

**District of Columbia**  
**Office of the State Superintendent of Education**

Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002

OSSE  
Student Hearing Office  
May 2, 2014

<p><b>STUDENT<sup>1</sup>,</b> <b>By and through PARENTS,</b></p> <p style="text-align: center;"><i>Petitioners,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA</b> <b>PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:  May 2, 2014</p>
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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed February 28, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioners, the Student’s parents, against Respondent, District of Columbia Public Schools (“DCPS”).

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On March 4, 2014, the undersigned was appointed as the Impartial Hearing Officer.

On March 10, 2014, Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on March 11, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on March 30, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on March 31, 2014 and will conclude on May 14, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on March 18, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 14, 2014 and that the Due Process Hearing (“DPH”) would be held on April 21 and 24, 2014. The undersigned issued a Prehearing Conference Summary and Order (the “PHO”) after the PHC on March 18, 2014.

No other motions were filed by either party and the DPH was held at the Student Hearing Office, 810 First Street, NE, Washington, DC 20002, from 9:35 a.m. to 12:15 p.m. on April 21, 2014 in Room 2004, and from 9:52 a.m. to 2:20 p.m. on April 24, 2014 in Room 2006. Petitioners elected for the hearing to be closed.

At the DPH, the following documents were admitted into evidence without objection:

Petitioners’ Exhibits: P-2 through P-51, P-53 through P-59 and P-61<sup>2</sup>;

Respondent’s Exhibits: R-1 through R-34;

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<sup>2</sup> Proposed exhibit P-1 was excluded as duplicative of HO-1. Proposed exhibits P-52 and P-60 were excluded because they were not timely disclosed as required by the PHO. On April 17, 2014, Petitioners filed a Motion for Reconsideration or in the Alternative for a Continuance, seeking reconsideration of the decision of the undersigned to exclude P-60 and the expert testimony of Associate Head, Non-Public School. Attached to that Motion was a Motion for Continuance. By Orders issued the same date, the undersigned denied both motions, for reasons explained in those Orders.

Joint Stipulations of Fact: J-1 through J-3; and  
Hearing Officer's Exhibits: HO-1 through HO-7.

The following witnesses testified on behalf of Petitioners at the DPH:

- (a) Petitioner/Parent #1;
- (b) Psychologist, who was admitted by stipulation of counsel as an expert in clinical psychology; and
- (c) Associate Head, Non-Public School ("Associate Head").

The following witnesses testified on behalf of Respondent at the DPH:

- (a) Former DCPS Progress Monitor, Non-Public Unit, currently Professor, Montgomery College ("Progress Monitor");
- (b) Special Education Teacher, Attending School ("SPED Teacher"); and
- (c) Special Education Coordinator, Attending School ("SPED Coordinator") (also referred to as "LEA Representative").

The parties gave oral closing arguments and did not file written closing arguments or briefs.

## **II. JURISDICTION**

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

### **III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT**

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at Non-Public School as a result of a unilateral parental placement due to dissatisfaction with Respondent's placement of the Student at General Education School. The Student has been determined to be eligible for special education and related services as a child with a disability, Other Health Impairment ("OHI") under the IDEA, based upon his diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD").

Petitioners claim that Respondent has denied Student a FAPE by placing him at a general education school when he needed a full-time special education school, by failing to provide the related services specified in his Individualized Education Program ("IEP"), and by failing to convene a meeting of the Student's IEP Team upon Petitioners' request, as further described in Section IV, *infra*.

### **IV. ISSUES**

As confirmed at the PHC and in the PHO, the following issues were presented for determination at the DPH:

- (a) Since the beginning of School Year ("SY") 2013-2014, has Respondent denied the Student a FAPE by failing to propose an appropriate IEP to meet his needs because he requires a full-time special education setting?<sup>3</sup>

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<sup>3</sup> In his closing argument, Petitioner's counsel attempted to enlarge this issue to comprise whether Respondent failed to provide an appropriate IEP because the Student required more and/or different services while attending General Education School. However, the undersigned will decide only the issues accepted for the DPH as confirmed at the PHC and stated in the PHO. To prevail on this issue, Petitioner needed to establish that the Student *required a full-time special education setting*.

(b) Since the beginning of SY 2013-2014, has Respondent denied the Student a FAPE by failing to implement his IEP fully by failing to provide all of the Occupational Therapy (“OT”) and behavioral support services specified in the IEP?<sup>4</sup>

(c) On or about January 30, 2014, did Respondent deny the Student a FAPE and/or violate 34 C.F.R. §300.324(b) by refusing to convene a meeting of the Student’s IEP Team?

(d) Is Non-Public School a proper placement for the Student?

## **V. RELIEF REQUESTED**

Petitioners request the following relief: placement and funding of the Student at Non-Public School with all related services and costs.

## **VI. FINDINGS OF FACT**

### Facts Related to Jurisdiction

1. The Student is a male, Current Age. P-16-1<sup>5</sup>
2. The Student resides in the District of Columbia. P-17-1.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI. J-1, P-16-1.

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<sup>4</sup> In his closing argument Petitioner’s counsel attempted to enlarge this issue to comprise whether the behavioral support services provided by Respondent were effective. However, the undersigned will decide only the issues accepted for the DPH as confirmed at the PHC and stated in the PHO. To prevail on this issue, Petitioner needed to establish that the services were not provided, not that the services were delivered but were ineffectual.

<sup>5</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

#### The Student's Attendance at Non-Public School Prior to SY 2013-2014

4. During SYs 2009-2010, 2010-2011, 2011-2012 and 2012-2013 the Student attended Non-Public School, funded and placed there by Respondent. J-2.

5. During SY 2011-2012, the Student earned all As and Bs except for a C+ in Art Foundations. P-10-1.

6. During SY 2012-2013, the Student earned all As and Bs. *Id.*

#### The Student's Evaluations

7. From October 27 through November 17, 2003, the Student attended a day treatment program at a hospital, where he was diagnosed with ADHD and Mood Disorder Not Otherwise Specified ("NOS"). P-3-2.

8. After two subsequent episodes of uncontrollable behaviors such as biting, kicking, and running out of the classroom, the Student was hospitalized from December 1-19, 2003, at which time he was diagnosed with Bipolar Disorder. *Id.*

9. In 2004, a psychological evaluation of the Student was conducted. *Id.* The evaluator concluded that the Student was emotionally labile with aggressive tendencies and rigid thinking, and that he showed signs of anxiety, depression and distorted perception of others. *Id.* The evaluator diagnosed the Student with ADHD and Bipolar Disorder, early onset by history. *Id.*

10. In 2006, Respondent conducted a psycho-educational reevaluation of the Student. *Id.* On the Weschler Intelligence Scale for Children-Fourth Edition ("WISC-IV"), the Student's cognitive functioning fell in the Average to High Average range. *Id.* The Student's visual motor skills fell in the Low range. *Id.* On the Woodcock-Johnson

Tests of Academic Achievement-Third Edition (“WJ-III”), the Student’s academic achievement in reading, math and writing skills fell in the Average to Superior range. *Id.* The Student had a relative weakness in writing skills under timed conditions. P-3-5. On the Behavior Assessment System for Children-2<sup>nd</sup> Edition (“BASC-II”) Teacher Ratings Scales-Child Form, the Student scored “At Risk” for Hyperactivity, Attention Problems, Emotional Self-Control, Executive Functioning and Negative Emotionality. *Id.* On the BASC-II Self-Report questionnaire, the Student scored “At Risk” for Sense of Inadequacy, Attention Problems and Mania. P-3-7. The Student’s ratings on the Connors’ Teacher Rating Scale-Revised-L (“CTRS-R:L”) indicated a hyperactive, inattentive and impulsive student. P-3-6. On the Reynolds Adolescent Depression Scale-Second Edition (“RADS-2”), the Student did not score in the clinically significant range for depression. *Id.* On the Revised Children’s Manifest Anxiety Scale (“RCMAS”), the Student did not score in the clinically elevated range for anxiety. *Id.*

11. On February 5, 2009, an educational assessment of the Student was conducted by the school he then attended, using the WJ-III. P-2. The Student’s academic skills, his ability to apply those skills, and his fluency with academic tasks were all within the average range. P-2-2. The Student had a significant weakness in written language. *Id.*

12. On February 4 and 11, 2009, Respondent conducted a comprehensive psychological reevaluation of the Student. P-3.

13. On January 4, 2010, an OT evaluation of the Student was conducted due to concerns with his handwriting and organizational skills. P-4-1. The evaluator noted weakness in the Student’s motor coordination, adversely affecting his overall visual motor integration, thereby impeding handwriting speed, accuracy and legibility. P-4-3.

The evaluator also noted weakness in the Student's visual perception, affecting his ability to recall visual information, thereby impeding copying information and organizing his work and materials. P-4-4.

The Student's IEP Developed October 9, 2012

14. The Student's IEP developed at the IEP Team annual review on October 9, 2012 identified the following areas of concern: (a) distractibility in Mathematics, Reading, and Written Expression; (b) inappropriate use of sarcasm and humor creating discord in the classroom; and (c) difficulty with organization, writing and keyboarding. P-8. The IEP prescribed 30.5 hours per week of specialized instruction outside of general education, 45 minutes per week of behavioral support services and 45 minutes per week of OT. P-8-8.

15. The justification for the full-time outside of general education setting as the Student's Least Restrictive Environment ("LRE") was the Student's need for "a small class size, low student to teacher ratio, with specialized instruction and integration of services...." P-8-9.

16. The Team discussed the possibility of the Student making a transition to a less restrictive environment for SY 2013-2014, depending upon his progress. P-8-23.

17. The Team believed the student had made sufficient progress that Non-Public School, which could not satisfy his advanced academic needs, no longer was the most appropriate setting for him. Testimony of Progress Monitor.

18. The Team updated the Student's IEP to reflect his current needs, goals and services. *Id.*

19. The Team discussed steps to collect data and to prepare the Student to move into a less restrictive setting for SY 2013-2014. *Id.*

The Student's Academic and Social-Emotional Progress During SY 2012-2013

20. During SY 2012-2013, Progress Monitor observed the Student several times, spoke with his teachers, gathered work samples, and discussed with Petitioners what an appropriate setting for SY 2013-2014 would be, including so-called "application" programs (*i.e.*, DCPS public schools that required students to apply and be accepted). *Id.* Progress Monitor assisted Petitioners in the application process for several programs. *Id.*

The Student's Draft IEP Discussed on May 21, 2013

21. The Student's draft IEP discussed at the IEP Team meeting on May 21, 2013, identified the same general areas of academic concern, while noting that he was excelling in Mathematics, had shown substantial progress in Reading, and had made significant gains in his "OT skills areas." P-11. No change was noted in his social-emotional functioning. P-11-10. The draft IEP proposed no change in specialized instruction, related services, or LRE. P-11-13 and -14.

The Student's IEP Developed on June 14, 2013 and the Associated Prior Written Notice

22. At a meeting on June 14, 2013, held at General Education School, the Student's IEP Team discussed the Student's progress during SY 2012-2013 and the fact that he had been accepted at General Education School. Testimony of Progress Monitor.

23. All participants in the meeting, including Petitioners, the Student, representatives of Non-Public School, representatives of General Education School, and Progress Monitor agreed that the Student was ready to attend General Education School with the supports agreed to at the meeting. *Id.*, testimony of Parent #1, testimony of Associate Head.

24. The Student was an active participant in the meeting, and self-advocated in favor of attending General Education School because he welcomed the challenge of more difficult classes. Testimony of Progress Monitor.

25. The Student's IEP developed at the meeting reduced his specialized instruction outside of general education from 30.5 hours (*i.e.*, full time) to five hours per week. P-12-12. His behavioral support services were increased from 45 minutes per week to 55 minutes per week and his OT services remained at 45 minutes per week. *Id.*

26. The justification for the five hours of specialized instruction being outside of general education was the same as the previous justification for the 30.5 hours of specialized instruction being outside of general education. P-12-13.

27. The Prior Written Notice ("PWN") issued by Respondent on June 20, 2013 explained the reduction in hours of specialized instruction as follows: "[The Student] has made significant progress to change placement to a lesser restrictive educational setting...." P-13.

28. Based upon the entire record, the undersigned finds that the Student's IEP, as revised June 14, 2013, including the Student's placement, was reasonably calculated to confer educational benefit on him.

### The Student's Transfer to General Education School

29. On July 12, 2013, the Chief of Special Education of DCPS wrote a letter to Petitioners identifying General Education School as the Location of Services ("LOS") for the Student for SY 2013-2014. P-14.

30. The July 12, 2013 letter constituted the Student's official transfer. Testimony of Progress Monitor.

31. The Student enrolled at General Education School for SY 2013-2014. J-3.

### The Student's Academic Performance and Attendance in September 2013

32. General Education School had the Student's class schedule, gender and grade incorrect at the beginning of SY 2013-2014. Testimony of Parent #1.

33. The schedule error consisted of the Student being assigned to the wrong teacher's Probability & Statistics class; however, the content of the course was the same in both classes. Testimony of SPED Teacher.

34. The Student's transition to General Education School was very smooth. Testimony of SPED Coordinator.

35. SPED Coordinator gave the Student permission to store the skateboard that he rode to school in her office, so she usually saw him daily in that context or in the hallway going to or from lunch. *Id.*

36. On September 23, 2013, Parent #1 emailed SPED Coordinator stating, *inter alia*, that he was receiving automated calls stating that the Student was missing classes. P-15.

37. SPED Coordinator replied on September 26, 2013 that she would share the Student's attendance and standing in each class when they met the next Monday. *Id.*

38. Between August 29 and September 30, 2013, the Student attended school every day. P-17. The Student's Attendance Summary showed that he was absent three times each from Probability & Statistics and from "Naval Science" (*i.e.* Junior Reserve Officer Training Corps or "JROTC"). *Id.* The absences from JROTC actually were tardies and the absences from Probability & Statistics did not occur (rather, the course was coded incorrectly in the Student's schedule). P-15 (handwritten notes), P-19-1.

39. During the first 30 days of SY 2013-2014, the Student earned all As and Bs in his classes. P-19-1. He did not have excessive behavioral issues. *Id.* He was adjusting well. *Id.* He was reported to be making progress on those of his IEP goals that had been introduced. R-17. He had mastered one of his goals, *i.e.*, critical thinking. R-17-5, testimony of SPED Teacher.

40. SPED Teacher had observed the Student in class and had found him to be very engaged, very comfortable sharing his positions in class, and on one occasion being the spokesperson for his team on an issue involving social justice. Testimony of SPED Teacher.

41. The Student demonstrated strengths in critical thinking skills, reading, and mathematics. *Id.*

42. SPED Teacher observed the Student interacting well with peers, being friendly, talkative, chatting and joking a lot in one of his classes. *Id.*

43. The Student had an A in English and consistently completed his English homework on time with strong effort, although he needed help with grammar and needed to increase his confidence in writing. R-10.

44. The Student had an A in his language course, had no problems in that class, and worked very hard, although he had fallen asleep once or twice. R-11.

45. SPED Teacher helped the Student organize his backpack and created a homework folder for him. Testimony of SPED Teacher.

The Student's IEP Revised September 30, 2013 and the Associated Prior Written Notice

46. An IEP Team meeting was held on September 30, 2013 attended by, among others, Parent #2 and the Student. P-16.

47. All of the Student's teachers had reported that he was doing well. Testimony of SPED Teacher.

48. At the September 30, 2013 meeting, Parent #2 expressed concerns about supporting the Student with tracking his assignments, additional support in writing and editing (to be provided twice per week for 30 minutes after school), logging into the school's "Engrade" computer system<sup>6</sup> and a problem with the Student being charged for his school lunches. Testimony of SPED Coordinator, R-15-2.

49. The Student expressed that he did not want behavioral support services. Testimony of SPED Coordinator.

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<sup>6</sup> The "Engrade" system allows teachers to input information on student attendance, completion of homework, and completion of assignments, and for parents to view that information. Testimony of Parent #1, testimony of SPED Teacher.

50. Parent #2 disagreed with elimination of behavioral support services and was stern with the Student, which led him to be visibly upset and agitated. Testimony of SPED Coordinator.

51. SPED Coordinator took the Student out of the meeting room, and he told her that Parent #2 always spoke for him, did not let him speak, and did not take his feelings into account. *Id.*

52. SPED Coordinator explained to the Student that Parent #2 wanted the services to help him, and he agreed, provided the services could be shortened. *Id.*

53. SPED Coordinator and the Student returned to the meeting. *Id.*

54. After discussion, the Student's behavioral support services were reduced from 55 minutes per week to 30 minutes per week because his group therapy goals were eliminated. P-16-13, R-15-2.

55. The Student expressed that he liked his classes and did not want to be "pulled out" for specialized instruction. Testimony of SPED Coordinator.

56. After discussion, the Student's five hours per week of specialized instruction were shifted from outside general education to general education because the Student was doing well in class and he refused to be "pulled out" for specialized instruction. *Id.*, testimony of SPED Teacher, P-16-13, R-15-2.

57. The revised IEP made similar recommendations in all academic areas, *i.e.* that the Student needed "multiple checks for understanding, "scaffolded work," explicit and repeated instructions, extended time on assignments, and an area with minimal distractions and preferential seating. P-16.

58. The Team discussed how General Education School would assist the Student with his executive functioning and organization skills, including “checking in” with SPED Teacher and using an agenda to record his assignments. Testimony of SPED Coordinator. The Student stated that he felt these supports would address those needs.

*Id.*

59. On October 8, 2014, Respondent issued a PWN forwarding the revised IEP and giving the following explanation for the changes:

The IEP was developed to fit [the Student’s] needs for the 2013-2014 school year. Since he is currently in [Current Grade], the goals were updated to align to the appropriate grade-level standards. As [the Student] prefers and is currently performing well within the general education environment, the hours were changed to inside general education to support his efforts inside the classroom so that he is not removed for specialized instruction.... IEP progress reports from [the Student’s] teachers indicate that he is performing well with the provided supports (e.g. use of a word processor). He is participating and engaged in all classes, but continues to need support in regards to executive functioning and writing skills.

P-21-1.

60. Based upon the entire record, the undersigned finds that the Student’s June 14, 2013 IEP provided him with educational benefit from the beginning of SY 2013-2014 through September 30, 2013, and that the IEP, as revised September 30, 2013, was reasonably calculated to confer educational benefit on him.

The Student’s Academic Performance and Attendance in October 2013

61. On October 7, 2014, Parent #2 emailed SPED Teacher and SPED Coordinator expressing concern about the Student missing assignments in two subjects and requiring

“more stringent oversight in accordance with his IEP ... at the school level.” P-20.

Parent #2 expressed that she was “furious with him....” *Id.*

62. On October 25, 2014, SPED Teacher emailed Parent #1 about a conversation she had with the Student concerning his need to turn in an assignment that he said he had completed on his home computer and concerning missing assignments from three courses. P-22. Parent #1 replied that he had asked the Student “about ten times last night if he had everything turned in....” *Id.*

63. On October 30, 2014, SPED Teacher emailed Parent #1 to advise him about the Student’s failure to “check in” with her that day or the day before, and her about her conversation with the Student about the need to do so and about his missing assignments. P-23-1.

64. SPED Teacher asked the Student why he was not “checking in,” and he responded that he did not want to be late for the class that followed his appointed time to “check in.” Testimony of SPED Teacher. SPED Teacher advised the Student that she would provide him with a “pass” so that he would not be marked late to the class. *Id.*

65. According to Parent #1, the Student “had a great start to the school year, and did well over the first quarter.” P-37-1. He was reported to be making progress on those of his IEP goals that had been introduced, and to have mastered one goal. R-17.

66. The Student earned all As and Bs in SY 2013-2014 Term 1. R-18-1.

67. Petitioners did not request an IEP Team meeting in October 2013. Testimony of Parent #1.

68. Based upon the entire record, the undersigned finds that during October 2013 the Student was progressing academically and Respondent was taking appropriate steps

to remediate his missing assignments; accordingly, the Student's September 30, 2013 IEP conferred educational benefit upon him in October 2013 and continued to be reasonably calculated to confer educational benefit on him.

### The Student's Academic Performance and Attendance in November 2013

69. On November 4, 2014, SPED Teacher emailed Parent #1, providing credentials to log onto the "Engrade" system, and informing Parent #1 that the Student had been coming to his "check in" regularly but still had outstanding assignments.

P-24-1.

70. Parent #1 responded that the Student had been assuring him that his homework was all done, or that there was an extenuating circumstance. *Id.* Parent #1 stated that "[i]f it keeps up, we will need to find another way to ensure his homework is complete." *Id.*

71. On November 7, 2013, SPED Teacher emailed Parent #1 about three assignments that the Student said he had completed but had not brought to school from home. P-25-1.

72. Parent #1 replied on November 8, 2013, confirming that one assignment had been turned in the previous day and that the Student said the other assignment was not due; Parent #1 asked for clarification. *Id.*

73. On November 15, 2013, the Student completed some of his assignments in the office of Special Education ("SPED") Educator/Resource Teacher. P-27-2.

74. As of November 16, 2013, the Student was doing well in his language class, but his homework was delayed. P-27-1.

75. On November 18, 2013, Parent #1 emailed SPED Teacher requesting a meeting in the near future, preferably in the evening, about the Student's "total lack of performance," his avoidance of homework, his avoidance of JROTC, and his missing classes. P-26-1. Until the meeting, Parent #1 requested that SPED Teacher visit the Student in his classes "so that there is a clearer sense for him and us of what needs to be done in a timely manner." *Id.*

76. The same day, SPED Teacher emailed Parent #1 regarding the status of the Student's assignments, and requesting an evening home visit to discuss his concerns and for her and SPED Educator/Resource Teacher to get to know the Student and Parent #1 better. *Id.*

77. Petitioners did not respond to SPED Teacher's request to meet. Testimony of Parent #1, testimony of SPED Teacher.

78. On November 22, 2013, SPED Teacher emailed Parent #1 stating that the Student had left his homework folder at school. P-28-1. SPED Teacher relayed the assignments, and noted that the Student was not using a binder that he had been provided with dividers to organize his papers. *Id.*

79. The Student was reported to be making progress on those of his IEP goals that had been introduced. P-58.

80. Neither Respondent nor Petitioners requested an IEP Team meeting during November 2013. Testimony of Parent #1, testimony of SPED Coordinator.

81. Based upon the entire record, the undersigned finds that during November 2013, the Student was progressing academically and Respondent was taking appropriate steps to remediate his missing assignments; accordingly, the Student's September 30,

2013 IEP conferred educational benefit upon him in November 2013 and continued to be reasonably calculated to confer educational benefit on him.

The Student's Academic Performance, Attendance and Emotional State in December 2013

82. On December 2, 2013, Parent #1 emailed SPED Teacher as follows:

Hi Geneva! I hope you had a good holiday.  
I got the first volley of engrade messages. It seems there is some kind of problem with Naval Science. Can you talk to the Chief and verify [the Student] is attending? [The Student] says he has been, and he is up and out of the house early enough to be there on time.

P-29-1.

83. Parent #1 received this “volley” of messages from the “Engrade” system regarding the Student’s absences from “Naval Science” (*i.e.*, JROTC) because one of the teachers (“Chief”) had resigned and the other teacher did not have access to “Engrade” for several weeks. Testimony of SPED Teacher. At that point, “Engrade” sent automated messages regarding all of the Student’s prior absences from JROTC. *Id.* The Student’s absences were all in his “Zero Period” JROTC class, which met before First Period; he was not missing any of his core classes. *Id.*

84. On December 20, 2013, Parent #1 went to General Education School with the Student and spoke with SPED Coordinator to inform her that he had recently learned that the Student was skipping school and staying home playing video games. Testimony of SPED Coordinator, P-37-1.

85. Parent #1 also informed SPED Coordinator that the Student had stolen a credit card. Testimony of SPED Coordinator.

86. The Student stated that he thought he no longer had to attend JROTC because one of its teachers had resigned. *Id.* The Student also stated that he did not think he had time to go to JROTC after having his breakfast at school. *Id.* SPED Coordinator confirmed that the Student still was enrolled in that class and was required to attend. *Id.*

87. At the December 20, 2013 meeting, SPED Coordinator and Parent #1 discussed at length the need to start attendance monitoring to ensure that the Student was coming to school on time, checking in with SPED Teacher, and attending each class on time. *Id.*

88. After the meeting between Parent #1 and SPED Coordinator, the Student met with Social Worker, who noticed that he appeared faint. *Id.* The Student informed Social Worker that due to a personal situation he had not eaten in 24 hours. *Id.* Social Worker gave the Student something to eat and took him to the school nurse to be assessed. *Id.* The school nurse found nothing wrong and the Student was escorted back to class.

P-30-1.

89. SPED Coordinator emailed Parent #1 that the Student had been sent to the nurse because he was faint and he had stated that he had not eaten for 24 hours, and that she hoped “the next 2 weeks his is able to overcome his set backs.” P-31-1.

90. Petitioners punished the Student by banning him from playing video games. Testimony of Parent #1.

91. Neither Respondent nor Petitioners requested an IEP Team meeting during December 2013. *Id.*, testimony of SPED Teacher.

92. Despite the Student skipping his JROTC class and failing to complete some assignments, he was reported to be making progress on those of his IEP goals that had been introduced. P-58.

93. Based upon the entire record, the undersigned discounts the Student's IEP Progress Reports, as they are overly general and inconsistent with the other evidence of the Student's difficulties.

94. Based upon the entire record, the undersigned finds that the Student's skipping of JROTC classes and his continuing failure to complete assignments put General Education School, and hence Respondent, on notice by December 20, 2013, that the Student's needs were not being met by his September 30, 2013 IEP.

95. The undersigned finds that the proposed initiation of an attendance monitoring system was an appropriate response to the Student's attendance issue but not a response to his failure to complete assignments.

#### Occupational Therapy Services

96. From the beginning of SY 2013-2014 to November 25, 2013, the Student did not receive OT because General Education School could not provide OT. P-19, testimony of SPED Coordinator.

97. The undersigned finds that the total failure to provide OT services for three months was a material failure to implement that aspect of the Student's IEP.

98. On November 25, 2013, Respondent provided Petitioners authorization to obtain nine hours of OT services outside of DCPS. R-22-3.

99. Based upon the entire record, in particular (a) the lack of any evidence of educational harm to the Student from the delay in the provision of OT services and (b) the fact that the Student does not receive direct OT services at Non-Public School that Petitioners consider to be an appropriate placement, the undersigned finds that Respondent's authorization of independent OT services fully remedied the denial of FAPE.

#### Behavioral Support Services

100. The Student received all of the behavioral support services required by his IEP, *i.e.*, from the beginning of SY 2013-2014 until September 30, 2013, 55 minutes per week of counseling (R-6-12 and -13), and beginning September 30, 2013, 30 minutes per month of counseling (R-14-13 and -14). Testimony of SPED Coordinator.<sup>7</sup>

101. The Student was very guarded during his counseling sessions. *Id.*, P-41-1.

#### The Student's Apparent Suicide Attempt and Subsequent Social-Emotional Functioning

102. Sometime between December 20 and 25, 2013, the Student hung a noose in his back yard, placed a chair nearby, left a suicide note and wandered several miles from his home to Silver Spring where he was found hours later by Parent #2. Testimony of Parent #1.

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<sup>7</sup> In view of the documentary evidence (P-34-1, P-41-1) and the testimony of SPED Coordinator, the undersigned does not credit the testimony of Parent #1 that the Student received no counseling services. *See*, Section VIII, *infra*.

103. For weeks after the apparent suicide attempt, the Student “froze up,” “shut down,” would not talk, was “almost vegetative,” and spent his days watching television.  
*Id.*

104. Petitioners did not notify Respondent of the apparent suicide attempt until the filing of the DPC herein. Testimony of SPED Coordinator.

105. Petitioners did not request an IEP Team meeting between the date of the apparent suicide attempt and January 9, 2014. Testimony of Parent #1.

#### The Events of January 2014

106. The Student attended General Education School only two days in January 2014. Testimony of SPED Coordinator.

107. On January 7, 2014, SPED Teacher emailed Parent #1 stating that the Student needed to make up many assignments to pass his Computer Applications course.  
P-32-1.

108. Parent #1 responded that he would follow up with the Student that evening.  
*Id.*

109. SPED Coordinator emailed SPED Teacher asking her to “capture this information for his other courses to ensure his academic success.” P-33-1.

110. On January 9, 2014, Case Manager emailed SPED Coordinator and SPED Teacher conveying Petitioners’ request to schedule an IEP meeting to address the Student’s progress, parent concerns and location of services due to his reported “difficulties at school and adjusting to his new school.” P-35-1.

111. Also on or about January 9, 2014, Case Manager emailed Parent #1 asking whether the Student was “linked to any outside agencies already that provide him support (ie therapy, mentor, etc)?” P-34-2. Parent #1 responded as follows:

Unfortunately, not right now. Things really were going very well and we thought that the school councilor (sic) and SPEDs was enough support. My wife is trying to locate a therapist he had in the past... Thanks for reaching out to us. Your timing couldn't be more perfect.

P-34-1.

112. Early to mid-January, 2014, Parent #2 emailed Associate Head, stating that the Student was experiencing a great deal of difficulty at General Education School, not being successful there, and asked for him to be readmitted to Non-Public School.

Testimony of Associate Head. Apparently Parent #2 did not advise Associate Head of the Student's apparent suicide attempt.

113. On January 13, 2014, Parent #1 wrote to two officials of Respondent stating, *inter alia*, that he did not believe the Student's IEP was being “met” at General Education School. P-37-1. Parent #1 requested that the Student return to Non-Public School “or a like school, where the structure is such that he can get an education with the support he requires.” *Id.* Parent #1 stated that the Student had experienced “two emotional ‘meltdowns’ since we discovered he had not been able to attend school. We have him staying at home until we can find a way to help him.” *Id.* Parent #1 stated that it was “important that we have [the Student] back in a school as soon as possible.” *Id.*

114. By January 13, 2014, Petitioners' “plan then was for him to go to [Non-Public School].” Testimony of Parent #1. Petitioners would not send the Student to a DCPS public school even if it had the same full-time outside of general education program with therapeutic supports. *Id.*

115. On January 14, 2014, Parent #1 emailed SPED Coordinator advising her that the Student would be staying home for the week because he was not well enough to attend school, and noting that an IEP Team meeting had been scheduled for the following Thursday (*i.e.*, January 16, 2014). P-38-1.

116. During January 2014, Petitioners did not inform Respondent that the Student had apparently attempted suicide. Testimony of Parent #1. There is no evidence in the record that Petitioners informed Respondent of the Student's current emotional state, *i.e.* that he had "frozen up," "shut down," would not talk, was "almost vegetative," and spent his days watching television. *Id.*

117. Petitioners never notified Respondent that the Student was a danger to himself. Testimony of SPED Coordinator.

118. On January 15, 2014, the JROTC teacher stated that when the Student was present, he was an excellent student who got along well with other students and appeared to quickly comprehend all materials presented; his only problem was his attendance record. R-25-1.

119. On January 15, 2014, Petitioners' counsel wrote to SPED Coordinator, informing her that the Student would be returning to Non-Public School effective January 29, 2014 based upon "his failure to make progress at [General Education School] and need for significantly more services and supports than he is currently receiving." P-39-1. Petitioners' counsel stated that Petitioners intended to seek public funding for the Student's placement at Non-Public School. *Id.*

120. Petitioners' counsel requested cancellation of the meeting scheduled for the following day, January 16, 2014 "to discuss [the Student's] recent absences." P-39-2.

Petitioner's counsel closed his letter stating, "if there are other issues that [Case Manager] or you wish to discuss, please feel free to contact my office."<sup>8</sup> *Id.*

121. Parent #1 testified that he and Parent #2 declined to attend the January 16, 2014 IEP Team meeting because "we were going to start [Non-Public School]."

Testimony of Parent #1.

122. Case Manager responded to Petitioners' counsel's email, asking whether Petitioners still wished to proceed with the January 16, 2014 meeting.<sup>9</sup> P-40-1. Petitioners' counsel replied that they would not be attending the January 16, 2014 meeting. *Id.* Case Manager responded stating that the meeting would be rescheduled and asking Petitioners' and Petitioners' counsel's available date and time. *Id.*

123. On January 16, 2014, SPED Coordinator emailed Petitioners' counsel, stating that the Student had received all of the supports outlined in his IEP with the exception of OT services that had been authorized outside of DCPS. P-41-1. SPED Coordinator stated that the school social worker had been unsuccessful getting at the route (sic root) of the Student's concerns because he was extremely guarded. *Id.* SPED Coordinator concluded as follows:

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<sup>8</sup> In his closing argument, Petitioner's counsel implied that Respondent's failure to respond to this sentence, identifying other issues Respondent wished to discuss, constituted an admission that the only purpose of the scheduled meeting was to discuss the Student's recent absences. However, Respondent never had stated that the purpose of the meeting was to discuss the Student's recent absences. Rather, Case Manager's January 9, 2014 email scheduling the IEP meeting, which Parent #1 received, stated that the purposes of the meeting were "to address [the Student's] progress, parent concerns, and location of services." P-35-1. Respondent was not obliged to correct Petitioner's counsel's error.

<sup>9</sup> Parent #1 testified that he did not recall this response by Case Manager. This is an example of the unreliability of Parent #1 as a witness. *See* Section VIII *infra*.

Finally, if it is your client's decision to transfer their son back to [Non-Public School] it is most appropriate that he transfers now rather than waiting for the following reason[s]: 1) his current absences are unexcused which will ultimately cause [General Education School] to refer him to Truancy court and 2) He is currently missing his final exams and portfolio presentation which are significant percentages of his grade, this will ultimately cause their son to fail this quarter. Finally I urge you and your client to consider an immediate transfer rather than delay it.

*Id.*

124. The undersigned finds that the above-quoted language is not an admission by SPED Coordinator either that General Education School was an inappropriate placement or LOS for the Student, or that Respondent would fund the Student's attendance at Non-Public School. Rather, the above-quoted language addressed only the *timing* of a change in schools, *i.e.*, if Petitioners were planning to place the Student unilaterally at Non-Public School, Respondent believed it would be better to do so immediately to avoid truancy and academic failure.

125. On January 23, 2014, SPED Coordinator emailed Petitioners' counsel stating, *inter alia*, that General Education School was ready and able to provide the Student "with FAPE to education and his services as outlined in his IEP." P-42-1. SPED Coordinator asked for clarification of Petitioners' plans to transfer the Student, and she stated that General Education School "continues to be available to discuss [the Student's] academic and behavioral needs so that we can appropriately implement his educational plan in a least restrictive setting." *Id.*

126. As of the end of SY 2013-2014 Term 2, *i.e.*, January 24, 2014, the Student was failing two of his courses. P-47-2. His Grade Point Average ("GPA") had fallen from 3.33 in Term 1 to 1.00 in Term 2. P-47-5.

127. These grades reflected the Student's failure to complete his "portfolio products" and presentation, and his failure to take final exams. Testimony of SPED Coordinator.

128. The Student's report card (P-47) did not accurately reflect his absences or his JROTC grade. *Id.*

129. On January 28, 2014, a month after the Student's apparent suicide attempt, he met with the psychologist that had treated him years before. Testimony of Parent #1; testimony of Psychologist.

130. Non-Public School accepted the Student on January 29, 2014. P-43-1.

131. On January 30, 2014, Petitioners' counsel emailed SPED Coordinator, informing her that the Student had returned to Non-Public School that day, and stating the following:

In your last correspondence you stated that [General Education School] is available to discuss [the Student's] academic and behavioral needs. While the parents continue to believe that [the Student's] needs cannot be met at [General Education School] and that he requires a more intensive setting, they are available and willing to attend an IEP meeting, if DCPS wishes to convene one. If so, please propose some dates so that we can find a time that works for all of us.

P-46-1.

132. Project Coordinator, Office of Specialized Instruction, DCPS ("Project Coordinator") responded by forwarding a copy of her letter to Petitioners (P-44-1) stating that Respondent did not agree to fund the Student's attendance at Non-Public School and that Respondent had made a FAPE available to the Student with an appropriate IEP, and a placement in the Student's LRE. P-45-1.

133. Later on January 30, 2014, Petitioners' counsel responded to Project Coordinator, asking whether Respondent would be convening an IEP Team meeting. *Id.* SPED Coordinator replied as follows: "At this time, [General Education School] will not be convening an IEP meeting for your client." *Id.*

134. Based upon the entire record, the undersigned finds that as of January 30, 2014, Petitioners were unwilling to consider any school for the Student other than Non-Public School and that Respondent was aware that Petitioners had no intention of the Student attending any other school.

The Student's Academic Performance, Attendance and Emotional State Since January 28, 2014

135. Since January 28, 2014, the Student has been receiving psychotherapy at his parents' expense from Psychologist once every other week. Testimony of Psychologist.

136. As of January 28, 2014, the Student presented as forlorn and despondent. *Id.* Psychologist drew the Student out, and the Student expressed that he initially had positive expectations about General Education School but found the work and social pressures overwhelming. *Id.* The Student expressed to Psychologist that he was unable to keep up with the academic demands, particularly the homework, that he saw himself as having failed at "mainstreaming" due to his "incapacity," and that he had sought refuge in video games. *Id.* The Student expressed some suicidal ideation "in the background," but did not have a clear intent or plan to commit suicide. *Id.*

137. Between January 30, 2014 and March 31, 2014, the Student was able to get to his classes on time, was regaining his momentum, and was responding to the high level of structure at Non-Public School. P-56-22 and -23.

138. For the third quarter of SY 2013-2014, at Non-Public School, the Student earned all As and Bs. P-59-2. He is doing his work “for the most part.” Testimony of Associate Head. He requires assistance and adult supervision with multi-stage, complex assignments. *Id.*

139. Psychologist testified that as of April 21, 2014, the Student is engaging, arrives at his therapy sessions by himself on time, talks spontaneously, and speaks positively about the future including possibly getting married and pursuing a career in law enforcement or public safety with regular hours. Testimony of Psychologist. Psychologist attributed this improvement to the Student’s familiarity with Non-Public School (and vice versa), the small class size, the greater structure, the reduced homework, and the resources provided by the Non-Public School staff. *Id.*

140. Psychologist testified that General Education School is a “high performing school,” preparing students for college, and is “above [the Student’s] aptitude” because of his distractibility and his difficulty following through on non-preferred activities. *Id.*

141. Psychologist did not testify that the Student could not be educated with non-disabled peers, *i.e.*, that he required a full-time out of general education setting.

142. Psychologist does not know whether the Student could make a successful transition to a DCPS public school other than General Education School. *Id.*

143. Associate Head has observed the Student three times since January 30, 2014, and has seen him interacting appropriately with peers at Non-Public School, engaging in positive conversations with his teachers before and after class, and engaging in his academic work. Testimony of Associate Head.

144. The Student presents at Non-Public School as very quiet and has not shared with peers his experience at General Education School. *Id.*

145. Based upon the entire record, the undersigned finds that the Student is receiving educational benefit at Non-Public School.

146. The record is devoid of evidence that the Student requires a setting as restrictive as Non-Public School.

#### The Student's Truancy Referral

147. Because the Student had not been officially "withdrawn" from General Education School, his absences since the beginning of January 2013 triggered a truancy referral, resulting in a visit to Petitioners by the police on March 21, 2014. P-51-1.

148. Prior to March 21, 2014, Respondent had not provided any instructions or forms to Petitioners to effect the withdrawal of the Student from General Education School. Testimony of SPED Coordinator.

#### The March 25, 2014 IEP Team Meeting

149. On March 11, 2014, Respondent invited Parent #1 to an IEP Team meeting on March 25, 2014 at General Education School (R-29-1) and Parent #2 agreed to attend (P-49-1).

150. On March 24, 2014, Petitioners' counsel wrote to SPED Coordinator, advising her that Associate Head of Non-Public School was ill and unable to attend the March 25, 2014 meeting, and requesting that the meeting be rescheduled. R-30-2.

The March 31, 2014 IEP Team Meeting and Associated PWN

151. An IEP Team meeting was held on March 31, 2014 at General Education School and both Petitioners attended. P-56-1.

152. The IEP developed at the meeting added an attendance goal, and prescribed 400 minutes per week of specialized instruction outside general education, 250 minutes per week of specialized instruction in general education, 240 minutes per month of behavioral support services and 180 minutes per month of OT. P-56-10 and -13.

153. Based upon the entire record, particularly SPED Coordinator's discussion with Parent #1 and the Student on December 20, 2013, the undersigned finds that the revisions to the Student's IEP proposed on March 31, 2014, would have been proposed on January 16, 2014, had the IEP meeting taken place then.

154. On April 3, 2014, Respondent issued a PWN summarizing that Respondent had offered to implement the March 31, 2014 IEP at General Education School, but Petitioners had rejected the IEP stating that the Student required a full-time out of general education IEP to be implemented at Non-Public School. P-57-1.

155. Based upon the entire record, the undersigned finds that Petitioners' participation in the March 31, 2014 IEP Team meeting was a sham, inasmuch as they had determined by January 13, 2014, that they would not allow the Student to attend any school other than Non-Public School. Testimony of Parent #1.

## VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

## VIII. CREDIBILITY

The undersigned found Parent #1 not to be entirely credible. On more than one occasion, Parent #2<sup>10</sup> interrupted the testimony of Parent #1 in an attempt to “correct” his answers. His testimony also was replete with inconsistencies. For example, Parent #1 testified that he did not know the Student was accepted at General Education School until a week before the beginning of SY 2013-2014 in August 2013, when in fact, the Student’s acceptance at General Education School was discussed at the IEP Team meeting held there on June 14, 2013, and Respondent had issued a letter to Petitioners on July 12, 2013 advising them that the Student would attend General Education School. Upon direct examination, Parent #1 testified that the Student matriculated at General Education School as a sophomore, but upon questioning by the undersigned, he acknowledged that the Student was a junior. He testified that SPED Teacher had not responded to his request to meet in the evening after his work, but after being shown documentary evidence that she had offered to meet with him in the evening, he could not explain why he did not follow through and meet with her. Also upon examination by the

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<sup>10</sup> Parent #2 had been disclosed as a witness but did not testify.

undersigned, Parent #1 testified that he had repeatedly asked Respondent to provide more services to the Student at the Attending School, but he could not point to any email in evidence containing such a request, and he did not recall details of whom he asked or when, except that during the Christmas break by email and telephone, he asked Case Manager for additional counseling. The undersigned does not find it credible that Parent #1 emailed Case Manager and failed to preserve the emails, inasmuch as he preserved so many others. The undersigned cannot determine whether Parent #1 was prevaricating or simply has a bad (or selective) memory; regardless, when his testimony conflicted with other evidence in the record, the undersigned has credited the other evidence.

The undersigned found all of the other witnesses to be credible, to the extent of their first hand knowledge or professional expertise.

## **IX. CONCLUSIONS OF LAW**

### Purpose of the IDEA

1. The IDEA is intended

(A) 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 and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...”

20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

### FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

### IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the individualized education program (“IEP”) which the IDEA “mandates for each child.”

*Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v.*

*Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

\* \* \*

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s

disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

\* \* \*

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications ....

20 U.S.C. §1414(d)(1)(A).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Rowley*, 458 U.S. at 201.

5. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student’s progress, courts should defer to the administrative agency’s expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress,

deference is particularly important when assessing an IEP's substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate ... . The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

*K.S. v. District of Columbia*, \_\_\_ F. Supp. 2d \_\_\_, 113 LRP 34725 (2013); *see also, S.S. v. Howard Road Academy*, 585 F. Supp. 2d 56 (D.D.C. 2008) (“The Court cannot say that these responses were inappropriate at the time they were taken or that school officials should have realized at that time that S.S. required that all of his specialized instruction take place in a self-contained special education classroom.”) (footnote omitted).

### Implementation of the IEP

6. If an appropriate IEP is developed, but the Local Educational Agency (“LEA”) fails to implement the IEP fully, the failure constitutes a denial of FAPE if the failure is “material.” *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83 (D.D.C. 2010).

7. Because Respondent’s failure to provide any OT services to the Student from the beginning of SY 2013-2014 to November 25, 2013 was material (Finding of Fact 97), that failure constitutes a denial of FAPE.

8. The denial of FAPE was fully remedied by the authorization of nine hours of independent OT services. Finding of Fact 99.

### When an IEP Must be Revised

9. IEPs must be reviewed and revised to address, *inter alia*:

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child’s anticipated needs; or

(E) Other matters.

34 C.F.R. §300.324(b)(1)(ii).

10. Because the Student was making educational progress from the beginning of SY 2013-2014 until late December 2013 (Findings of Fact 39, 41, 43, 44, 65, 68, 74, 79, 81 and 92), condition “A” above was not triggered.

11. The meeting between Parent #1 and SPED Coordinator on December 20, 2013 (Findings of Fact 84-87) triggered condition “C” above. In view of the imminent winter holiday break, an IEP Team meeting in mid-January 2014 would have been a timely response by Respondent.

12. IDEA requires a child’s IEP Team, in developing the IEP of a child whose behavior impedes his learning or that of others, to “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. §1414(d)(3)(B)(i). Based upon the statements made by SPED Coordinator to Parent #1 and the Student on December 20, 2013 (Finding of Fact 87), such interventions and supports would have been considered at the mid-January 2014 IEP Team meeting.

13. Petitioners’ failure to inform Respondent of the Student’s apparent suicide attempt (Finding of Fact 104) or his emotional state thereafter (Findings of Fact 116 and 117), deprived Respondent of information that would have indicated the need to accelerate an IEP Team meeting.

#### Unilateral Parental Placement of Child in a Private School

14. As recently explained by the U.S. District Court for District of Columbia in *District of Columbia v. Vinyard*, \_\_\_ F. Supp. 2d \_\_\_ (Civ. No. 12-1604 (CKK), September 22, 2013) :

The District argues that 20 U.S.C. § 1412(a)(10), which addresses “Children enrolled in private schools by their parents,” does not require the District to provide a FAPE to parentally placed private school students. The Court agrees that the District is not required to *implement* an IEP for a student whose parents unilaterally maintain a student’s enrollment at a private school when an IEP provides for a public placement. But nothing in this section authorizes the school district to ignore a parent’s request that an IEP be developed for a child simply because the child is presently

enrolled in a private school. To the contrary, the statute provides that “each child with a disability” shall be reevaluated at the request of the child’s parent. 20 U.S.C. §1414(a)(2) (emphasis added). The multi-disciplinary team must review the data from any reevaluation and determine, among other things “whether the child continues to need special education and related services” and “whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program.” *Id.* §1414(c)(1)(B). Nothing in this section limits the District’s responsibilities to reevaluating only disabled students enrolled in public schools. If, after reevaluation G.V.’s parents once again decline services under the IEP and maintain his enrollment in a private school, the District is correct that pursuant to section 1412(a)(10) the District is not required to provide services to G.V. under the IEP. But section 1412(a)(10) merely governs the school district’s obligations after the parents decline a FAPE offered by the school district, it is does not limit when the school district is required to propose a FAPE when requested by the parents.

\* \* \*

Faced with facts strikingly similar to this case, the court in *Moorestown Township Board of Education v. S.D.*, 811 F. Supp. 2d 1057 (D.N.J. 2011), reached the same conclusion. Dissatisfied with the proposed IEP for the student for the 2006-2007 school year, the child’s parents unilaterally placed the child in a private school. *Id.* at 1062. During the fall of 2007, the parents asked the school district to convene a meeting to discuss an IEP for the child for the 2008-2009 school year. *Id.* The school district declined to reevaluate the child because he was not enrolled in a public school in the district. *Id.* Relying on, among other things, the same Office of Special Education and Rehabilitative Services guidance cited by both parties, the court rejected the school district’s position, and found that by “fail[ing]e to respond to [the parents’] repeated requests for evaluations and an IEP, . . . Moorestown failed to offer M.D. a FAPE.” *Id.* at 1077.

The District of Columbia attempts to distinguish many of these cases, including *Moorestown*, on two grounds: (1) the Defendants indicated they intended to keep G.V. enrolled in a private school; and (2) G.V. has never attended a public school. Neither argument is persuasive. The District is correct that after reviewing the proposed IEP for the 2010-2011 school year, the Defendants declined the offer of services and indicated they would keep G.V. in private school for the 2010-2011 school year. There is nothing in the record to suggest that after asking the District to revise G.V.’s IEP for the 2011-2012 school year, the Defendants indicated they intended to enroll G.V. in private school no matter what.

There was no opportunity for the Defendants to indicate that they would keep G.V. in private school for the 2011-2012 school year rather than the proposed placement because the District failed to offer a public placement for G.V. The District suggests that the Defendant's behavior after August 2011---namely filing a due process complaint and asking the hearing officer to find the Lab School is an appropriate placement---"remove[s] any possible ambiguity about the parents' intent to keep G.V. in the private school of their choice.".... However, the relevant inquiry is whether the parents expressed their intent to maintain the child's private school enrollment *after* the school district offers a FAPE.... Here, the parents requested an IEP, the District refused, and the parents filed a due process complaint. The parents' subsequent conduct does not excuse the District's initial failure to comply with its obligation to offer G.V. a FAPE.

15. In the instant case, Petitioners had expressed their intent to maintain the Student's private school enrollment whether or not Respondent revised the Student's IEP and placement. Findings of Fact 114, 121 and 134.

#### Procedural Violations

16. A parent may file a DPC over procedural violations of IDEA by an LEA. However, a procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. §1414(f)(3)(E)(ii). *See also*, 34 C.F.R. §300.513(a). *Accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

17. In the instant case, because Petitioners had determined by January 13, 2014, that the Student should attend Non-Public School and that they would not consider his attendance at any DCPS public school even if it provided the same services and had the same therapeutic environment as the Non-Public School (Finding of Fact 114), Petitioners had effectively waived Respondent's offer of a FAPE.

18. Thus, Respondent's failure to convene an IEP Team meeting on or about January 30, 2014, was a procedural violation of IDEA that must be disregarded as harmless because Respondent had no obligation "to go through the wasteful effort of attempting to conduct an IEP meeting and prepare an IEP for a student whose parent[s had] unilaterally withdrawn [him] from the District and whose parent[s had] failed to respond to an overture from the District to convene an IEP meeting." *K.G. v. Sheehan*, 56 IDELR 17, 111 LRP 6572 (D.R.I. 2010).

Authority of Hearing Officer to Order Tuition Reimbursement and/or Prospective Placement in Private School<sup>11</sup>

19. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). That relief may include compensatory award of tuition reimbursement or prospective services. *Id.* In all cases, an order of relief must be

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<sup>11</sup> The undersigned has concluded that Respondent's FAPE denial was limited to the failure to provide OT services, which has been fully remediated. This discussion of remedies is included in this HOD only to avoid the necessity of a remand to determine the appropriate remedy in the event a reviewing court overrules that conclusion and finds other denials of FAPE.

evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (“*Branham*”).

20. The IDEA provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child and the parents elected to place the child in such private school or facility. 20 U.S.C. §1412(a)(10)(C)(i), *accord*, DCMR §5-E3018.1.

21. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

*Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991)(internal citations omitted); *see also*, *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

22. On the other hand, “a court or a hearing officer may require the agency to reimburse the parents for the cost of . . . enrollment [in a private school] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. §300.148(c); *see also*, DCMR §5-E3018.3 and *School Comm. of Burlington v.*

*Department of Educ.*, 471 U.S. 359, 369-70 (1985) (“*Burlington*”). Moreover, “equitable considerations are relevant in fashioning relief.” *Id.* at 374.

23. Although an inadequate IEP is a *necessary* condition for private school placement and reimbursement, it is not a *sufficient* condition for such placement and reimbursement. *N.T. v. District of Columbia*, 839 F.Supp.2d 29 (D.D.C. 2012). If a public school could offer a FAPE, and DCPS has not demonstrated unwillingness or inability to modify the student’s IEP, then a hearing officer may order a modification in the IEP rather than private school placement or reimbursement:

Because DCPS can craft an appropriate IEP to provide a FAPE, it is not required to pay for [the student’s private] placement.

*Id.*, citing *Jenkins v. Squillacote*, *supra* and *Burlington*. In the instant case, Respondent demonstrated willingness and ability to modify the Student’s IEP (*See*, Findings of Fact 22-27 and 110), thereby rendering private school placement and reimbursement inequitable.

24. A private placement “need not be the least restrictive environment” to be “proper” under the IDEA. *N.T. v. District of Columbia*, *supra*, citing *Warren G. v. Cumberland Count Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001). However, a hearing officer may consider whether the private placement is the least restrictive environment in evaluating whether private placement is the proper remedy. *N.T. v. District of Columbia*, *supra*, citing *Branham and Kerkham v. Superintendent, D.C. Public Schools*, 931 F.3d 84, 87 (D.C. Cir. 1991).

25. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the

student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the LRE for the Student. *Branham*.

26. When DCPS makes a special education placement, the following order or priority applies among placements that are appropriate for the student:

- (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.

DC ST §38-2561.02(c). Although this order of priority is not binding upon a Hearing Officer, a Hearing Officer is not precluded from taking these priorities into consideration in ordering a placement.

27. The IDEA requires that special education be provided in the LRE:

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A); *accord*, DCMR §5-E3011.1; *see also*, 34 C.F.R.

§300.114(a)(2).

28. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

29. In the instant case, because the Student is receiving educational benefit at Non-Public School, the undersigned concludes that Petitioners' placement of the Student at Non-Public School would have been "proper" if Respondent had denied the Student a

FAPE with regard to his placement at General Education School and had been unwilling or unable to modify his IEP—neither of which the undersigned has found.

30. Because there is no evidence in the record that the Student cannot be educated with non-disabled peers even part of the school day, the undersigned concludes that Non-Public School is not the Student's LRE; accordingly, prospective placement of the Student at Non-Public School would not be a proper remedy if Respondent had denied the Student a FAPE with regard to his placement at General Education School and had been unwilling or unable to modify his IEP—neither of which the undersigned has found.

#### Authority of Hearing Officer to Reduce or Deny Tuition Reimbursement

31. The IDEA, 34 C.F.R. §300.148(d)(1) provides that the cost of reimbursement may be reduced or denied if:

- (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section....

*Accord*, DCMR §5-E3018.4.

#### Relevance of the Parent's Motive in Unilaterally Placing the Student

32. Petitioners' intent in enrolling the Student at Non-Public School would be relevant to the equity of awarding tuition reimbursement as a remedy if Respondent had denied the Student a FAPE with regard to his placement at General Education School and

had been unwilling or unable to modify his IEP—neither of which the undersigned has found.

33. The undersigned concludes that Petitioners had a motive of obstructing or manipulating the special education process through their withholding of significant information—the Student’s apparent suicide attempt and his subsequent emotional state—and their failure to attend the January 16, 2014 IEP Team meeting.

34. Petitioners did not “make a bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements.” *Sarah M. v. Weast*, 111 F. Supp. 2d 695 (D. Md. 2000). Because Petitioners were (and remain) fixated upon Non-Public School, they failed to make a bona fide effort to develop an IEP for the Student.

35. Through their conduct from December 20, 2013 to date, Petitioners have lost the right to seek a FAPE and the right to seek reimbursement of Non-Public School’s tuition, and this would be the case even if Respondent had denied the Student a FAPE with regard to his placement at General Education School and had been unwilling or unable to modify his IEP—neither of which the undersigned has found—and even though Non-Public School would have been a proper placement.

36. Petitioners have not, however, lost the right to seek a FAPE in the future, if and when they demonstrate a bona fide interest in developing an IEP for the Student that might result in a different placement or LOS than Non-Public School.

## Summary

37. Since the beginning of School Year SY 2013-2014, Respondent did not deny the Student a FAPE by failing to propose an appropriate IEP to meet his needs including a full-time special education setting.<sup>12</sup>

38. From the beginning of SY 2013-2014 to November 25, 2013, Respondent failed to implement the Student's IEP fully by failing to provide any of the OT services specified in his IEP, which was a material failure to implement and therefore a denial of FAPE; however, Respondent remediated the failure to provide OT services by authorizing funding of independent OT services.

39. Respondent provided all of the behavioral support services specified in the Student's IEP.

40. On or about January 30, 2014, Respondent violated 34 C.F.R. §300.324(b) by refusing to convene a meeting of the Student's IEP Team; however, this was a procedural violation rather than a denial of FAPE because Petitioners already had decided that they would not accept any placement or LOS for the Student other than Non-Public School. No remedy is appropriate for this procedural violation because Petitioners remain unwilling to accept any placement or LOS other than Non-Public School.

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<sup>12</sup> This conclusion flows ineluctably from following facts: (a) The Student's IEP developed June 14, 2013, and as revised September 30, 2013, was reasonably calculated to confer educational benefit. (b) Petitioners withheld from Respondent significant information about the Student's apparent suicide attempt and his emotional state that might have required revisions to his IEP. (c) Parent #1 declined a meeting with SPED Teacher to discuss the Student's current needs and services. (d) Petitioners declined to attend the IEP Team meeting scheduled for January 16, 2014 at which his current needs, services and placement would have been discussed. (e) Petitioners have been unwilling since January 13, 2014, to have the Student attend any school other than Non-Public School. (f) There is no evidence in the record that the Student requires a full-time special education setting.

41. If Respondent had denied the Student a FAPE with regard to the Student's placement—which the undersigned has not found—then Non-Public School would have been a proper placement for the Student although not an appropriate prospective placement.

42. If Respondent had denied the Student a FAPE with regard to the Student's placement—which the undersigned has not found—then reimbursement of private school tuition would *not* have been an equitable remedy due to Petitioners' conduct.

### **X. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

Petitioners' DPC dated February 28, 2014, is dismissed in its entirety, with prejudice.<sup>13</sup>

Dated this second day of May, 2014.



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Charles Carron  
Impartial Hearing Officer

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<sup>13</sup> Nothing in this Order precludes Petitioners from making prospective requests that the Student be evaluated or reevaluated for special education eligibility, that his eligibility be determined, and that an IEP be developed for him if he is found eligible.

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).