DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

Parent, on behalf of STUDENT,[1]	)	Case Number:
Petitioner,	)	Hearing Dates: June 15, 2011, Room 2008 August 1, 2011, Room 2006
v.	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	Hearing Officer: Frances Raskin

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of a -year-old student ("Student") with a disability who attends a non-public residential school in Massachusetts ("RTC-2"). On April 22, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

This Hearing Officer was appointed to preside over this case on April 26, 2011. Respondent DCPS filed a response to the Complaint ("Response") on May 3, 2011.[2] Respondent DCPS filed its Response two days after the deadline established by IDEA.[3]

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

On May 6, 2011, DCPS waived the resolution meeting. On May 11, 2011, this Hearing Officer held a prehearing conference in which Charles Moran, counsel for Petitioner, and Harsharen Bhuller, counsel for Respondent, participated. The prehearing conference continued to May 17, 2011, so that Respondent could provide additional information regarding its position on the claims raised in the Complaint.[4] During the prehearing conference, counsel agreed that the forty-five day, due process hearing timeline began on May 7, 2011.

During the prehearing conference on May 6, 2011, the parties agreed to schedule the due process hearing for June 6, 2011. However, during the prehearing conference on May 11, 2011, the parties informed this Hearing Officer that they agreed to hold an IEP meeting in an attempt to resolve some of the claims in the Complaint. The parties requested additional time in which to hold the due process hearing so that they could hold the meeting prior to the hearing. The parties agreed that the due process hearing would be rescheduled for June 15, 2011, and June 16, 2011.[5]

On May 18, 2011, this Hearing Officer issued a Prehearing Conference Summary and Order. In the prehearing order, 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 develop an individualized educational program for him since the end of the 2009-2010 school year;

B. Whether Respondent denied the Student a FAPE by failing to provide the Student an appropriate placement and location of services from the end of the 2009-2010 school year through the date that Petitioner unilaterally placed the Student at RTC-2; and

C. Whether Petitioner's unilateral placement of the Student at RTC-2 was appropriate.

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[3] 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. 34 C.F.R. § 300.508(e). During the prehearing conference, counsel for Petitioner asserted that Petitioner was not prejudiced by the failure of Respondent to file a timely response.

[4] The prehearing conference began on May 11, 2011, but was continued to May 17, 2011, because counsel for Respondent requested additional time to provide responses to the questions posed by counsel for Petitioner and this Hearing Officer, including the dates on which Respondent would be available for an individualized educational program ("IEP") team meeting, and whether Respondent had access to the Student's educational records from the time he spent at a residential treatment facility in Washington, D.C. ("RTC-1"). During the prehearing conference on May 17, 2011, counsel for Respondent stated that she had been unable to obtain this information.

[5] On May 11, 2011, counsel for Petitioner filed a motion seeking a six-day continuance. On June 7, 2011, this Hearing Officer issued an order granting the motion.

The due process hearing commenced at 11:00 a.m. on June 15, 2011. At the outset of the hearing, in the absence of any objections, this Hearing Officer entered the parties' respective five-day disclosures into evidence.[6] Before the parties provided opening statements, counsel for Respondent informed opposing counsel and this Hearing Officer that Respondent had agreed that the Student should be placed in a residential treatment facility. Counsel for Respondent offered to place the Student in one of four facilities, all of which are outside the District of Columbia, if any of these facilities accept the Student for admission into its program.[7] Petitioner then requested a sixty-day continuance to allow her to visit these facilities, complete the application process, and determine if any of the facilities would be able to meet the Student's needs. After discussing the continuance with this Hearing Officer, the parties agreed that the continued due process hearing would take place on July 28, 2011, and August 1, 2011.[8]

On July 28, 2011, the due process hearing did not proceed due to a power outage that affected the Student Hearing Office.[9]

The due process hearing convened on August 1, 2011. At the outset of the hearing, counsel for Petitioner informed this Hearing Officer that the parties had resolved Petitioner's claim regarding the failure of Respondent to develop an IEP for the Student since the end of the 2009-2010 school year.[10] Counsel for Petitioner agreed that the only issues remaining for adjudication were (a) whether Respondent denied the Student a FAPE by failing to provide the Student an appropriate placement and location of services from the end of the 2009-2010 school year, and (b) whether Petitioner's unilateral placement of the Student RTC-2 was appropriate.

This Hearing Officer then admitted into evidence the parties' respective five-day disclosures, which the parties had supplemented on July 26, 2011.[11] Without objection, this Hearing Officer entered into evidence Petitioner's exhibits 1-24. Without objection, this Hearing Officer entered into evidence Respondent's exhibits 1-20 and 22-28.[12]

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[6] This Hearing Officer entered into evidence Petitioner's exhibit 1-15 and Respondent's exhibits 1-11.

[7] DCPS offered to place the Student in the following residential treatment facilities: VA; VA; and the Pennsylvania.

[8] On June 21, 2011, counsel for Petitioner filed a motion for a forty-two day continuance. On June 26, 2011, the Chief Hearing Officer issued an order granting this continuance.

[9] The Student Hearing Office was closed after an electrical outage rendered the building's elevators inoperable.

[10] Counsel for Petitioner stated that, on July 14, 2011, DCPS and counsel for Petitioner had developed an IEP. Counsel for Petitioner stated that Petitioner was satisfied with this IEP. Counsel for Petitioner further stated that DCPS had agreed to fund compensatory education for the Student. In her supplemental disclosures, Petitioner disclosed this IEP as exhibit 24.

[11] Although the five-day disclosure deadline was July 25, 2011, the parties agreed to exchange the supplemental disclosures on July 28, 2011.

[12] Respondent did not disclose any document marked as exhibit 21.

The parties then informed this Hearing Officer that they had agreed to several stipulations of fact, which they read into the record.[13] After the parties provided opening statements, Petitioner testified and called three witnesses, her educational advocate, the director of referrals and recruitment for RTC-2, and a consultant to RTC-2. Respondent presented two witnesses, a DCPS placement specialist and a DCPS program manager. After the parties presented oral closing arguments, the due process hearing concluded on August 1, 2011.

IV. ISSUES PRESENTED

A. Whether Respondent denied the Student a FAPE by failing to provide the Student an appropriate placement and location of services from the end of the 2009-2010 school year through the date that Petitioner unilaterally placed the Student at RTC-2; and

B. Whether Petitioner's unilateral placement of the Student RTC-2 was appropriate.

Petitioner seeks relief in the form of an order requiring DCPS to reimburse her for the costs of the Student's enrollment at RTC-1 after she unilaterally placed him at RTC-1 on March 25, 2011. Petitioner also requests that this Hearing Officer order Respondent to fund the Student's enrollment at the RTC-1 for the 2011-2012 school year.

V. FINDINGS OF FACT

1. The Student's full-scale IQ is 64, which is in the extremely low range of intellectual functioning.[14] His verbal reasoning abilities are in the borderline range.[15] His nonverbal reasoning abilities also are in the borderline range.[16] The Student's working memory is in the low average range.[17] His processing speed is in the extremely low range.[18] He also exhibits a low range of functioning in hand-eye coordination.[19]

2. In word reading, the Student performs in the extremely low range.[20] He performs in the borderline range in sentence comprehension, spelling, and math.[21] He is performing below grade level in reading and math computation.[22]

3. The Student exhibits a high level of maladjustment.[23] He appears to be socially and

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[13] These stipulations are reflected in the findings of fact, below.
[14] Petitioner Exhibit 5 at 3 (August 10, 2010, Report of Neuropsychological Evaluation). This indicates that the Student meets the criteria for mild mental retardation. Petitioner Exhibit 6 at 8, 9 (December 22, 2010, Report of Neuropsychological Evaluation).
[15] *Id.*
[16] *Id.* at 4.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 5.
[21] *Id.*
[22] *Id.* at 8.
[23] *Id.* at 7.

emotionally delayed.[24] He exhibits clinically significant hyperactivity and rule breaking behaviors.[25] He also exhibits behaviors that are considered odd, and he may seem disconnected from his surroundings at times.[26] He has poor expressive and receptive communication skills and has difficulty seeking out and finding information on his own.[27] He also exhibits impaired daily living skills.[28]

4. The Student exhibits at-risk behaviors including aggression, anxiety, depression, withdrawal, attention problems, and lack of leadership skills.[29] Thus, the Student has an adjustment disorder with mixed disturbance of emotion and conduct.[30] However, his extensive history of repeated psychiatric hospitalizations and behavior in school and at home indicate that his emotional disturbance is much more severe than is typical of adjustment disorder and is consistent with a severe form of psychopathology.[31]

5. The Student meets the disability criteria for emotional disturbance.[32] He also meets the disability criteria for other health impairment as a result of his attention deficit hyperactivity disorder ("ADHD").[33]

6. On March 19, 2010, while attending a nonpublic school ("Non-Public School 2"), the police were called after the Student punched another student in the mouth and caused a big commotion with other students.[34] The Student was arrested after he refused to calm down.[35]

7. Due to the severity of his behavioral difficulties, on March 26, 2010 DCPS agreed to move the Student from Non-Public School 2.[36] The Student was failing all of his classes and his behavior was interfering with his learning.[37]

8. In the spring of 2010, the Student threatened family members and peers, punched holes in the walls of his home, and broke the window in his bedroom.[38] In April 2010, the Student was involved in a physical altercation with another student at school and had to be

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 9.
[31] Petitioner Exhibit 6 at 9. Since the Student was years old, he has had ten admissions to the two admissions to , and four admissions to the
[32] Petitioner Exhibit 5 at 8.
[33] *Id.*
[34] Petitioner Exhibit 9 at 26 March 19, 2010, Scruples Corp. Behavior Health Service Notes
[35] *Id.*
[36] Petitioner Exhibit 9 at 25 (March 26, 2010, Scruples Corp. Behavior Health Service Notes).
[37] *Id.*
[38] Petitioner Exhibit 3 at 1 (June 10, 2010, Psychiatric Report); Petitioner Exhibit 9 at 2 (February 23, 2010, Department of Mental Health Major Unusual Incident Follow-Up Report).

restrained.[39] After he returned home, he punched holes in the wall, used profanity toward his mother, and eventually was transported to the [0] In April or May 2010, after returning home from another stay at the police were called after he attacked a family friend.[41] In June 2010, while hospitalized at the Student was involved in physical altercations with other patients.[42]

9. Due to the severity of his disabilities, Student must be educated in a residential treatment facility.[43]

10. On September 8, 2010, Petitioner entered into a settlement agreement with DCPS.[44] In the agreement, DCPS agreed to fund the Student at a nonpublic school ("Non-Public School") on an interim basis until the Student is placed in a residential facility.[45] The Student enrolled in the Non-Public School on or about the last week of September 2010.[46] The Student remained in the Non-Public School for only three days and exhibited violent behavior during this time.[47] The weekend that followed, the Student was again hospitalized at after a violent episode.[48]

11. The Student remained at for about one month.[49] When the Student left he transferred directly to a residential treatment center ("RTC-1") in the District of Columbia.[50] The Student's insurance company paid for his stay in RTC-1.[51] RTC-1 is a short-term setting.[52] RTC-1 was unable to meet the Student's needs.[53] The Student was overmedicated and his personal hygiene was neglected.[54]

12. On November 15, 2010, DCPS convened a meeting of the Student's individualized educational program ("IEP") team.[55] Petitioner and her Advocate attended the meeting.[56] Petitioner's Advocate requested that the IEP team revise the Student's IEP.[57] Although DCPS declined to revise the Student's IEP, the IEP team agreed that the Student should be placed in a

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[39] Petitioner Exhibit 9 at 3 April 27, 2010, Department of Mental Health Major Unusual Incident Follow-Up Report).
[40] *Id.*
[41] Petitioner Exhibit 2 at 1 (May 13, 2010, Psychiatric Report).
[42] Petitioner Exhibit 9 at 18 (June 15, 2010, Scruples Corp. Behavior Health Service Notes).
[43] Stipulation of parties.
[44] Petitioner Exhibit 1 (September 8, 2010, Settlement Agreement).
[45] *Id.* at 2, 4. Stipulation of parties.
[46] Stipulation of parties.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Testimony of Advocate.
[53] *Id.*
[54] Testimony of Petitioner.
[55] Petitioner Exhibit 7 at 2 (November 15, 2010, IEP Meeting Notes).
[56] *Id.*
[57] *Id.*

residential treatment facility that could meet his needs.[58]

13. On February 23, 2011, counsel for Petitioner sent a letter to the DCPS general counsel stating that Petitioner planned to unilaterally enroll the Student in a residential treatment facility in Massachusetts ("RTC-2").[59] The letter stated that, if DCPS did not agree to fund the Student's placement in RTC-2, with transportation, Petitioner planned to place the Student at RTC-2 and file a due process complaint.[60] On March 25, 2011, Petitioner unilaterally enrolled Student at RTC-2.[61]

14. From September 8, 2010, until June 15, 2011, DCPS did not propose or place the Student in a residential treatment facility.[62] On June 15, 2011, DCPS proposed four residential treatment facilities.[63] Three of those facilities have rejected the Student for admission.[64]

15. RTC-2 is a therapeutic, residential facility for students with severe disabilities.[65] Many of these students were unsuccessful in previous settings, including other residential facilities.[66] RTC-2 has twenty-four-hour video monitoring throughout the educational and residential facilities.[67] Each of the teachers and related service providers are licensed by the State of Massachusetts. RTC-2 is capable of implementing the Student's IEP.[68] RTC-2 does not have a Certificate of Authority from the Office of State Superintendant of Education.[69]

16. The Student has adjusted well to his routine at the RTC-2.[70] He came to class ready to work on his assignments.[71] Although he was off-task at times, he completed all assignments on time and to the best of his abilities.[72] The Student participated in an intensive behavior intervention program ("BIP") that includes numerous behavior change targets.[73] He was learning about behavioral self-management strategies and options.[74] He participated in individual and group counseling to further strengthen his socially and emotionally adaptive behavior.[75]

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[58] *Id.*
[59] Petitioner Exhibit 10 at 1 (February 23, 2011, Letter from Charles Moran to Robert Utiger).
[60] *Id.*
[61] Stipulation of Parties.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Testimony of RTC-2 Director.
[66] *Id.*
[67] *Id.*; testimony of Advocate.
[68] *Id.*
[69] Testimony of RTC-2 Director.
[70] Petitioner Exhibit 11 at 2 (June 8, 2011, RTC-2 Initial Clinical/Behavioral Progress Report).
[71] *Id.*
[72] *Id.*
[73] *Id.* at 3.
[74] *Id.*
[75] *Id.*

17. The Student has made progress since his arrival at the RTC-2, including in his relations with his mother and in his personal hygiene.[76] RTC-2 allows parents, including Petitioner, to contact their children at any time of the day.[77] Petitioner talks to the Student on a daily basis.[78] Once a week, she and the Student have a video chat through Skype.[79] The Student likes being at RTC-2.[80]

18. However, the Student has continued to exhibit aggressive behavior.[81] In thirty-nine days, he had forty occurrences of aggression.[82] He exhibited aggressive posturing, verbal threats of aggression, and yelling at a staff member who tried to assist with a behavioral crisis of another student.[83] The Student's intense, aggressive behavior requires twenty-four-hour supervision and highly structured behavioral psychology treatment.[84]

19. If a student's behavioral programming is ineffective to accomplish the student's treatment goals, RTC-2 implements aversive techniques ("aversives").[85] These aversives include a two second application of an electric shock to the surface of the skin, typically on a student's arm or leg.[86] The shock is applied as soon after the occurrence of a problem behavior is as possible.[87] Nineteen percent of the Students at RTC-2 receive aversives.[88] The Student is not receiving aversives.[89]

20. In order to administer these aversives to a student, the student's parent must consent to the treatment.[90] The RTC-2 then must obtain authorization from the Massachusetts Probate Court, which is a state family court.[91] In each such case, the court appoints an attorney for the student.[92] The court holds an adversarial proceeding before determining whether to approve the aversives for a particular student.[93]

21. On July 14, 2011, DCPS developed an IEP for the Student.[94] The IEP provides that

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[76] Testimony of Petitioner.
[77] Testimony of RTC-2 Director.
[78] Testimony of Petitioner.
[79] *Id.*
[80] *Id.*
[81] Petitioner Exhibit 17 at 1 (July 14, 2011, RTC-2 Initial Clinical/Behavioral Progress Report).
[82] *Id.*
[83] *Id.*
[84] *Id.* at 2.
[85] Petitioner Exhibit 22 at 1 (RTC-2 Policy and Procedure on Court-Authorized Supplementary Aversives – Level II and III Interventions).
[86] *Id.*
[87] *Id.*
[88] Testimony of RTC-2 Director.
[89] *Id.*
[90] *Id.* at 2; testimony of director of referrals and recruitment for RTC-2 ("RTC-2 Director").
[91] *Id.*; testimony of RTC-2 Director.
[92] *Id.*
[93] *Id.*
[94] Petitioner Exhibit 24, Respondent Exhibit 28 (July 14, 2011, IEP).

the Student will receive twenty-nine hours per week of specialized instruction, one hour per week each of behavioral support services, speech language pathology, and occupational therapy.[95]

22. The Advocate provided credible testimony at the due process hearing. Her testimony was consistent with the documentary evidence. Further, she has extensive experience in special education, including as an employee of DCPS for 26 years. For 12 of those years, she worked as an educator and worked with ED students. During the last year of her employment with DCPS, she was the principal of a special education school.

23. Petitioner provided credible testimony at the due process hearing. Her testimony was consistent with the documentary evidence and was uncontroverted by any of Respondent's witnesses.

24. The RTC-2 Director provided inconsistently credible testimony. While his testimony about the services that RTC-2 provides was consistent with the documentary evidence and uncontroverted by the DCPS witnesses, it was less credible on other issues not related to this case.[96]

25. This Hearing Officer finds that the consultant to RTC-2 was not credible. He cited no studies or other scientific evidence to support his assertion that students benefit from observing other students being subjected to aversives. Additionally, he serves as a paid consultant to RTC-2, which creates a conflict of interest and indicates a potential for bias.

26. The DCPS Placement Specialist and Program Manager provided credible testimony, although most of this testimony was not germane to the issues in this case. Although the Program Manager was emotional in her opposition to the use of aversives at RTC-2, she admitted that she had not personally observed this procedure in practice. Instead, her testimony was based on anecdotal reports involving other students.

VI. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[97] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[98] FAPE "consists of educational instruction specially designed to meet the unique needs of the

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[95] *Id.* at 10.

[96] This witness denied knowledge of any criminal proceedings against the founder of RTC-2. This testimony was undermined by the testimony of the Advocate and Petitioner Exhibit 20, which was a plea agreement on felony charges brought by the State of Massachusetts against the founder of RTC-2.

[97] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).

[98] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[99]

Each local education agency ("LEA") is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[100] In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable him/her to receive educational benefits.[101] The IEP is the centerpiece of special education delivery system.[102]

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.[103] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[104]

The burden of proof is properly placed upon the party seeking relief.[105] A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[106] The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.[107] In other words, preponderance of the evidence is

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[99] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[100] 34 C.F.R. § 300.101.
[101] *Rowley* at 206-207.
[102] *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[103] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[104] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *See also C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective") (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a "substantive deprivation" of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).
[105] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[106] 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).
[107] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

evidence that is more convincing than the evidence offered in opposition to it.[108] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[109] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[110]

VII. DISCUSSION

A. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Provide Him an Appropriate Educational Placement for the 2010-2011 School Year.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[111] establishes annual goals related to those needs,[112] and provides appropriate specialized instruction and related services.[113] The program must be implemented in the least restrictive environment ("LRE").[114] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[115]

The IDEIA 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.[116] 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.[117] 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.[118]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[119] "Educational placement" refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the

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[108] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).
[109] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[110] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[111] 34 C.F.R. § 300.320 (a) (1).
[112] 34 C.F.R. § 300.320 (a) (2).
[113] 34 C.F.R. § 300.320 (a) (4).
[114] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[115] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[116] 34 C.F.R. § 300.116 (c).
[117] 34 C.F.R. § 300.116 (d).
[118] *Id.* at (e).
[119] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

"bricks and mortar" of the specific school.[120]

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.[121] Special classes separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[122]

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia.[123]

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.[124]

Here, DCPS entered into a settlement agreement on September 8, 2010, in which it agreed to place the Student in a residential facility. The parties stipulated that, from September 8, 2010, until June 15, 2011, DCPS did not propose or place the Student in a residential treatment facility. Instead, Petitioner was left to her own devices to find an appropriate facility for the Student. During this time, the Student had numerous violent outbursts and was repeatedly hospitalized.

Finally, in February 2011, Petitioner notified DCPS that she planned to place the Student at RTC-2. Petitioner waited another month before placing the Student at RTC-2, during which time DCPS made no effort to find an alternative residential facility for the Student.

It wasn't until June 15, 2011, DCPS proposed four residential treatment facilities, all of which are private facilities outside the District of Columbia. Despite the Student's escalating behavioral difficulties and repeated psychiatric hospitalizations, DCPS did not revise the Student's IEP to reflect that he requires a residential placement until July 14, 2011.

Petitioner proved that the RTC-2 is an appropriate location of services for the Student. The Student has made progress at the RTC-2, although he continues to exhibit behavioral difficulties. The Student's relationship with Petitioner has improved, he completes his classroom assignments to the best of his ability, and reports to class ready to learn. This is a distinct

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[120] *Id.*
[121] 34 C.F.R. § 114 (a)(2)(i).
[122] *Id.* at 114 (a)(2)(ii).
[123] D.C. Code § 38-2561.02.
[124] *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

improvement from his functioning while at RTC-1.

Thus, Petitioner proved that DCPS denied the Student a FAPE from September 8, 2010, through March 25, 2011, by failing to provide him an appropriate placement and location of services.

B. Petitioner Proved that She is Entitled to Reimbursement for All Costs of the Student's Stay in the Residential Treatment Facility.

If an LEA has failed to make a basic floor of educational opportunity available to a student, and the parent subsequently unilaterally enrolls a child in private school, IDEA authorizes reimbursement for the cost of private education.[125] Reimbursement merely requires the school district to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it provided the student a FAPE.[126] Thus, a hearing officer may grant reimbursement of private school tuition only when a school district fails to provide a FAPE *and* the private-school placement is appropriate.[127] Reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State.[128]

Parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if the LEA violated IDEA, the private school placement was appropriate, and the cost of the private education was reasonable.[129] When a hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted.[130] In other words, in making the equitable determination of whether a parent is entitled to reimbursement, and the amount of reimbursement to which the parent is entitled, this Hearing Officer must examine the actions of each party.[131]

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[125] *Burlington*, 471 U.S. at 369; 34 C.F.R. § 300.148 (if the parents of a child with a disability enroll the child in a private school without the consent of or referral by the LEA, a hearing officer may require the LEA to reimburse the parents for the cost of that enrollment if the hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate).

[126] *Id.* at 471 U.S. at 369-71; *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 38-39 (D.D.C. 2008); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1 (D.D.C. 2006) (private school tuition reimbursed when school district failed to complete student's IEP prior to the start of the school year).

[127] *Burlington,* 471 U.S. 359, 369; *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993). The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act. 471 U.S. at 369.

[128] *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993).

[129] *Holland v. District of Columbia*, 71 F.3d at 425 (citing *Carter*, 510 U.S. at 15).

[130] *Forest Grove School Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009).

[131] *Burlington,* 471 U.S. at 373 (finding that equitable considerations are relevant to fashioning relief).

An award of tuition reimbursement may be reduced or denied if, at the most recent IEP meeting that the parent attended prior to removing the student, the parent failed to inform the LEA that she disagreed with the placement proposed by the LEA and intended to enroll the student in a private school at public expense.[132] Alternatively, the tuition reimbursement may be reduced or denied if the parent failed to give written notice to LEA of her intent to unilaterally place the student in a nonpublic school at least ten business days prior to the removal of the child from the public school.[133] Finally, a hearing officer may deny or reduce the reimbursement to the parent if she finds that the parent's actions were unreasonable.[134]

Here, the parties stipulated that the Student's least restrictive environment is a residential facility. Due to his low cognitive functioning and severe emotional disturbance, a less restrictive placement would be inappropriate.

DCPS delayed placing the Student in an appropriate location of services for ten months. Only after the due process complaint was filed, DCPS proposed no appropriate locations of service for the Student. It wasn't until the first day of the due process hearing that DCPS proposed any locations that might be able to provide the Student the services he requires. Yet, three of those four residential facilities rejected the Student.

Due to the severity of the Student's behavioral difficulties, the RTC-2 was one of the few facilities that could meet the student's needs. It provides the structure he requires and the behavioral management system that is designed to improve his awareness of his behavior and rewards for reaching his behavioral goals. Thus, RTC-2 is an appropriate location of service for the Student even though it does not have an OSSE Certificate of Approval.[135]

Although District of Columbia law prohibits DCPS from placing a Student in a facility that uses aversives,[136] DCPS failed to convince this Hearing Officer that RTC-2 is not an appropriate location of services for the Student. DCPS presented no evidence that the Student is not making progress at RTC-2, other than raising concerns about the use of aversives on other students at RTC-2. Because the Student is not receiving aversives, this testimony was unavailing.

Thus, this Hearing Officer find that Petitioner is entitled to reimbursement for the costs associated with the Student's placement in RTC-2 since March 25, 2011.

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[132] 34 C.F.R. § 300.148 (d)(1)(i).
[133] 34 C.F.R. § 300.148 (d)(1)(ii).
[134] 34 C.F.R. § 300.148 (d)(3).
[135] *See Carter*, 510 U.S. 7.
[136] D.C. Code § 38-2561.03 (Unless the placement of a student has been ordered by a District of Columbia court, federal court, or a hearing officer pursuant to IDEA, no student whose education, including special education or related services, is funded by the District of Columbia government shall be placed in a nonpublic special education school or program that allows the use of aversive intervention in its policy or practice or has not received and maintained a valid Certificate of Approval from the Office of State Superintendant of Education).

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 7th day of August 2011, it is hereby:

ORDERED that Respondent shall reimburse Petitioner for the costs associated with the Student's placement in RTC-2 from March 25, 2011 through the date of this Order, including the costs of transporting the Student to RTC-2;

IT IS FURTHER ORDERED that Respondent shall bear the costs of the Student's placement at RTC-2 for the 2011-2012 school year; and

IT IS FURTHER ORDERED that, if RTC-2 obtains court approval to administer aversive treatments to the Student at any time during the 2011-2012 school year, Respondent shall place the Student in an alternative residential facility that can meet his needs within fifteen calendar days of the date it learns of the issuance of the court order.

By: /s/ *Frances Raskin*
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

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Harsharen Bhuller, Counsel for Respondent
Student Hearing Office
DCPS