

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent] & [Parent], on behalf of
[Student],¹

Date Issued: October 11, 2012

Petitioners,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 OCT 11 PM 5:09

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioners on August 23, 2012. A timely response to the complaint was filed on September 4, 2012. A prehearing conference was convened by the undersigned on September 12, 2012, and a prehearing order was issued on that date. A resolution meeting was convened on September 13, 2012, and resulted in no agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on September 23, 2012.

The Petitioners filed a trial brief and sent disclosures to the Respondent on September 25, 2012. The Respondent filed a trial brief and sent disclosures to the Petitioners on September 26, 2012. The hearing was convened at 9:30 a.m. on October 3, 2012, in room 2006 at 810 First

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

Street NE, Washington, D.C. The hearing recessed at 6:00 p.m. and reconvened at 9:30 a.m. on October 4, 2012, and concluded approximately 12:00 p.m. The hearing was closed to the public.

The due date for this HOD is November 6, 2012. This HOD is issued on October 11, 2012.

Following the presentation of the Petitioners' case the Respondent moved for a directed finding on the record arguing the evidence presented did not establish the Petitioners' claims. This motion was denied and the Respondent made the same motion at the close of its case. The motion was again denied because the IHO wished to review all of the evidence carefully before making findings of fact which would be used in any legal analysis.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent denied the Student a free appropriate public education (FAPE) because the individualized education program (IEP) proposed or provided for the 2011-2012 school year was not reasonably calculated to enable the Student to be involved in or progress in the general education curriculum because the IEP lacks: sufficient specialized instruction outside

of the general education setting; sufficient behavioral supports; and a statement of the anticipated frequency, location, and duration of services?

(2) Whether the Respondent failed to make an educational placement of the Student based on his IEP for the 2011-2012 school year when it proposed placement at _____ Center?

The substantive requested relief at the time of hearing was reimbursement for the cost of the Petitioners' unilateral placement of the Student at _____ School for the 2011-2012 school year and continued reimbursement of the Student's placement at Kingsbury at public expense until the Respondent locates another appropriate placement.

The Respondent denied the Student a FAPE when it failed to propose an IEP that was reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP lacked sufficient specialized instruction outside of the general education setting and sufficient behavioral supports including the anticipated frequency, location, and duration of those supports. The Respondent placed the Student for the 2011-2012 school year based on his IEP. The IEP, however, denied the Student a FAPE and the Petitioners are entitled to reimbursement.

IV. EVIDENCE

Five witnesses testified at the hearing, three for the Petitioners and two for the Respondent.

The Petitioners' witnesses were:

- 1) The Student's Mother, Petitioner, (P)
- 2) Suzanne Keith Blattner, Special Education Consultant, (Expert in early childhood special education with emphasis on assessment), providing an expert opinion on the Student's education needs and programming. (S.B.)

- 3) Associate Head of School, (Expert in special education programming and administration), providing an expert opinion on the Student's educational programming at School. (M.G.)

The Respondent's witness were:

- 1) Specialist for Elementary Design, DCPS.
 2) Special Education Teacher,

34 exhibits were admitted into evidence of 36 disclosures from the Petitioners.² The

Petitioners' exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2	October 14, 2010	Email from Nesper to [Petitioner]
P 3	March 11, 2011	Email from Sanao to [Petitioner]
P 4	August 26, 2011	Email from [Petitioner] to White
P 5	August 26, 2011	Email chain ending from Taylor to [Petitioner]
P 6	September 2, 2011	Email from Ellis to [Petitioner]
P 7	August 27, 2011	Email from Ellis to [Petitioner]
P 8	September 9, 2011	Email chain ending from White to [Petitioner, Ellis]
P 9	September 4, 2011	Educational Consultation Summary
P 10	September 16, 2011	IEP [Meeting Notes]
P 11	September 16, 2011	DCPS IEP Meeting for [Student]
P 12	September 19, 2011	Letter from Petitioners to Respondent
P 13	September 23, 2011	Email from White to [Petitioner]
P 14	September 23, 2011	Prior Written Notice
P 15	September 29, 2011	[Petitioner] Observation
P 16	October 7, 2011	Prior Written Notice – Evaluation
P 17	October 13, 2011	IEP Meeting Notes (DCPS Notes)
P 18	October 27, 2011	Email from [Petitioner] to White
P 19	Undated	Letter from [Petitioners] to White
P 20	November 3, 2011	Letter from [Petitioner] to Takoma Education Campus Team
P 21	November 10, 2011	Prior Written Notice (See R 6)
P 22	November 10, 2011	Multidisciplinary Team (MDT) Meeting Notes (See R 5)
P 23	November 10, 2011	Letter from [Petitioner] to DCPS IEP Team
P 24	October 13, 2011	IEP (See R 4)

² Petitioners also moved two of the Respondent's exhibits into evidence as the Respondent, despite the order of the undersigned dated September 12, 2012 requiring disclosures to be moved into evidence prior to the presentation of cases, initially refused to do so. The two documents, R 10 and R 13, were admitted during the presentation of the Petitioner's case. The Respondent objected. However, the Respondent subsequently offered all of its disclosures into the record without objection from the Petitioners.

<u>Ex. No.</u>	<u>Date</u>	<u>Document (cont.)</u>
P 25	February 3, 2011	LEND Fellow Consultation
P 26	June 13, 2011	Confidential Psychological Evaluation Report (See R 2)
P 27	May 3, 2011	Re-Evaluation
P 28	October 11, 2011	Educational Assessment (See R 3)
P 30	November 1, 2011	Letter from Cruz to [Petitioners]
P 31	March 1, 2012	[Observation Report]
P 32	Undated	Second Semester: [Student]
P 33	Undated	Curricula Vitae for Suzanne Keith Blattner
P 34	Undated	Curricula Vitae for Marlene Gustafson
P 35	April 1, 2012	Kingsbury Day School Enrollment Agreement 2012-2013 Academic Year
P 36	September 24, 2012	Statement

16 exhibits were admitted into evidence of the Respondent's 16 disclosures.³ The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	March 3, 2010	Confidential Psychological Report
R 2	June 13, 2011	Confidential Psychological Evaluation Report (See P 26)
R 3	October 11, 2011	Educational Assessment (See P 28)
R 4	October 13, 2011	IEP (See P 24)
R 5	November 10, 2011	Multidisciplinary Team (MDT) Meeting Notes (See P 22)
R 6	November 10, 2011	Prior Written Notice (See P 21)
R 7	December 2, 2010	IEP
R 9	June 17, 2011	IEP Progress Report – Annual Goals
R 10	November 9, 2011	IEP Progress Report – Annual Goals
R 11	October 7, 2011	Analysis of Existing Data
R 12	October 13, 2011	Disability Worksheet
R 13	September 16, 2011	Data Triangulation Chart
	September 15, 2011	Functional Assessment Scatter Plot
	September 16, 2011	Functional Assessment Observation
	September 13, 2011	Problem Behavior Questionnaire Profile
	September 16, 2011	FBA Teacher Interview
R 14	October 13, 2011	Final Eligibility Determination Report, Evaluation Summary Report
R 15	October 13, 2011	Prior Written Notice – Identification
R 16	October 13, 2011	Evaluation Summary Report
R 17	Undated	Curricula Vitae of Colleen Koval

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credible. Any finding

³ R 4 and R 8 were duplicates, and so only R 4 was admitted.

the eyes out of one child who required medical attention.¹² He also had toileting accidents which improved over the course of the school year.¹³

3. The Student's teacher notified the Petitioners on October 14, 2010, that a functional behavioral assessment (FBA) would be completed for the Student.¹⁴ No FBA was begun until the following September.¹⁵ The teacher also advised the Petitioners that the Student "also needs to be either at my side or my aide's at all times because during unstructured times, he always hurts his peers. I am very concerned and hopefully we can remedy this."¹⁶
4. The staff at the Student's school continued to attempt to get additional support for the Student in the form of a dedicated aide during the course of the school year, including sending a request to the Office of Special Education for the Respondent on February 18, 2011.¹⁷ The Respondent did not ensure the IEP team had the authority to determine the Student's related services and supplementary aides and services specifically whether the Student required a dedicated aide.¹⁸
5. In May 2011 the Student was diagnosed with Autism, and the Respondent conducted an assessment (the Autism Diagnostic Observation Schedule, ADOS) and also concluded the Student had autism on June 13, 2011.¹⁹ No IEP team meeting was convened to review and revise the IEP based on the assessment results prior to the start of the 2011-2012 school year.²⁰

¹² T of P (P testified that the Student's behaviors did not improve. While the Student continued to have behavioral problems, the record shows there was some improvement, R 2/P 26, R 9.)

¹³ T of P, R 9.

¹⁴ T of P, P 2.

¹⁵ P 3, R 13.

¹⁶ P 2.

¹⁷ T of P, P 3.

¹⁸ T of P, T of S.B., T of J.E., P 3, P 11, P 12, P 14, P 17, P 22, P 23, P 24/R 4.

¹⁹ T of P, T of S.B., R 2/P 26.

²⁰ T of P, P 4, R 12, R 15.

6. While the Student's IEP required extended school year (ESY) services from June 27, 2011 to July 22, 2011, it is unknown whether the services were provided, taken advantage of, or how the Student performed.²¹
7. The Student began the 2011-2012 school year in a kindergarten classroom with both non-disabled and disabled peers.²² The Student was having some problems with toileting again, he was not eating his lunch, he continued to have problems staying focused and on task, and continued to be physically aggressive towards peers and adults.²³ In two 20 minute observations of the Student in the classroom conducted by Respondent's staff the Student was on task only 20 percent of the time.²⁴
8. In the fall of 2011 the Student was described as bright with strong academic skills that may be limited due to functional needs.²⁵ He was verbal, using four word phrases, but his words were disordered and he used some scripted communication.²⁶ He was not able to deal with the non-verbal parts of communication.²⁷ He also had sensory processing issues, including significant auditory hypersensitivity.²⁸ He did not know how to react to some sounds.²⁹ He liked to move and it was difficult for him to sit still and regulate himself.³⁰ He wanted to be social but did not know how, which resulted in aggression towards peers.³¹ He often became

²¹ R 7. (Other than ESY services being detailed in the IEP, neither party presented evidence or argument about ESY services. For example, the Petitioners provided no testimony or evidence about how the Student performed during ESY services. The Respondent never argued or presented evidence that ESY were not taken advantage of. Given this dearth of evidence, no consideration can be made concerning ESY for the summer of 2011 in examining whether the IEP proposed in October 2011 was reasonably calculated to provide educational benefit.)

²² T of P, P 4, P 9, P 14.

²³ T of P, T of S.B., P 9, P 11, R 13.

²⁴ R 13.

²⁵ T of S.B., T of P, T of J.E., P 26/R 2, P 27, P 28/R 3.

²⁶ T of S.B.

²⁷ T of S.B.

²⁸ T of S.B.

²⁹ T of S.B.

³⁰ T of S.B.

³¹ T of S.B.

disruptive to the classroom by rolling around on the floor.³² The Student has the capacity to be a successful and functional student with proper support.³³

9. On August 26, 2011, the Student's Mother requested an IEP team meeting to discuss the ADOS and diagnosis of Autism.³⁴ The meeting was convened on September 16, 2011.³⁵ A draft IEP had been provided to the Petitioners a couple of days prior to the meeting, and the draft did not include data from the Respondent's June assessment report.³⁶ The team agreed upon goals for occupational therapy and speech and language pathology for the Student.³⁷ A dedicated aide for the Student, at least temporarily for his safety and learning support, was again requested, as was a more intensive (full-time) special education program, and the Petitioners requested he be placed back in a pre-K classroom, and a behavior intervention plan be developed.³⁸ It was agreed the team would need to meet again.³⁹
10. The Petitioners sent a letter to the Respondent on September 19, 2011, advising various staff, including the Principal and the Special Education Coordinator at as well as the Acting Deputy Chancellor for Special Education, of their requests at the meeting, their concerns about the education of the Student, their desire to keep the Student in DCPS, and that they believed their sons rights under the Individuals with Disabilities Education Improvement Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 were being violated.⁴⁰

³² T of S.B.

³³ T of S.B.

³⁴ T of P, P 4.

³⁵ T of P, T of S.B., P 10, P 11.

³⁶ T of P, P 11.

³⁷ P 12.

³⁸ T of P, T of S.B., P 11, P 12, P 14.

³⁹ T of P, T of S.B., P 11.

⁴⁰ T of P, P 12.

11. On September 23, 2011, the Special Education Coordinator sent an email to the Petitioners indicating that the next IEP team meeting would be held October 13, 2011, and that the Student's educational placement would be changed to a self-contained Autism classroom at Campus.⁴¹ The Petitioners were asked to advise the Principal of the school if they were "in agreement with this placement so we can move forth."⁴² The prior written notice also documented the Respondent's refusal to change the Student's placement to a pre-K classroom because the Student would not be with age appropriate peers and so the placement "would not meet his academic or social needs."⁴³ The Respondent continued to refuse to permit the IEP team to make a determination on whether the Student would have a dedicated aide indicating that a request for such a service would have to be made through another "process" involving unidentified DCPS central staff.⁴⁴
12. On September 29, 2011, the Student's Mother and her consultant observed the self-contained Autism classroom at ' and spoke with the teacher, There were four children in the class, with a maximum capacity of eight.⁴⁶ There was a teacher and three dedicated aides in the classroom.⁴⁷ The children appeared older than the Student and lower functioning as they were not interacting with each other at all, did not communicate with each other verbally, and were being taught through discrete trial training, which is used for very low functioning students.⁴⁸ Thus, the Student would have no opportunity for peer modeling and improving social skills.⁴⁹ Some of the skills the students were working on were

⁴¹ P 13, P 14.

⁴² P 13, P 14.

⁴³ P 14.

⁴⁴ T of P, T of S.B., P 12, P 14.

⁴⁵ T of P, P 15.

⁴⁶ P 15.

⁴⁷ P 15.

⁴⁸ P 15, T of S.B.

⁴⁹ P 15, T of S.B.

far below where the Student was at that point, and included: following 1-2 step directions; identifying their names in isolation; tracing pre-writing strokes with moderate pressure; imitating stroke patterns using sensory tools; following group instructions to do all the same response when presented in a group; maintaining eye contact with communication partner 50% of the time; physically transition to the next activity independently without verbal or physical prompts; participating in social greeting via gestures, signs, and/or vocalizations; and working on counting to ten.⁵⁰

13. The team reconvened on October 13, 2012, and further discussed revisions to the Student's IEP and placement.⁵¹ The Respondent's Special Education Specialist at the meeting, Ms. Berry, again informed the team that they were not empowered to determine whether a dedicated aide would be provided to the Student.⁵² The meeting concluded with the Petitioners agreeing to view another proposed placement, this time a self-contained classroom with a reverse mainstream structure whereby children without disabilities are included in a primarily special education classroom.⁵³
14. On October 18, 2011, the Petitioners observed the classroom proposed at the October 13, 2011, IEP team meeting.⁵⁴ The classroom was part of a specific program called "Tools of the Mind" and included children aged 3 to 4 and a half.⁵⁵ The classroom is limited by program parameters to ten non-disabled students and six students with disabilities.⁵⁶ The classroom is highly structured.⁵⁷ Because the classroom included such young children the Student would not have the opportunity for peer modeling and it was not developmentally or academically

⁵⁰ P 15, T of S.B.

⁵¹ T of P, T of S.B., T of A.P., T of J.E., P 17.

⁵² P 17.

⁵³ P 17, T of P, T of S.B., T of A.P.

⁵⁴ T of P, P 18.

⁵⁵ T of A.P.

⁵⁶ T of A.P.

⁵⁷ T of A.P.

appropriate for him.⁵⁸ A.P., the Specialist for Elementary Design for the Respondent who recommended the classroom was only familiar with the program, and not the particular classroom which was proposed, and also agreed the Student needed to be in a classroom that would challenge the Student academically.⁵⁹

15. On October 24, 2011, the Petitioners informed the Respondent that they were rejecting the proposed "Tools of the Mind" classroom for the Student and that they were interested in other DCPS options for pre-K children age four, as opposed to age three, and that they would like another IEP team meeting.⁶⁰

16. An IEP had been proposed on October 13, 2011.⁶¹ The IEP included the following goals:⁶²

- Given a hundreds chart to 50 (with at least 10 missing numbers), [Student] will be able to accurately produce the missing numbers with 75% accuracy. . . .
- . . . [Student] will be able to answer at least two out of three literal comprehension questions. . . .
- . . . [Student] will make at least one relevant comment or ask at least one relevant question. . . .
- Given a set of at least 20 (random) single consonants, [Student] will be able to produce the corresponding sound with 100% accuracy. . . .
- Given all vowels, [Student] will be able to accurately identify each short vowel sound with 100% accuracy. . . .
- . . . [Student] will be able to produce a set of 20 upper case letters with 90% accuracy. . . .
- . . . [Student] will be able to produce a random set of 20 lower case letters with 90% accuracy. . . .
- . . . [Student] will accurately write his first and last name with correct letter formation and capitalization. . . .
- Given a set of 20 single sounds (consonants or vowels), [Student] will be able to write the corresponding letter with 80% accuracy. . . .
- [Student] will demonstrate having all bowel movements in the toilet with 100% accuracy.
- [Student] will request help when presented with objects that he cannot open with no more than two prompts and hand over hand facilitation.

⁵⁸ P 18, T of P.

⁵⁹ T of A.P.

⁶⁰ P 18, P 20, T of P.

⁶¹ P 24/R 4.

⁶² P 24/R 4.

- [Student] will correctly label emotions/feelings during structured speech/language sessions, with minimal supports (no more than 1-2 prompts) and provide a reason that the person/animal is feeling happy/sad/mad/excited/hungry/etc., with 80% accuracy. . . .
- . . . [Student] will answer literal and inferential wh-questions with minimal supports (no more than 1-2 prompts) and with 80% accuracy. . . .
- . . . [Student] will follow 3 step directions that include prepositional phrases. . . .
- Given visual and verbal prompts, [Student] will increase participation in tasks/activities to completion by exhibiting appropriate behaviors. . . . [Student] will demonstrate this by staying seated, no aggressive physical contact with peers/adults and raising his hand to speak.
- . . . [Student] will increase the use of appropriate behavior toward teachers/staff as well as peers when he encounters an interactive social situation. . . . [Student] will demonstrate this behavior by making appropriate eye contact, speaking in an indoor voice, and remaining present.
- [Student] will improve his social skills by appropriately responding when confronted with a situation he finds frustrating. . . . He will demonstrate this by verbalizing his frustration and asking for a break/time out.
- [Student] will sit in a large group for 10 minutes and attend to the teacher or material for 50% of the time and respond to two of the teacher's instructions.
- [Student] will demonstrate gains in sensory processing as noted in increased attention to classroom tasks, transitions in the classroom and school setting.
- [Student] will trace corner and center uppercase letters, then form letters with proper starting orientation and size, 75% of trials each letter. . . .
- [Student] will color a simple shape with attention to boundaries, with moderate pressure, 60% coverage, < 3 deviations per 6" shape.
- [Student] will cut a bold straight, curved line with independent orientation to scissors and paper, with attention to boundary line, smooth strokes.
- [Student] will increase fine motor strength and dexterity skills with clothing fasteners and management, classroom tools, mealtime containers to 80% each task. . . .

17. The October 13, 2011 IEP included the following special education and related services and supplementary aids and services:

- Specialized instruction in the general education setting for 25 hours per week, starting October 13, 2011 and continuing until October 12, 2012
- Speech-language pathology outside of the general education setting for 240 minutes per month (four hours), starting October 13, 2011 and continuing until October 12, 2012
- Occupational therapy outside of the general education setting for 240 minutes per month (four hours), starting October 13, 2011 and continuing until October 12, 2012
- Behavior support services for 30 minutes per week, starting October 13, 2011 and continuing until October 12, 2012 (the location of service was not specified).

The IEP included “recommendations,” based on the June 13, 2011, assessment report, as follows:

- Maintain close contact with the classroom teacher regarding IEP goals.
- A parent teacher log.
- Visual supports at home and school, specifically: use of a visual schedule; visual transition aids; a work system; picture cards.
- Gain direct eye contact and use quiet tone of voice when speaking to the Student so that he will have to focus in to hear you.
- Make sure the Student understands what is expected when giving directions and use visual cues and routines.
- Use a timer out of the Student’s view to avoid distractibility, so the Student will have a clear expectation of when the task at hand is ending.

Additional classroom accommodations included:

- Repetition of directions
- Simplification of oral directions
- Longer response time
- Preferential seating
- Flexible scheduling
- Daily schedule system

The IEP specifically indicated no dedicated aide was necessary and that bus transportation was a required related service. Extended school year services were no longer required. No behavior intervention plan was part of the IEP, beyond the goals and 30 minutes per week of unspecified behavioral support services.⁶³

18. In a letter dated November 3, 2011, the Petitioners advised the Respondent that they were dissatisfied with the programming and placement options presented for the Student, that they wanted the Student placed at _____ School _____ and that they “may be making a unilateral placement of [Student] at _____ School at public expense” if no agreement at the upcoming IEP team meeting could be reached about the Student’s program

⁶³ P 24/R 4., T of P, T of S.B.

and placement.⁶⁴ They Petitioners indicated their willingness to consider options other than _____ at the IEP team meeting.⁶⁵

19. An IEP team meeting was convened on November 10, 2011.⁶⁶ The dedicated aide was again discussed and the team agreed it was necessary, but the Respondent's staff refused to include the aide in the IEP because it had not yet been approved.⁶⁷ Placement at _____ was requested and denied by the Respondent because the Respondent wanted to place the Student in another classroom at Takoma that was a pre-K and kindergarten class with a dually certified teacher (both general education and special education) and two teacher assistants.⁶⁸ The Student attended the pre-K/Kindergarten class for about two weeks prior to being withdrawn from the public school and enrolled at _____ by the Petitioners.⁶⁹ No revisions to the IEP were proposed following the November 10, 2011, IEP team meeting.⁷⁰

20. _____ is a special education day school for students with language based disabilities including high-functioning autism.⁷¹ The Student was placed in a pre-K/Kindergarten classroom, and remains in a classroom, with age-appropriate peers who function at his developmental and language levels.⁷² The classroom in 2011-2012 had eight other children and three adults (a teacher, an assistant teacher, and a dedicated aide for one of the Students).⁷³ Two of the students were pre-k and the other six were kindergarten students.⁷⁴

⁶⁴ P 20, T of P.

⁶⁵ P 20, T of P.

⁶⁶ T of P, P 21.

⁶⁷ P 22, T of P, T of J.E.

⁶⁸ P 22, T of P, T of J.E., T of A.P.

⁶⁹ T of P, T of J.E.

⁷⁰ T of J.E., P 22. (There was conflicting evidence about a dedicated aide provided in November 2011 following the IEP team meeting. Whether a dedicated aide was provided is immaterial and may even be evidence not appropriate to consider because it occurred after the IEP was proposed and the record is clear that a dedicated aide was not part of the IEP.)

⁷¹ T of M.G.

⁷² T of S.B., T of M.G.

⁷³ P 31, T of M.G.

⁷⁴ P 31.

The Student received two hours per week of occupational therapy and one hour per week of speech and language therapy.⁷⁵ The classroom was highly structured and students were supported by sensory-based activities such as sand and water tables and manipulatives.⁷⁶ The structure of the classroom included a daily schedule that was constantly reviewed with the students, individual schedules for students, active alleviation of student anxiety by the teacher, and alerting the students to impending transitions.⁷⁷ Accommodations to reduce impact of classroom stimuli, such as earplugs, were also employed with the Student.⁷⁸ The structure of the classroom and supports used eliminated the need for a dedicated aide for the Student and he did not have one as his behaviors were well managed.⁷⁹ The Student was verbal, happy, and talked to the other students and knew their names.⁸⁰ The Student's reduced anxiety resulting in him not engaging in the "fight or flight" reaction that was often triggered in the less structure environments he had previously been placed in.⁸¹

21. The Petitioners paid a pro-rated share of the annual tuition for _____ for the 2011-2012 school year, totaling _____
22. The Petitioners enrolled the Student in _____ for the 2012-2013 school year, where he currently attends, and agreed to pay _____ for the annual tuition.⁸³ The Petitioners paid a _____ enrollment deposit and agreed to pay monthly payments of _____ debited from their financial account, starting August 1, 2012, and continuing until May 1, 2013.⁸⁴

⁷⁵ P 31.

⁷⁶ P 31, T of M.G.

⁷⁷ P 31, T of M.G.

⁷⁸ P 31, T of M.G., T of S.B.

⁷⁹ P 31, T of M.G., T of S.B.

⁸⁰ T of S.B., P 31.

⁸¹ T of S.B.

⁸² P 36, T of M.G.

⁸³ P 35.

⁸⁴ P 35.

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least

ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010). An IEP is developed or revised based on data from, typically, various sources such as assessments, class work, teacher and staff observations, and parent information, among other things. 34 C.F.R. §§ 300.324, 300.503. The data upon which proposals and refusals are based must be documented in a written notice to the parents. 34 C.F.R. § 300.503. The IEP team is responsible for developing, reviewing, and revising a student’s IEP and making placement determinations for the student. 34 C.F.R. § 300.324, D.C. Mun. Regs. 5-E3001.1 (Definition of “IEP team”). The Respondent is bound by the IEP developed at an IEP team meeting. *See*, 34 C.F.R. § 300.17, Fed. Reg. Vol. 71, No. 156, p. 46670 (2006).

3. The Student’s behavior resulting from his disability was the driving factor in this matter. The IEP team knew this, yet failed to construct an IEP reasonably calculated to deal with the Student’s behavioral needs. Rather, the Respondent required a process other than the IEP team to determine whether a dedicated aide was necessary to help the Student’s teachers deal with the Student’s behavior. While a BIP is not a requirement whenever a child has behavioral needs, it is one means of addressing behavior in the IEP. No BIP was ever created for the Student and this would have been appropriate, given the problems observed over the course of the prior school year and during the fall of the 2011-2012 school year. Indeed, the school staff, for over a year, had been discussing a functional behavioral assessment, a precursor to a BIP, and one was not completed until October 2011. Yet no BIP followed. Rather, different classrooms utilizing different programs or program elements were proposed. But the IEP lacked the necessary specialized instruction outside of the general education

setting and related services and supplementary aids and services necessary to address the Student's behavior constructively, to ensure he could meet his annual goals and be involved in and progress in the general education curriculum. Thus, it was not reasonably calculated to provide educational benefit.

4. In determining the educational placement of a child with a disability the Respondent must ensure that the placement is based on the child's IEP. 34 C.F.R. § 300.116(b)(2), D.C. Mun. Regs. 5-E3013.1.
5. When the Respondent finally settled on a placement of the Student in a pre-K/Kindergarten class with a dually certified teacher, the placement was based on the October 13, 2011 IEP in that the IEP required all specialized instruction to be provided in the general education setting, and the placement in November 2011 did this. Thus, there was no violation based on the Petitioners' claim. However, this does not change the fact that the IEP was not appropriate.
6. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Reimbursement for a unilateral private placement may be an appropriate remedy: 1) where there has been a denial of FAPE; 2) where the private placement by the parents was appropriate; and 3) if supported by the equities. School Committee of Town of Burlington v. Department of Education of Massachusetts ("Burlington"), 471 U.S. 359 (1985), 34 C.F.R. § 300.148(c). "If DCPS had been unwilling or unable to modify the IEP to meet N.T.'s needs for small group instruction, then private placement and reimbursement might be an appropriate remedy. *See, e.g. Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S.7 (1993)." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C. 2012).

7. The Respondent was unable or unwilling to modify the Student's IEP to meet his needs when it failed to provide for full-time specialized instruction outside of the general education setting and to provide a BIP and/or a dedicated aide to assist in addressing the Student's behavioral needs. The only behavioral support services provided were unspecified, including no statement of the anticipated frequency, location, and duration of the services. *See* 34 C.F.R. § 300.320(a)(7). Thus, it was not unreasonable for the Petitioners, at their own financial risk, to place the Student at _____ which provided appropriate programming to meet his needs successfully. Furthermore, there is no evidence in the record that the Respondent proposed a revised IEP prior to the start of the 2012-2013 school year. Given the lack of a new proposal, the Petitioners were justified in continuing the placement of the Student at _____ and will be reimbursed for doing so until the Respondent proposes an appropriate IEP and placement for the Student during the current school year.
8. The Respondent has argued that it owed no duty of FAPE to the Student because he was unilaterally enrolled by his parents in a non-public school. This argument lacks any merit. IDEA and its implementing regulations, on their face, clearly anticipate disputes over FAPE resulting in unilateral private placements, as follows from the Supreme Court decision in Burlington. *See*, 34 C.F.R. § 300.148. The Respondent here was on notice of the dispute and the Petitioner's intent to place the Student in a non-public school and seek reimbursement prior to that placement occurring. Thus, the Respondent's obligation to provide a FAPE never stopped.

VII. DECISION

1. The Respondent denied the Student a FAPE when it failed to propose an IEP that was reasonably calculated to enable the Student to be involved in and progress in the general

education curriculum because the IEP lacked sufficient specialized instruction outside of the general education setting and sufficient behavioral supports including the anticipated frequency, location, and duration of those supports.

2. The Respondent did not fail to ensure the Student's placement for the 2011-2012 school year was based on his IEP. The IEP, however, was not appropriate.

VIII. ORDER

1. The Petitioners will be reimbursed _____ for the 2011-2012 school year. This reimbursement shall be paid to the Petitioners within 30 days of the date of this order.
2. The Petitioners will be reimbursed for the cost of the 2012-2013 year at _____ School. The Petitioners shall be reimbursed the enrollment deposit of _____ and the first three months of tuition (paid August 1, September 1, and October 1, 2012) in the amount of _____ for a total of _____ upon presentation of proof of payment to the Respondent (such as a receipt or bank record). The Respondent shall pay the Petitioners the reimbursement within 30 days of proof of payment. The Respondent shall reimburse the Petitioners the remaining months of tuition for the 2012-2013 school year at _____ School within 30 days of proof of payment for each remaining month (November 2012 through May 2012). The total monthly reimbursement, including deposit, shall not exceed _____.
3. The Respondent shall convene an IEP team meeting for the Student no later than May 15, 2013, to begin developing an IEP for the Student for the 2013-2014 school year. The IEP must include a statement of the anticipated start date of the special education and related services that is no later than the first day of public school for the 2013-2014 school year. The order imposes no other requirements on that IEP and any disputes about the proposed IEP or placement shall be deemed distinct and separate from the issues and orders herein.

4. The Respondent may convene an IEP team meeting for the Student to review and revise the Student's IEP and make a subsequent placement determination at any point between the date of this order and the deadline set in Order #3, supra. If the Respondent convenes the IEP team prior to April 1, 2013, and revises the IEP to be appropriate for the Student and makes a subsequent placement determination that is based on the IEP and is in the least restrictive environment (LRE) for the Student, the proposed IEP and placement shall go into effect 14 days following written notice of the IEP revisions and placement determination, unless objected to by the Petitioners. If the Student's placement is changed through appropriate due process⁸⁵ and not timely objected to (within 14 days) the Respondent will not be required to further reimburse the Petitioners for their unilateral placement pursuant to this order starting the month following the proposal.⁸⁶

IT IS SO ORDERED.

Date: October 11, 2012



Jim Mortenson, Independent Hearing Officer

⁸⁵ An IEP team meeting and prior written notice.

⁸⁶ A subsequent challenge to a proposal by the Respondent may result in reimbursement if it is determined the proposed IEP and placement are not reasonably calculated to provide the Student a FAPE in the LRE.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).