petitioner's unilateral placement.<sup>138</sup>

40. The Nonpublic School currently has a certificate of approval from the District of Columbia Office of State Superintendent of Education ("OSSE").<sup>139</sup> Pursuant to its certificate of approval, the Nonpublic School has authorization to serve District of Columbia students with specific learning disabilities in grades six through twelve and ages twelve to twenty-two.<sup>140</sup>

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<sup>128</sup> Testimony of Head of School.

<sup>129</sup> *Id.*; testimony of Advocate.

<sup>130</sup> Petitioner Exhibit 26 at 1 (July 30, 2012, Fourth Advisory Report Card).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Petitioner Exhibit 16 at 1 (July 24, 2012, letter from Counsel for Petitioner to Respondent).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Testimony of Petitioner.

<sup>138</sup> *Id.*

<sup>139</sup> Testimony of Advocate, Head of School; Petitioner Exhibit 30 at 4 (June 12, 2012, Approved Nonpublic Schools).

<sup>140</sup> Petitioner Exhibit 30 at 1, 4.

41. The Nonpublic School is a full-time, separate, special education, day school.<sup>141</sup> It has an eleven-month school year that runs from September through the end of July.<sup>142</sup> Currently the Nonpublic School has only twenty-three students who range from ages fourteen to twenty-two and grades eight to twelve.<sup>143</sup> All of the students at the Nonpublic School are on track to earn high school diplomas.<sup>144</sup>

42. All of the classrooms at the Nonpublic School have a student-teacher ratio of no more than six-to-one.<sup>145</sup> The Nonpublic School follows the DCPS common core state standards curriculum.<sup>146</sup> It offers English 1, 2, and 3; algebra 1 and 2, geometry, probability and statistics, District of Columbia government, and United States government courses, as well as foreign language, earth science, environmental science, biology, chemistry, and health classes.<sup>147</sup> It also offers electives in business management and physical education.<sup>148</sup>

43. The Nonpublic School tuition is \$35,500 per year, which includes counseling as a related service.<sup>149</sup> Other related services, such as speech-language therapy and occupational therapy are not included in the tuition.<sup>150</sup> OSSE has approved the Nonpublic School tuition rate and the related therapy hourly rates.<sup>151</sup>

44. The Student is receiving academic benefit at the Nonpublic School.<sup>152</sup> Since enrolling at the Nonpublic School, he has been late five or six times.<sup>153</sup> When he began attending the Nonpublic School in April 2012, he was functioning on the third-grade level in reading, written expression, and math.<sup>154</sup> He is currently performing at the mid-fifth grade level in these subjects.<sup>155</sup>

45. At the Nonpublic School, the Student is taking French, world history, English 1, geometry, earth science, and health classes.<sup>156</sup> He is performing well in all of his classes except science.<sup>157</sup> Because of the small classes at the Nonpublic School, the Student is able

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<sup>141</sup> Testimony of Heard of School.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Testimony of Head of School.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

to focus and concentrate on his assignments.<sup>158</sup> If he is off task, his teachers can easily redirect him because of the low student-teacher ratio.<sup>159</sup>

46. Petitioner provided credible testimony. She was forthright about the Student's academic difficulties. Her testimony was consistent with the documents in evidence and the testimony of the other witnesses, notably the Educational Advocate. Respondent presented no testimony or evidence to rebut or undermine the credibility of Petitioner's testimony.

47. The Advocate provided credible testimony. He has a master's degree in counseling and mental health and twenty-four years of experience working with special education and at-risk youth. He has been working as the Student's educational advocate for eight years. He was familiar with the Student's educational history, the nature of his disability, and his academic challenges. He also was familiar with DCPS School 2 as he had recently met with the school administration on behalf of another learning-disabled student with a full-time IEP. His testimony was supported by the documentation in the record and Respondent presented no documents or testimony to undermine or contradict the Advocate's testimony.

48. The Head of School provided credible testimony. She was familiar with the Student and his academic struggles. She provided in-depth testimony on the progress the Student has made while at the Nonpublic School and the services the Nonpublic School provides its students. Respondent presented no testimony or documents to contradict or impeach the Head of School's testimony.

49. The Resolution Specialist provided credible testimony about the February 13, 2012, IEP meeting. The notes of the meeting supported her testimony. She also testified credibly about the PWN she issued to DCPS School 2, although she did not explain why she chose DCPS School 2 or whether this school could implement the Student's IEP. The Resolution Specialist was forthright when she testified that Charter School 1 could not implement the Student's January 7, 2012, IEP. She admitted that Charter School 2 could not implement the Student's February 13, 2012, IEP.

## V. 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.<sup>160</sup> FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).

appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."<sup>161</sup>

In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner's IEP is reasonably calculated to enable Petitioner to receive educational benefit.<sup>162</sup>

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.<sup>163</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.<sup>164</sup>

The burden of proof is properly placed upon the party seeking relief.<sup>165</sup> Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>166</sup>

**A. Petitioner Proved that Respondent's Failure to Timely Evaluate the Student in All Areas of Suspected Disability Led to the Development of an Inappropriate IEP in November 2010.**

An evaluation consists of procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.<sup>167</sup> A reevaluation is any evaluation conducted after the initial evaluation.<sup>168</sup>

In conducting the evaluation, the LEA must use a variety of tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child is eligible for

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<sup>161</sup> 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

<sup>162</sup> *Rowley*, 458 U.S. at 206-207.

<sup>163</sup> 34 C.F.R. § 300.513 (a)(2).

<sup>164</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

<sup>165</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>166</sup> 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).

<sup>167</sup> 34 C.F.R. § 300.15. In the District of Columbia, an evaluation includes the process of review by an IEP team information from parents; existing data; and results of assessment procedures used to determine the child's present level of performance, educational needs and whether a child has a disability, and the nature and extent of the special education and related services that the child needs. D.C. Mun. Reg. tit. 5-E § 3001.1.

<sup>168</sup> D.C. Mun. Reg. tit. 5-E § 3001.1.

special education services and, if so, the content of the child's IEP.<sup>169</sup> The evaluation must be sufficiently comprehensive.<sup>12</sup> The LEA cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.<sup>13</sup> The evaluation must identify all of the child's special education and related services needs, whether or not commonly linked to the disability category.<sup>14</sup>

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent requests a reevaluation.<sup>170</sup> The parent need not provide an explanation or otherwise justify her request for reevaluations.<sup>171</sup> Upon receipt of the request, the LEA must conduct the reevaluations.<sup>172</sup> The agency must conduct the reevaluations in a "reasonable period of time," or "without undue delay."<sup>173</sup>

On January 7, 2010, Petitioner requested that Respondent reevaluate the Student because the Student was graduating from DCPS School 1 in a few months. At the meeting, Petitioner executed a form that indicated that she gave her consent for Respondent to conduct reevaluations of the Student to determine whether he continued to be eligible for special education and to determine his educational needs. The IEP team agreed that the Student should be reevaluated.

Although Respondent conducted an educational achievement evaluation of the Student in May 2010, it did not conduct any other evaluations of the Student before he graduated from DCPS School 1 or during the 2010 summer. Thus, Respondent did not evaluate the Student in all areas of suspected disability or identify all of his special education and related services needs.

Due to Respondent's failure to evaluate the Student in all areas of suspected disability, it developed an IEP in November 2010 without current data on his educational needs. Without these evaluations, Respondent failed to take into account in developing the IEP that Student has significant deficits in processing speed, a low-average IQ, and severely impaired receptive and expressive language abilities.

Instead, Respondent created an IEP that reduced the Student's specialized instruction, from 26.5 hours per week to 15 hours per week. Respondent also changed the setting in which he was to receive instruction from the outside general education setting, i.e., pullout, to an inclusion setting. As a result, the Student failed to make any progress under the November 2010 IEP. At the end of the 2010-2011 school year, he had to repeat the ninth grade because he had failed all of his classes.

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<sup>169</sup> 34 C.F.R. § 300.304(b)(1).

<sup>170</sup> 34 C.F.R. § 300.303 (a)(2).

<sup>171</sup> *Cartwright v. District of Columbia*, 267 F. Supp. 2d. 83, 86-87(D.D.C. 2003).

<sup>172</sup> *Id.* at 87.

<sup>173</sup> *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

Thus, Petitioner proved that Respondent denied the Student a FAPE by failing to evaluate him for more than eighteen months after Petitioner's January 7, 2010, request. Petitioner proved that this delay led to the development of an inappropriate IEP on November 18, 2010.

**B. Petitioner Proved that Respondent's Failure to Timely Review the Student's Independent Evaluations Prevented the Student from Making Academic Progress During the Last Half of 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,<sup>174</sup> establishes annual goals related to those needs,<sup>175</sup> and provides appropriate specialized instruction and related services.<sup>176</sup> The program must be implemented in the least restrictive environment ("LRE").<sup>177</sup> For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."<sup>178</sup>

The public agency must ensure that the IEP team reviews a student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved.<sup>179</sup> The agency must ensure that the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; the results of any reevaluation; or information about the child provided to, or by, the parents.<sup>180</sup>

Additionally, if the parent obtains an independent educational evaluation at public expense, or shares with the public agency an evaluation obtained at private expense, the public agency must consider the results of the evaluation, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.<sup>181</sup>

Petitioner provided Respondent copies of the Student's independent psychological, speech-language, vocational, and functional behavioral assessments to Respondent by November 30, 2011. Yet, Respondent failed to review the independent evaluations until February 13, 2012, nearly seventy-five days after Petitioner provided the last of the evaluation reports to the CCM.

Once the Student's IEP team reviewed the independent evaluations at the February 13, 2012, meeting,, it realized his November 2010 IEP was woefully inadequate. The

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<sup>174</sup> 34 C.F.R. § 300.320 (a) (1).

<sup>175</sup> 34 C.F.R. § 300.320 (a) (2).

<sup>176</sup> 34 C.F.R. § 300.320 (a) (4).

<sup>177</sup> 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

<sup>178</sup> *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

<sup>179</sup> 34 C.F.R. § 300.324 (b)(1).

<sup>180</sup> *Id.*

<sup>181</sup> 34 C.F.R. § 300.502 (c)(1).

Student's IEP team realized that the Student required 26 hours per week of specialized instruction outside the general education setting to address his deficiencies in reading, math, and written expression, as well as his speech and language deficits. They agreed that he also required sixty minutes per week of speech-language pathology and thirty minutes per week of behavioral support services.

At the February 13, 2012, IEP meeting, Respondent also realized that Charter School 2 could not provide the Student a FAPE because it could not implement an IEP that required it to provide the Student 26 hours per week of specialized instruction outside the general education setting. Yet, Respondent did not propose an alternate location of services until two weeks after meeting.

Due to Respondent's delay in reviewing the independent evaluations, the Student continued to labor under the November 2010 IEP, which did not provide the specialized instruction or the setting he required to access the curriculum, until February 13, 2012. By the time Respondent revised the Student's IEP to provide more appropriate annual goals and the specialized instruction and related services he required, only four months remained of the 2011-2012 school year. Thus, the Student had insufficient time to turn around his failing grades. While he was able to improve some of his failing grades in the fourth quarter, his efforts weren't sufficient to be promoted to the tenth grade.

Had Respondent reviewed the Student's independent evaluations within thirty days of the date Petitioner provided the last of the evaluations to the CCM, i.e., before winter break, it would have revised the Student's IEP before the Student returned to school in January 2012. This would have given the Student two full quarters to work toward earning passing grades in his courses. Instead, Respondent delayed this review for six weeks after returning from winter break, leaving the Student to founder in an academic environment that was inaccessible to him. As a result, the Student had to repeat the ninth grade for a third time.

Thus, Petitioner proved that Respondent denied the Student a FAPE.

**C. Petitioner Proved Respondent denied the Student a FAPE by Failing to Provide the Student a Location of Services that Could Implement His February 13, 2012, IEP.**

Each public agency 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.<sup>182</sup> In order to implement the IEP, a team that includes the

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<sup>182</sup> 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.

child's parents determines where the child should be placed based on the child's IEP.<sup>183</sup> Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.<sup>184</sup>

In determining the appropriate placement for a child, preference given to the least restrictive environment and the appropriate schools nearest the child's home.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup>

On February 27, 2012, two weeks after it developed an IEP for the Student that provided that he was to receive 26 hours of specialized instruction outside the general education environment, Respondent proposed placing the Student in DCPS School 2. Yet, DCPS School 2 does not have the resources to implement the Student's IEP. Rather, at the DCPS School, the Student would be in inclusion classes for at least part of his school day and would be in general education classes with no special education support for all of his electives.

Thus, DCPS denied the Student a FAPE by failing to provide a location of services that could implement his IEP.<sup>189</sup>

**D. Petitioner is Entitled to Reimbursement for Her Unilateral Placement of the Student in the Non-Public School.**

If the parents of a child with a disability enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.<sup>190</sup>

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<sup>183</sup> 34 C.F.R. § 300.116.

<sup>184</sup> See *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

<sup>185</sup> *Id.*

<sup>186</sup> 34 C.F.R. § 300.116 (c).

<sup>187</sup> 34 C.F.R. § 300.116 (d).

<sup>188</sup> . *Id.* at (e)

<sup>189</sup> Petitioner is the prevailing party on this claim.

<sup>190</sup> 34 CFR § 300.148 (c); see also *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate); *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369 (1985) (parents may be

A parental placement may be found to be appropriate by a hearing officer even if it does not meet the State standards that apply to education provided by the SEA and LEAs.<sup>191</sup>

Here, Respondent denied the Student a FAPE for nearly two school years by failing to timely reevaluate him, developing an IEP in November 2010 that was not reasonably calculated to provide meaningful benefit, and by failing to timely review his independent evaluations. Only in February 2012, two years after Petitioner requested that Respondent reevaluate the Student, did Respondent finally develop an IEP for the Student that could provide him the specialized instruction and related services that he required to access the curriculum.

In the meantime, the Student had failed the ninth grade and was on track to fail it a second time. Yet, Respondent failed to propose a location of services to implement the Student's IEP at the February 13, 2012, IEP meeting. After waiting two weeks, on February 27, 2012, Petitioner sent a letter to Respondent stating that Petitioner intended to unilaterally enroll the Student in the Nonpublic School for the remainder of the 2011-2012 school year. In the letter, Petitioner explained that she decided to enroll the Student in the Nonpublic School because Respondent had failed to provide the Student an appropriate IEP, placement, and location of services. Petitioner informed Respondent in writing of her intention to seek reimbursement for the costs of the Student's enrollment in the Nonpublic School.

After another two weeks elapsed before Respondent proposed a location of services to implement the Student's February 13, 2012, IEP. On March 13, 2012, a full month after the February IEP meeting, Respondent issued a PWN that informed Petitioner that the Student was to attend DCPS School 2 for the remainder of the 2011-2012 school year. In the meantime, the Student had been left at Charter School 2, a school in which he had a history of academic failure and that could not implement his IEP.

Respondent's March 13, 2012, PWN provided no explanation of why Respondent believed that DCPS School 2 would be appropriate for the Student or whether it could implement the February 13, 2012, IEP. Petitioner proved that DCPS School 2 cannot implement the Student's IEP.

Thus, Respondent failed to make FAPE available to the Student for two, consecutive school years.

Petitioner enrolled the Student in the Nonpublic School in April 2-12. The Nonpublic School has implemented the Student's IEP from the date he enrolled, and he has made remarkable progress. During the fourth quarter of the 2011-2012 school year, he raised his grade in English I from a D to a C. He raised his math grade from a C to a B. And he raised his grade in social studies from a D to a C. Unfortunately, due to his low academic

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reimbursed for private-school tuition when school district fails to provide a child a FAPE and the private-school placement is appropriate).

<sup>191</sup>34 CFR § 300.148 (c); *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993).

performance at Charter School 2 during the first three quarters of the 2011-2012 school year, the Student was not promoted to the tenth grade.

The Student is currently repeating the ninth grade for a third time. However, at the Nonpublic School, he is finally receiving the special education support and related services he requires to make academic progress. When he began attending the Nonpublic School in April 2012, he was functioning on the third-grade level in reading, written expression, and math. He is currently performing at the mid-fifth grade level in each of these core subject areas.

At the Nonpublic School, the Student is taking diploma-track classes, French, world history, English 1, geometry, earth science, and health. He is performing well in all of his classes except science. Because of the small classes at the Nonpublic School, the Student is able to focus and concentrate on his assignments. If he is off task, his teachers can easily redirect him because of the low student-teacher ratio.

Finally, the Nonpublic School has a certificate of authority from OSSE. Because OSSE has approved the Nonpublic School's annual tuition rate of \$35,500, this Hearing Officer finds that the costs of the Student's enrollment there are reasonable.

Thus, Non-Public School 2 is an appropriate placement for the Student. Petitioner is entitled to reimbursement of the costs of his enrollment from April 1, 2012, until the end of the 2012-2013 school year.

#### **ORDER**

Based upon the findings of fact and conclusions of law herein, it is this, the 7th day of October hereby:

**ORDERED** that Respondent shall reimburse Petitioner for the costs of the Student's enrollment in the Nonpublic School, including transportation, from April 1, 2012, through July 31, 2013; and

**IT IS FURTHER ORDERED** that, on or before November 9, 2012, DCPS shall review the Student's progress at the Nonpublic School.

By: /s/ Frances Raskin  
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).