

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

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

OSSE  
Student Hearing Office  
February 06, 2013

---

<b>Parent, on behalf of</b>	)	<b>Case No. 2012-0802</b>
<b>STUDENT,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THE DISTRICT OF COLUMBIA</b>	)	
<b>PUBLIC SCHOOLS,</b>	)	
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Frances Raskin</b>

---

**HEARING OFFICER DETERMINATION**

**I. JURISDICTION**

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

**II. BACKGROUND**

Petitioner is the parent of a [REDACTED] student (“Student”) with a disability who attends a nonpublic school in the District of Columbia. On December 3, 2012, Petitioner filed a due process complaint (“Complaint”) against Respondent, the District of Columbia Public Schools (“DCPS”), alleging violations of IDEA.

On December 4, 2012, this Hearing Officer was assigned to preside over this case. On December 11, 2012, Respondent filed a timely response (“Response”) to the Complaint.<sup>2</sup>

On December 7, 2012, the parties waived the resolution meeting. Thus, the resolution period ended on December 7, 2012.

---

<sup>1</sup> Personal identification information is provided in Attachment A.

<sup>2</sup> Respondent did not challenge the sufficiency of the Complaint.

On December 12, 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 December 7, 2012.

During the prehearing conference, this Hearing Officer informed counsel that the end of the forty-five-day timeline, i.e., the deadline for the hearing officer determination (“HOD”), was January 21, 2013. Counsel for Respondent requested a continuance of the forty-five-day, due process hearing timeline because, due to the DCPS winter break, Respondent’s witnesses would not be available until January 7, 2013. Because this Hearing Officer and counsel for Respondent already had due process hearings scheduled for the week of January 7, 2013, the parties agreed to schedule the due process hearing for January 15-16, 2013.

On December 13, 2012, Respondent filed an unopposed motion for ten-day continuance. On January 6, 2013, this Hearing Officer granted the motion, which extended the deadline for the hearing officer determination to January 31, 2013.

The due process hearing commenced at 9:30 a.m. on January 15, 2013, in room 2009. At the outset of the hearing, Petitioner withdrew two of the issues certified for hearing. Counsel for Petitioner then informed this Hearing Officer that she was ill and requested a continuance of the due process hearing. The parties then agreed to reconvene the due process hearing on January 28, 2013.

On January 21, 2013, Petitioner filed an unopposed motion for a nine-day continuance of the forty-five-day, due process hearing timeline. On January 28, 2013, this Hearing Officer granted the motion, which extended the deadline for the hearing officer determination to February 9, 2013.

The due process hearing reconvened at 9:30 a.m. on January 28, 2013, in room 2004. This Hearing Officer entered into evidence Petitioner’s proposed exhibits<sup>3</sup> and Respondent’s proposed exhibits.<sup>4</sup> Petitioner then presented an opening statement in which she requested that this Hearing Officer place the Student in Nonpublic School 1 at public expense for the 2013-2014 school year in addition to the remainder of the 2012-2013 school year.

Petitioner and the Student testified, and presented two witnesses on their behalf, the founding director and chief executive officer (“Director”) of the nonpublic school the Student currently attends (“Nonpublic School 1”) and an expert in counseling psychology

---

<sup>3</sup> This Hearing Officer admitted into evidence Petitioner’s exhibits 1-17, inclusive. Neither party objected to the admission of the other party’s exhibits.

<sup>4</sup> This Hearing Officer admitted into evidence Respondent’s exhibits 1-5, inclusive. After Petitioner objected to the admission of Respondent’s proposed exhibit 6 on the grounds that Respondent had not timely disclosed this exhibit, this Hearing Officer denied Respondent’s request to admit into evidence this exhibit.

("Expert"). Respondent waived its opening statement and presented one witness, the admissions director ("Admissions Director") of Nonpublic School 2. After the parties presented oral closing arguments, the due process hearing concluded at 4:00 p.m. on January 28, 2013.

### III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:<sup>5</sup>

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on May 21, 2012, by unilaterally changing his placement for the 2012-2013 school year to Nonpublic School 2, which cannot implement the Student's individualized education program ("IEP"), specifically his transition plan, and cannot meet his emotional needs; and

B. Whether Respondent denied Petitioner her right to participate in the decisionmaking process regarding the provision of FAPE to the Student on May 21, 2012, by unilaterally predetermining the Student's placement for the 2012-2013 school year.

Petitioner requests relief in the form of an order that would require Respondent to place the Student in Nonpublic School 1 at public expense for the remainder of the 2012-2013 school year and the 2013-2014 school year.

### IV. FINDINGS OF FACT

1. The Student is a [REDACTED] young man who is in the eleventh grade at Nonpublic School 1.<sup>6</sup> He is eligible for special education services as a student with a specific learning disability.<sup>7</sup>

2. The Student's full-scale IQ is 84, which is in the low average range.<sup>8</sup> His oral language skills are average when compared to other students his age.<sup>9</sup> His oral expression skills are equivalent to a student aged twelve years and one month, which is in the limited to average.<sup>10</sup> His listening comprehension skills are advanced.<sup>11</sup> His fluency with academic tasks is average to advanced.<sup>12</sup>

---

<sup>5</sup> This Hearing Officer certified two additional issues for adjudication at the due process hearing. Petitioner withdrew these issues at the outset of the due process hearing on January 15, 2013.

<sup>6</sup> Testimony of Petitioner.

<sup>7</sup> Petitioner Exhibit 2 at 1 (May 21, 2012, IEP).

<sup>8</sup> Petitioner Exhibit 13 at 6 (August 4, 2010, Comprehensive Psychological Evaluation).

<sup>9</sup> Petitioner Exhibit 17 at 45 (January 14, 2013, Woodcock Johnson III Summary and Score Report).

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

3. The Student's academic knowledge and skills are limited to average for his grade.<sup>13</sup> His proficiency in written expression is very advanced.<sup>14</sup> His broad written language and brief writing are advanced.<sup>15</sup> His brief reading is average to advanced.<sup>16</sup> His broad reading, basic reading skills, and basic writing skills are average.<sup>17</sup> His reading comprehension is limited to average.<sup>18</sup>

4. The Student's proficiency in broad mathematics, math calculation skills, and brief mathematics is limited.<sup>19</sup> His mathematics reasoning skills, as compared to his same-age peers, are very limited.<sup>20</sup>

5. In 2010, the Student appeared to be in a state of chronic and substantial stimulus overload resulting from his persistent difficulty in mustering adequate psychological resources to cope with the demands of internal and external events in his life.<sup>21</sup> Consequently, he was at risk for recurrent episodes of overt anxiety, tension, nervousness, and irritability.<sup>22</sup> He had a limited tolerance for frustration and a less than average ability to persevere in the face of obstacles.<sup>23</sup> He was at risk for becoming temporarily psychologically incapacitated due to stimulus overload.<sup>24</sup>

6. The Student has limited capacity to form close attachments to other people.<sup>25</sup> His interpersonal relationships tend to be psychologically at arm's length rather than close and intimate.<sup>26</sup>

7. The Student began attending Nonpublic School 1 in November 2010 when he was in the ninth grade.<sup>27</sup> Nonpublic School 1 primarily serves students with specific learning disabilities.<sup>28</sup> Each of the classes at Nonpublic School 1 has between five and six students.<sup>29</sup> The focus of the school is to prepare students to earn a diploma and attend

---

<sup>11</sup> *Id.*

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

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

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

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

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

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

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

<sup>19</sup> *Id.*

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

<sup>21</sup> Petitioner Exhibit 13 at 17.

<sup>22</sup> *Id.*

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

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

<sup>25</sup> *Id.* at 18.

<sup>26</sup> *Id.*

<sup>27</sup> Testimony of Expert, Student.

<sup>28</sup> Testimony of Director.

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

college.<sup>30</sup> It provides its students support and preparation for college entrance exams, such as the Scholastic Aptitude Test, and takes them on tours of out of state schools.<sup>31</sup>

8. During his first few months at Nonpublic School 1, the Student received counseling support from the Expert, a psychologist at Nonpublic School 1, in addition to his regular counseling hours with the school psychologist.<sup>32</sup> The Expert provided counseling to the Student every day because he was suffering from the emotional trauma he experienced at his former school.<sup>33</sup> He had problems concentrating on his assignments, he shut down, put his head on his desk, and said he couldn't do the work.<sup>34</sup> He sat by himself, would not talk to other students, and would not participate in school activities.<sup>35</sup> As his anxiety rose, he began sweating profusely.<sup>36</sup>

9. It took from six to eight months for the Student to build a therapeutic relationship with the Expert.<sup>37</sup> The Expert worked with the Student on his communication skills as well as techniques to diffuse his emotions and become calm.<sup>38</sup> The Expert often worked with him three or four times a day.<sup>39</sup> The Expert also taught the Student's teachers how to work with the Student and build his self-esteem.<sup>40</sup>

10. By July 2011, the time the Expert spent with the Student on critical incidents and his emotional needs had slowly waned.<sup>41</sup> The Student had developed self-esteem and learned to advocate on his own behalf.<sup>42</sup> His grades also increased.<sup>43</sup> As a result of this progress, the Student's academic skills began to approach grade equivalency.<sup>44</sup>

11. The Student was stable until January 2012, when DCPS issued a prior written notice that indicated that he would be placed in a self-contained classroom within a general education senior high school.<sup>45</sup> The Student regressed and his self-esteem plummeted.<sup>46</sup>

---

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

<sup>31</sup> *Id.*

<sup>32</sup> Testimony of Expert.

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

<sup>34</sup> *Id.*

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

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

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

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

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

<sup>40</sup> *Id.*

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

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

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

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

<sup>45</sup> *Id.*; Petitioner Exhibit 12 at 94.

<sup>46</sup> Testimony of Expert.

12. In January 2012, the Student again began receiving counseling from the Expert twice a week in addition to his twice-weekly sessions with the school social worker.<sup>47</sup> The prospect of changing schools has made the Student very anxious and the Expert worked to defuse his anxiety and redirect him.<sup>48</sup> She has taught him strategies to deal with the events that trigger his anxiety so that he can continue to progress emotionally and academically.<sup>49</sup>

13. Through this intense support, the Student's grades have improved during the time he has been attending Nonpublic School 1.<sup>50</sup> Since the end of his ninth-grade year, he has increased his grade point average from 3.14 at the end of the 2011-2012 school year to 3.42 in the first advisory of the 2012-2013 school year.<sup>51</sup> The B grade he earned in mathematics, both at the end of the 2011-2012 school year and in the first advisory of the 2012-2013 school year, is the highest grade he has ever earned in this subject.<sup>52</sup>

14. During his two years at Nonpublic School 1, the Student has overcome his shyness.<sup>53</sup> His anxiety has decreased, he has settled into the school routine, and he has made friends with other students.<sup>54</sup> Due to his improved ability to remain in class, listen to his teachers, and interact with other students, his social worker has reduced his counseling services.<sup>55</sup> He also participates in after-school activities.<sup>56</sup>

15. The Student is on track to earn a high school diploma by the end of the 2013-2014 school year.<sup>57</sup> The Student is confident about his academics and his future.<sup>58</sup> He plans to attend college in Georgia and pursue studies in animation, media, and drawing.<sup>59</sup>

#### ***The May 21, 2012, IEP Team Meeting***

16. On May 21, 2012, Respondent convened an IEP team meeting to review the Student's IEP and discuss the school he would attend during the 2012-2013 school year.<sup>60</sup> Petitioner attended the meeting, accompanied by her educational advocate.<sup>61</sup> The Expert

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; testimony of Student.

<sup>51</sup> Testimony of Student.

<sup>52</sup> *Id.*; Petitioner Exhibit 6 at 58 (July 30, 2012, Fourth Advisory Report Card); Petitioner Exhibit 8 at 62 (December 14, 2012, First Advisory Report Card).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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

<sup>56</sup> Testimony of Petitioner.

<sup>57</sup> *Id.*

<sup>58</sup> Testimony of Student.

<sup>59</sup> *Id.*

<sup>60</sup> Respondent Exhibit 3 at 1 (May 21, 2012, MDT Meeting Notes).

<sup>61</sup> *Id.*

attended the meeting, as did a special education teacher and the Nonpublic School 1 head of school.<sup>62</sup> A DCPS compliance case manager and a DCPS nonpublic progress monitor also attended the meeting.<sup>63</sup>

17. During the May 21, 2012, meeting, the IEP team discussed the Student's progress on his IEP goals, including his transition goals.<sup>64</sup> The IEP team also reviewed the Student's social and emotional functioning.<sup>65</sup> The Expert explained that the Student's areas of weakness were his emotional instability, lack of trust, anxiety, and perspiration problems.<sup>66</sup> The Expert reported that the Student was achieving all of his social emotional goals.<sup>67</sup>

18. At the May 21, 2012, IEP meeting, the IEP team discussed the possibility of reducing the Student's speech and language therapy services so that the Student's behavioral support services could be increased from thirty minutes per week to sixty minutes per week.<sup>68</sup> The team also agreed to increase the Student's specialized instruction from twenty-five hours per week to twenty-five and a half hours per week.<sup>69</sup>

19. The IEP team then drafted an IEP for the Student that includes annual goals in mathematics, reading, written expression, speech and language, and emotional, social, and behavioral development.<sup>70</sup> The IEP team did not update the Student's transition plan.<sup>71</sup>

20. Despite the agreement of the IEP team to increase the Student's hours of specialized instruction to 25.5 hours per week, the May 21, 2012, IEP provides that the Student is to receive twenty-five hours per week of specialized instruction outside the general education environment.<sup>72</sup> The IEP further provides that the Student is to receive sixty minutes per week of speech and language pathology and thirty minutes per week of behavioral support services.<sup>73</sup>

21. The DCPS compliance case manager then informed the IEP team that DCPS planned to place the Student in Nonpublic School 2 for the 2012-2013 school year.<sup>74</sup> The compliance case manager explained that DCPS decided to change the Student's school

---

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1-2.

<sup>65</sup> *Id.* at 2.

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

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

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

<sup>70</sup> Petitioner Exhibit 2 at 28-33 (May 21, 2012, IEP).

<sup>71</sup> *Id.* at 39-42 (indicating that the Student's transition goals were in effect from December 20, 2011, through December 20, 2012).

<sup>72</sup> *Id.* at 34.

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

<sup>74</sup> Respondent Exhibit 3 at 3.

because the teachers at Nonpublic School 1 do not have certifications in special education.<sup>75</sup> She further explained that the teachers at Nonpublic School 2 possess all the necessary teaching certifications.<sup>76</sup>

22. At the May 21, 2012, meeting, Petitioner expressed disagreement with the DCPS decision to place the Student in Nonpublic School 2 for the 2012-2013 school year.<sup>77</sup> Petitioner expressed concern about the fact that the Student had changed schools too many times.<sup>78</sup> She explained that the Student becomes anxious when he has to face change.<sup>79</sup> She questioned why Respondent intended to place the Student in another school when he was doing well at Nonpublic School 1.<sup>80</sup> The DCPS progress monitor explained that DCPS had determined that Nonpublic School 1 could not implement the Student's IEP because its teachers were not fully certified.<sup>81</sup>

23. At the end of the May 21, 2012, meeting, the DCPS progress monitor issued a prior written notice ("PWN").<sup>82</sup> In the PWN, the progress monitor indicated that Respondent decided to change the Student's location of services from Nonpublic School 1 to Nonpublic School 2 for the 2012-2013 school year because Nonpublic School 1 did not have certified special education teachers.<sup>83</sup> Petitioner understood that, by issuing the PWN to Nonpublic School 2, Respondent had informed her that, if the Student remained at Nonpublic School 1 for the 2012-2013 school year, she would be responsible for his tuition costs.<sup>84</sup>

24. Respondent issued the May 21, 2012, PWN before Nonpublic School 2 had accepted the Student for admission into its student body.<sup>85</sup> Even though Petitioner and the Student have not visited Nonpublic School 2 since 2010, following the March 21, 2012, meeting, the Nonpublic School 2 accepted the Student for the 2012-2013 school year.<sup>86</sup>

25. In May 2012, none of the Student's teachers at Nonpublic School 1 were dually certified in special education as well as a content area.<sup>87</sup> However, by the time of the due process hearing, the Student's English teacher at Nonpublic School 1 was dually

---

<sup>75</sup> *Id.*; testimony of Petitioner.

<sup>76</sup> Respondent Exhibit 3 at 3.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Petitioner Exhibit 3 at 49 (May 21, 2012, Advocate Notes).

<sup>80</sup> *Id.*

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

<sup>82</sup> Petitioner Exhibit 4 at 52-53 (May 21, 2012, Prior Written Notice).

<sup>83</sup> *Id.* at 52.

<sup>84</sup> Testimony of Petitioner.

<sup>85</sup> Testimony of Admissions Director.

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

<sup>87</sup> Testimony of Director.

certified in English and special education.<sup>88</sup> She received her special education certification and English endorsement in August 2012.<sup>89</sup>

26. The Student's teacher for world history and United States government at Nonpublic School 1 also has certifications in social studies and in special education.<sup>90</sup> She received her certification in special education in 2009.<sup>91</sup> She received her social studies teaching endorsement in August 2012.<sup>92</sup>

27. The Student's teacher for business management at Nonpublic School 1, however, has only a transitional certification in health and physical education.<sup>93</sup> Transitional certifications are issued to teachers who are still taking courses to qualify for a full certification.<sup>94</sup> The business management teacher received this certification in December 2012.<sup>95</sup> He does not have a certification in special education.<sup>96</sup>

28. The Student's geometry teacher at Nonpublic School 1 is certified in special education in Maryland.<sup>97</sup> She does not have a special education certificate or teaching endorsement in mathematics from the District of Columbia.<sup>98</sup>

29. The Student's earth science teacher at Nonpublic School 1 is certified only as a substitute teacher in the District of Columbia.<sup>99</sup> While she holds certificates to teach special education in New Jersey and Virginia, she does not possess a District of Columbia certificate in special education.<sup>100</sup> She also does not possess a content endorsement in the District of Columbia.<sup>101</sup>

---

<sup>88</sup> *Id.*

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

<sup>90</sup> *Id.*; Petitioner Exhibit 7 at 60 (Student Schedule, First Semester 2012-2013 School Year); Petitioner Exhibit 11 at 84 (August 1, 2012, English Endorsement), 85 (August 1, 2012, Non-categorical Special Education Certification).

<sup>91</sup> Testimony of Director; Petitioner Exhibit 7 at 60; Petitioner Exhibit 11 at 82 (February 4, 2009, Non-categorical Special Education Certificate).

<sup>92</sup> Petitioner Exhibit 11 at 81 (August 29, 2012, Social Studies Endorsement).

<sup>93</sup> Testimony of Director; Petitioner Exhibit 7 at 60; Petitioner Exhibit 11 at 80 (December 5, 2012, Health and Physical Education Transitional Teacher certificate).

<sup>94</sup> Testimony of Director.

<sup>95</sup> Petitioner Exhibit 11 at 80.

<sup>96</sup> Testimony of Director.

<sup>97</sup> *Id.*; Petitioner Exhibit 7 at 60; Petitioner Exhibit 11 at 86 (January 1, 2012, Maryland Educator Certificate).

<sup>98</sup> Testimony of Director.

<sup>99</sup> *Id.*; Petitioner Exhibit 7 at 60; Petitioner Exhibit 11 at 87 (August 27, 2012, Regular Substitute Certification).

<sup>100</sup> Testimony of Director.

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

## ***Nonpublic School 2***

30. Petitioner visited Nonpublic School 2 in 2010 when she was investigating schools for the Student.<sup>102</sup> As a result of this visit, she developed the opinion that Nonpublic School 2 has a good academic curriculum.<sup>103</sup> The Student also believes that Nonpublic School 2 will implement his IEP and help him achieve his goals.<sup>104</sup>

31. The Office of State Superintendent of Education (“OSSE”) has issued a certificate of approval (“COA”) to Nonpublic School 1.<sup>105</sup> Nonpublic School 2 also possesses an OSSE COA.<sup>106</sup> All of the teachers at Nonpublic School 2 are dually certified in special education and one or more content areas.<sup>107</sup> Thus, Nonpublic School 2 could implement the Student’s May 21, 2012, IEP.<sup>108</sup>

32. At Nonpublic School 2, the Student would be placed in special education classes of no more than eight students.<sup>109</sup> Many of the classes are staffed with two teachers, teachers’ assistants, and only three or four students.<sup>110</sup> All of the Student’s core academic courses would have no more than four students.<sup>111</sup> Thus, the student-teacher ratio at Nonpublic School 2 does not exceed four to one.<sup>112</sup>

33. District of Columbia students at Nonpublic School 2 may earn District of Columbia high school diplomas.<sup>113</sup>

34. Because Nonpublic School 2 is a therapeutic day school, each student is assigned a social worker.<sup>114</sup> The social workers provide students behavioral support services in a one-to-one setting as required by their IEPs.<sup>115</sup> The social workers also are

---

<sup>102</sup> Testimony of Petitioner.

<sup>103</sup> Testimony of Petitioner.

<sup>104</sup> Testimony of Student.

<sup>105</sup> Testimony of Student.

<sup>106</sup> Testimony of Admissions Director.

<sup>107</sup> *Id.*

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

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

<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

<sup>115</sup> *Id.*

available throughout the day to students who need additional support or are in crisis.<sup>116</sup> All male students participate in a weekly men's group therapy session.<sup>117</sup>

35. During their senior year of high school, students at Nonpublic School 2 participate in a college summit class.<sup>118</sup> This class gives students an idea of what they should expect when they attend college.<sup>119</sup> The students learn about the importance of balancing campus life with their studies, campus clubs and organizations, and how to self advocate, including by informing their professors that they were eligible for special education and had IEPs before attending college.<sup>120</sup> The college summit also has guest speakers who talk to the students about college life.<sup>121</sup>

36. During the summer before their senior year, students at Nonpublic School 2 participate in a three-day, on-campus event.<sup>122</sup> The students visit a local university, where they stay in the dormitories with a college student and shadow the college student for three days.<sup>123</sup> Nonpublic School 2 also organizes college tours for students to visit colleges and universities.<sup>124</sup>

37. The Student is experiencing tremendous anxiety due to the prospect of having to leave Nonpublic School 1 and attend Nonpublic School 2.<sup>125</sup> This anxiety is reflected in the Student's emotional regression.<sup>126</sup> Forcing him to start over in a new environment would be harmful to him emotionally, which would impede his ability to access the educational curriculum.<sup>127</sup> He also would lose self-esteem.<sup>128</sup>

### ***Credibility Determinations***

38. Petitioner provided credible testimony. She testified forthrightly about the Student's academic struggles and emotional instability. She also testified in detail about her visit to Nonpublic School 2 and her belief that it would be able to implement the Student's IEP. She also testified in detail about the May 21, 2012, IEP meeting. The documentary evidence in the record as well as the testimony of the other witnesses corroborated her testimony about this meeting.

---

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

<sup>117</sup> *Id.* All female students also participate in a weekly young women's group therapy session. *Id.*

<sup>118</sup> *Id.*

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

<sup>120</sup> *Id.*

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

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

<sup>123</sup> *Id.*

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

<sup>125</sup> Testimony of Expert.

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.*

39. The only area in which this Hearing Officer finds that Petitioner did not provide credible testimony was her testimony that students with emotional disturbance (“ED”), including a relative of the Student, enrolled in a segregated program at Nonpublic School 2, would mingle with the students in the program for children with specific learning disabilities in which the Student would be placed. The testimony of the Admissions Director contradicted Petitioner’s testimony and established that the ED students have a separate entrance and do not interact with the other students except during graduation ceremonies and the school prom.

40. The Student provided credible testimony. He was circumspect about his emotional difficulties and anxiety, as well as the academic and social emotional progress he has made at Nonpublic School 2. He also provided in-depth testimony about his academic goals and his plans for college. The Student’s testimony was corroborated by the documentary evidence and testimony of the other witnesses.

41. The Expert provided credible and compelling testimony about the Student’s emotional difficulties, especially the sources and manifestations of his anxiety. She testified in depth and with precision about the effect of his anxiety on his academic performance and the progress he had made at Nonpublic School 2. She also testified credible about how his anxiety about starting over at a new school would prevent him from accessing the curriculum. Respondent presented no testimony or documentary evidence to rebut or otherwise undermine the testimony of the Expert.

42. The Director provided credible testimony about Petitioner’s academic needs, and her recollections of the discussion at the May 21, 2012, meeting. She was forthright about the certifications held by the teachers at Nonpublic School 1, including that many of the teachers either lacked certifications in special education or a content-area endorsement. Her testimony was generally corroborated by the documents in evidence and the other witnesses who testified at the due process hearing.

43. The Admissions Director testified credibly about the curriculum, class sizes, and therapeutic supports for students at Nonpublic School 2. She also testified credibly about the process by which Respondent made its decision to place the Student at Nonpublic School 3, including that the school had not yet admitted the Student when the decision was made. Her testimony was uncontroverted by any of the other witnesses who testified.

## **V. CONCLUSIONS OF LAW**

The purpose of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”<sup>129</sup> Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is

---

<sup>129</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).

provided be sufficient to confer some educational benefit upon the handicapped child.<sup>130</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 appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP).”<sup>131</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>132</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.<sup>133</sup>

The burden of proof is properly placed upon the party seeking relief.<sup>134</sup> Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>135</sup>

## VI. DISCUSSION

### A. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Unilaterally Changing his Placement for the 2012-2013 School Year.

The term “educational placement” refers to the type of educational program prescribed by the IEP.<sup>136</sup> “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.<sup>137</sup>

Placement decisions must be made in conformity with the child’s IEP.<sup>138</sup> The decision to place a student before developing an IEP on which to base that placement

---

<sup>130</sup> *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

<sup>131</sup> 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

<sup>132</sup> 34 C.F.R. § 300.513 (a)(2).

<sup>133</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

<sup>134</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>135</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>136</sup> *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

<sup>137</sup> *Id.*

<sup>138</sup> 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Reg. tit. 5-E § 3013 (2006); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988).

violates the IDEA regulations.<sup>139</sup> It also violates the spirit and intent of IDEA, which emphasizes parental involvement.<sup>140</sup> After the fact involvement is not enough.<sup>141</sup> Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.<sup>142</sup>

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.<sup>143</sup>

The question of what constitutes a change in educational placement is, necessarily, fact specific and thus, "in determining whether a given modification in a child's school day should be considered a 'change in educational placement,'" the "touchstone" is whether the modification "is likely to affect in some significant way the child's learning experience."<sup>144</sup> In determining whether a "change in educational placement" has occurred, the LEA must determine whether the proposed change would substantially or materially alter the child's educational program.<sup>145</sup>

In determining whether the proposed change would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.<sup>146</sup> In other words, if the proposed change substantially or materially affects the composition of the educational program and services provided the student, it is a change in placement.<sup>147</sup>

In contrast, a simple change in location is limited to the physical characteristics associated with a particular site. A transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location

---

<sup>139</sup> *Spielberg*, 853 F.2d at 258.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

<sup>143</sup> *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202). *See also* D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).

<sup>144</sup> *J.R. v. Mars Area Sch. Dist.*, 318 Fed. Appx. 113, 119 (3d Cir. Pa. 2009).

<sup>145</sup> *Letter to ██████*, 21 IDELR 992 (Office of State Education Programs ("OSEP"), July 6, 1994).

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

<sup>147</sup> *Letter to ██████*, 21 IDELR 233 (OSEP Aug. 18, 1980); *Letter to ██████*, 21 IDELR 992.

only.<sup>148</sup> Simple changes in the location of a building or facility are not generally viewed as a change in placement if there are no significant changes in the educational program.<sup>149</sup>

Here, Respondent followed the procedural requirements of the IDEA in first developing the Student's IEP before discussing his placement for the 2012-2013 school year. At the May 21, 2012, IEP meeting, the IEP team made no changes to hours of services on the Student's IEP, or the setting in which the IEP would be implemented. While the IEP team discussed removing the Student's speech and language services, and increasing the hours of specialized instruction and behavioral support services by half an hour each, these changes were not implemented in the IEP. In other words, the services dictated by the IEP were not changed at the May 21, 2012, meeting.

Nor did Respondent change the Student's placement at the May 21, 2012, IEP meeting. Pursuant to his May 21, 2012, IEP, the Student would continue to be entitled to receive twenty-five hours of specialized instruction, one hour of speech and language therapy, and one hour of behavioral support services each week. The May 21, 2012, IEP provided that the Student would continue to receive all of these services outside the general education setting. Even though Respondent decided to change the location in which the Student's May 21, 2012, IEP would be implemented, the Student would continue to spend his entire day outside the general education setting in a nonpublic, special education day school.

Thus, Respondent's proposal to place the Student in Nonpublic School 2 was a change in location, not a change in placement. The two schools are substantially identical, with small classes, low student-teacher ratios, therapeutic supports, and a focus on preparing students for post-secondary education. The students in both schools have similar disability classifications. Additionally Nonpublic School 2 can implement the Student's May 21, 2012, IEP as well, or more effectively, than Nonpublic School 1.

Moreover, Respondent was justified in changing the Student's location of services. In May 2012, none of the Student's teachers at Nonpublic School 1 were dually certified in special education as well as a content area. Thus, Respondent had legitimate concerns about the quality of instruction the Student received at Nonpublic School 1. The quality of instruction the Student receives while in high school is especially important considering that the Student plans to attend college following high school.

This Hearing Officer finds that Petitioner's concerns are legitimate, especially about the effect on the Student of his numerous changes in schools, and the difficulty he may have

---

<sup>148</sup> See, e.g., *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1980).

<sup>149</sup> *Letter to Flores*, 211 IDELR 233. See also *A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.)

adjusting to yet another school. However, in the long run, this Hearing Officer believes the Student will be better served at Nonpublic School 2, not least because its teachers are properly qualified to teach the subjects the Student requires to graduate. Considering that only two of the Student's five teachers at Nonpublic School 1 are qualified to teach DCPS-funded students,<sup>150</sup> the harm the Student will suffer from having to start over in a new environment will be outweighed by the higher quality instruction he is likely to receive there.<sup>151</sup>

All of the teachers at Nonpublic School 2 are dually certified in special education and a content area. Additionally, Nonpublic School 2 provides its seniors an opportunity to learn about what will be expected of them when they attend a four-year college or university. Through Nonpublic School's college summit class, students learn about the importance of balancing campus life with their studies, campus clubs and organizations, and how to self advocate, including by informing their professors that they were eligible for special education and had IEPs before attending college. The college summit class also offers guest lectures about college life.

During the summer before their senior year, students at Nonpublic School 2 participate in a three-day, on-campus event. The students visit a local university, where they stay in the dormitories with a college student and shadow the college student for three days. Nonpublic School 2 also organizes college tours for students to visit colleges and universities.

The college preparatory courses and activities that Nonpublic School 2 offers are of vital importance for the Student considering his anxiety and difficulty transitioning to new environments. While the Student will initially have difficulty transitioning to Nonpublic School 2, the benefits he will receive there are critical to his success in his post-secondary education. Additionally, Nonpublic School 2 offers therapeutic supports similar to those offered by Nonpublic School 1. At Nonpublic School 2, social workers will be available to assist the Student whenever he experiences anxiety or difficulty coping in his new environment.

Finally, Petitioner asserted that the Student would be harmed by having to change schools in the middle of the school year and shortly before he begins his last year in high school. There is no dispute that avoiding such mid-year transfers is a desirable goal.<sup>152</sup>

---

<sup>150</sup> Of particular concern is the Student's science teacher is qualified only as a substitute teacher.

<sup>151</sup> Hopefully, the extensive therapy the Expert provided the Student, and the strategies he learned to reduce his anxiety, will serve to smooth his transition.

<sup>152</sup> See *Block v. District of Columbia*, 748 F. Supp. 891, 895-96 (D.D.C. 1990) (stating that, "while a school may be appropriate for a student if he begins the school year there, it is not necessarily appropriate to inject the student into that school part-way through the school year") (citing *Holmes v. District of Columbia*, 680 F. Supp. 40, 41-42 (D.D.C. 1988)). See also *Burger v. Murray County School Dist.*, 612 F. Supp. 434, 437 (N.D. Ga. 1984) (stating that "[o]bvious

However, Respondent tried to avoid this possibility by holding the IEP meeting and issuing the PWN in May 2012, four months before the start of the 2012-2013 school year.

While Petitioner has two years in which to file a due process complaint, it would have been advisable for her to act quickly so that these issues could have been resolved prior to the start of the 2012-2013 school year.<sup>153</sup> This would have benefited the Student by eliminating the uncertainty that has increased his anxiety during the first half of the 2012-2013 school year.

Instead, Petitioner waited seven months before filing the due process complaint.<sup>154</sup> This resulted in the Student's mid-year transfer to Nonpublic School 2. Any harm that the Student experiences from a mid-year transfer to a new school is solely the result of Petitioner's delay in filing the due process complaint, not Respondent's May 2012 decision to change his location of services.

**B. Petitioner Failed to Prove that Respondent Denied Her the Opportunity to Participate in the Decisionmaking Process Regarding the Student's Placement for the 2012-2013 School Year.**

In enacting IDEA, "Congress sought to protect individual children by providing for parental involvement in . . . the formulation of the child's individual educational program."<sup>155</sup> The statute's emphasis on the full participation of parent(s) in the IEP process demonstrates that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."<sup>156</sup>

IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.<sup>157</sup> One of the important policies underlying the need for an accurate written IEP is "to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child's progress and determine if any change to the program is necessary."<sup>158</sup>

---

advantages inhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to a [disabled] child.").

<sup>153</sup> Had Petitioner filed the complaint within thirty days of the May 21, 2012, meeting, the issue of which school the Student would attend would have been resolved before the start of 2012-2013 school year.

<sup>154</sup> The record in this case provides no basis for this Hearing Officer to find that Respondent is even partly responsible for this delay.

<sup>155</sup> *Rowley*, 458 U.S. at 208.

<sup>156</sup> *Hinson v. Merritt Educational Ctr.*, 579 F. Supp. 2d 89, 102 (D.D.C. 2008) (citing *Rowley*, 458 U.S. at 206).

<sup>157</sup> 34 C.F.R. § 300.327; D.C. Mun. Reg. tit. 5-E § 3013.

<sup>158</sup> *Alfano v. District of Columbia*, 442 F. Supp. 2d 1, 6 (D.D.C. 2006) (citing *Mewborn v. Dist. Of Columbia*, 360 F. Supp. 2d 138, 143 (D.D.C. 2005)).

Thus, DCPS must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.<sup>159</sup> Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").<sup>160</sup>

Before a local education agency ("LEA") proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, it must provide prior written notice to the parent of a child with a disability.<sup>161</sup> This notice shall include a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal.<sup>162</sup>

While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection.<sup>163</sup> The term "placement" does not mean a particular school, but a setting, such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction.<sup>164</sup> Moreover, the provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such technical details as the projected date for the beginning of services, their anticipated frequency, and their duration.<sup>165</sup>

Here, Petitioner attended the May 21, 2012, IEP team meeting and was a member of the IEP team. She provided her perspective, both on the location of services, i.e., Nonpublic School 2, and how the change in location would affect the Student. She raised no issue, and presented no testimony, on the content of the Student's IEP or his placement, i.e. the hours of specialized instruction and related services that the IEP provides or the setting in which it specifies these special education services are to be provided. Hence, it appears that the issue Petitioner raises does not concern the content of the IEP or the Student's placement .

Rather, it appears that the issue Petitioner raises concerns Respondent's decision to place the Student at Nonpublic School 2 for the 2012-2013 school year. However,

---

<sup>159</sup> 34 C.F.R. § 300.501 (c)(1).

<sup>160</sup> *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

<sup>161</sup> 34 C.F.R. § 300.503 (a). *See also Letter to Lieberman*, 52 IDELR 18 (August 15, 2008) (proposal to change the type, amount, or location of the special education and related services being provided to a child, would trigger the notice requirements of 34 C.F.R. § 300.503).

<sup>162</sup> 34 C.F.R. § 300.503 (b); D.C. Mun. Reg. tit. 5-E § 3025.

<sup>163</sup> *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) (stating that the term "educational placement," as used in the IDEA, means educational program, not the particular institution where that program is implemented)(citations omitted).

<sup>164</sup> *Id.* at 380.

<sup>165</sup> *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(vi)).

Respondent decision to issue the PWN to Nonpublic School 2 does not, in itself, show that Respondent predetermined the Student's placement.<sup>166</sup> Petitioner failed to present any evidence that Respondent excluded Petitioner from the discussion or refused to listen to or consider the Petitioner's input.<sup>167</sup>

Finally, under the IDEA, the right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.<sup>168</sup> In other words, IDEA does not grant parents a veto power over the site selection decisions of IEP teams.<sup>169</sup>

For these reasons, this Hearing Officer finds that Respondent met IDEA requirements with respect to parental input in the May 21, 2012, meeting. Thus, Petitioner failed to prove that Respondent denied her the opportunity to participate in the decisionmaking process regarding the Student's placement for the 2012-2013 school year.

### **ORDER**

Based upon the findings of fact and conclusions of law herein, it is this fifth day of February 2013 hereby:

**ORDERED** that this case is dismissed with prejudice.

By: /s/ Frances Raskin  
Frances Raskin  
Hearing Officer

### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

Distributed to:  
Counsel for Petitioners  
Counsel for Respondent  
Student Hearing Office

---

<sup>166</sup> *N.L. vs. Knox County Schs.*, 315 F.3d 688, 694 (6th Cir. 2003).

<sup>167</sup> *See White*, 343 F.3d at 380.

<sup>168</sup> *See, e.g., Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir. 1999) (where no "serious hampering" of parent's opportunity to participate in the formulation process, IDEA requirement of meaningful parental input satisfied notwithstanding that parent's desired program not selected).

<sup>169</sup> *White*, 343 F.3d at 380.