**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

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**STUDENT,** [1]

**Petitioner,**

**v.**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,**

**Respondent.** **Hearing Officer: Frances Raskin**

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STUDENT HEARING OFFICE
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# HEARING OFFICER DETERMINATION

## I. JURISDICTION

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

## II. BACKGROUND

Petitioner is a -year-old student with a disability who attends a nonpublic school ("Nonpublic School") in the District of Columbia. On May 11, 2012, Petitioner filed a due process compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging violations of IDEA.

On May 16, 2012, this Hearing Officer was assigned to preside over this case. On June 6, 2012, Respondent DCPS filed a response to the Complaint.[2] Respondent filed its Response sixteen days after the deadline established by IDEA.[3]

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[1] Personal identification information is provided in Attachment A.
[2] Respondent did not challenge the sufficiency of the Complaint.
[3] If a respondent 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

On May 22, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties agreed to continue to work to resolve the Complaint through the end of the resolution session. Thus, the resolution period ended on June 10, 2012. The parties agreed that the forty-five day, due process hearing timeline began on June 10, 2012.

On June 12, 2012, this Hearing Officer held a prehearing conference in which Counsel for Petitioner and Counsel for Respondent, participated. During the prehearing conference, counsel agreed to schedule the due process hearing on June 30, 2012. This Hearing Officer issued a prehearing conference summary and order ("Prehearing Order") on June 13, 2012. Later that day, at the request of counsel for Petitioner, this Hearing Officer issued a Revised Prehearing Order.[4]

The due process hearing commenced at 9:00 a.m. on June 30, 2012. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits,[5] and Respondent's proposed exhibits.[6] Petitioner did not testify at the hearing but presented four witnesses on his behalf, his mother ("Parent"), the Assistant Principal and Special Education Coordinator ("SEC") of the Nonpublic School; an expert in school psychology ("Psychology Expert") at the Nonpublic School; the Student's tutor/mentor ("Mentor"); and the Student's counselor ("Counselor").

Respondent presented one witness, a Progress Monitor ("Monitor") assigned to the Nonpublic School. After the parties presented oral closing arguments, the due process hearing concluded at 2:30 p.m. on June 30, 2012.

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respondent must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP Team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. § 300.508(e).

[4] Counsel for Petitioner had filed a revised Complaint, which she did not serve on this Hearing Officer. Thus, when this Hearing Officer issued the Prehearing Order, it did not contain all the claims or relief requested in the revised Complaint. On June 13, 2012, at the request of Counsel for Petitioner, this Hearing Officer issued a Revised Prehearing Order to reflect the revised Complaint.

[5] This Hearing Officer admitted into evidence Petitioner's exhibits 1-13, inclusive.

[6] This Hearing Officer admitted into evidence Respondent's exhibits 1-5, inclusive.

## III. ISSUES PRESENTED.

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

A. Whether Respondent denied Petitioner a free, appropriate, public education ("FAPE") on April 20, 2012, by discontinuing his funding to attend the Nonpublic School even though a May 2, 2011, hearing officer determination ("HOD") had ordered Respondent to fund Petitioner's costs of attending the Nonpublic School through the 2011-2012 school year;[7] and

B. Whether Respondent denied Petitioner a FAPE on April 20, 2012, by failing to include extended school year services ("ESY") for the 2012 summer when it revised his individualized educational program ("IEP"), and even though the IEP team recommended that Petitioner receive ESY to prevent academic regression over the summer;

C. Whether Respondent denied Petitioner a FAPE on April 20, 2012, when it revised his IEP to reduce his hours of specialized instruction and related services from full-time specialized instruction and related services outside the general education setting to eleven hours of specialized instruction in the inclusion setting and no related services;[8] and

D. Whether Respondent denied Petitioner a FAPE on April 20, 2012, when it revised his IEP to change his placement from full-time specialized instruction outside the general education environment to an inclusion setting at Petitioner's neighborhood school.[9]

Petitioner requests relief in the form of an order that requires Respondent to fund summer school for the 2012 summer, amend his IEP to provide ESY for the 2012 summer, and provide compensatory education to Petitioner.

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[7] In its Response, Respondent asserts that it discontinued funding for the Student to attend IDEAL Academy on April 20, 2012, because of his truancy. Respondent further asserts that Petitioner stated that he no longer wants special education services.

[8] Petitioner presented no evidence on this claim and thus this Hearing Officer will not address it herein.

[9] Petitioner presented no evidence on this claim and thus this Hearing Officer will not address it herein.

## IV. FINDINGS OF FACT

1. Petitioner is a young man who is eligible for special education services as a student with multiple disabilities.[10] He is currently in twelfth grade and requires five credits to earn his diploma.[11] Petitioner attends the Nonpublic School, which he has attended for at least five years.[12]

2. On May 2, 2011, a hearing officer issued an HOD deciding claims that Petitioner raised in his January 6, 2011, due process complaint. [13] In the HOD, the hearing officer noted that, as of March 29, 2011, DCPS had not yet developed an IEP for Petitioner even though it had found him eligible for special education services on December 9, 2010.[14] The hearing officer found that DCPS had failed to provide Petitioner "an appropriate IEP, or indeed any IEP at all."[15] The hearing officer further found that Petitioner had met his burden of demonstrating that DCPS denied him a FAPE by failing to provide him an IEP subsequent to his eligibility determination.[16]

3. In the May 2, 2011, HOD, the hearing officer stated that "Petitioner has requested an interim placement at [his] current private school for the remainder of SY 2011/12."[17] The hearing officer then ordered that "Petitioner is hereby awarded an interim placement at [his] current private school for the remainder of SY 2011/12."[18]

4. Petitioner's full-scale intelligence quotient ("IQ"), the most representative estimate of his global intellectual functioning, is 74.[19] This places his general cognitive

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[10] Petitioner Exhibit 4 at 1 (April 20, 2012, IEP).
[11] Testimony of Monitor; Respondent Exhibit 3 at 1 (June 11, 2012, DCPS Letter of Understanding).
[12] Petitioner Exhibit 8 at 5 (November 5, 2010, Confidential Comprehensive Psychological Evaluation).
[13] Petitioner Exhibit 5 at 2, 10 (May 2, 2011, Hearing Officer Determination).
[14] *Id.* at 6.
[15] *Id.* at 7.
[16] *Id.*
[17] *Id.* at 8. Considering that the hearing officer referred to an "interim placement" and the "remainder" of the school year, the hearing officer must have intended to refer to the 2010-2011 school year as the 2011-2012 school year had not yet begun.
[18] *Id.* at 9. Considering that the hearing officer referred to the "remainder" of the school year, the hearing officer must have intended to refer to the 2010-2011 school year as the 2011-2012 school year had not yet begun.
[19] *Id.* at 6. The full-scale IQ is a composite of a student's abilities in the areas of verbal comprehension, perceptual reasoning, working memory, and processing speed. *Id.*

ability in the borderline range.[20] His overall thinking and reasoning abilities are at the fifth percentile of individuals his age.[21]

5. Petitioner's verbal reasoning abilities are in the low average range and above those of only nineteen percent of his same-age peers.[22] His nonverbal reasoning abilities are in the extremely low range and above those of only one percent of his peers.[23] Because his verbal reasoning abilities are better developed than his nonverbal reasoning abilities, Petitioner may experience significant difficulty when required to perform tasks requiring visual-spatial reasoning and perception of complex visual stimuli.[24]

6. Petitioner's working memory is in the low average range and better than about twenty-three percent of his same-age peers.[25] His ability to process simple or routine visual material quickly and efficiently without making errors is in the borderline range and exceeds only about three percent of his same-age peers.[26]

7. Petitioner has a long history of academic difficulties, which are further compounded by his difficulty sustaining attention, as well as his difficulties with impulsivity and self-control.[27] This perpetuates his feelings of inadequacy, low self-esteem, low self-confidence, and depression.[28]

8. Petitioner views school as boring and often feels like quitting.[29] Most of Petitioner's disdain for school stems from his poor academic performance.[30] He has weak study habits and struggles to organize and complete school assignments.[31]

9. Petitioner has significant difficulty adjusting to changes in his environment.[32] He has difficulties engaging in reciprocal social interaction.[33] He also has difficulty building

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[20] *Id.*
[21] *Id.*
[22] *Id.* at 7.
[23] *Id.* Nonverbal reasoning refers to a person's nonverbal concept formation, visual perception, and organizational abilities. *Id.*
[24] *Id.*
[25] *Id.* at 8. Working memory refers to a person's ability to sustain attention, concentrate, and exert mental control. *Id.*
[26] *Id.*
[27] Petitioner Exhibit 1 at 3 (April 20, 2012, advocate's meeting notes).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

relationships, which prevents him from seeking academic assistance from new teachers, tutors, and service providers.[34]

10. Petitioner has experienced significant emotional distress because the Parent suffers from a serious, chronic illness.[35] In January 2012, the Parent became extremely ill.[36] She was unable to care for herself and needed assistance twenty-four hours a day.[37]

11. As a result of the Parent's illness, Petitioner is reluctant to leave her during the day.[38] As a result, his school attendance dropped sharply.[39]

12. On January 19, 2012, Petitioner entered into an attendance contract, drafted by his DCPS case manager ("Case Manager"), in which he agreed to miss no more than two days of school over the next ten days.[40] The contract specified that, if Petitioner missed more than two days, he would run the risk that Respondent would remove him from the Nonpublic School.[41] On the date he signed the contract, Petitioner already had had thirty-four absences from school, including sixteen unexcused absences.[42]

13. On February 22, 2012, Petitioner entered into another attendance contract with the Case Manager.[43] Between January 4, 2012, and February 17, 2012, the Student had had twenty-six absences, only four of which were excused.[44] In the February 22, 2012, attendance contract, Petitioner agreed to miss no more than two days of school over the next ten days.[45] The contract specified that, if Petitioner missed more than two days, he ran the risk that DCPS may remove him from the Nonpublic School.[46]

14. The Nonpublic School's attendance policy dictates that, if a student has ten or more absences in a reporting period, which generally is 2.5 months, he will not receive credit for the classes he missed.[47] After Petitioner missed school on several consecutive days, the Nonpublic School held several meetings with Petitioner to discuss his attendance

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[34] Testimony of Counselor.
[35] Petitioner Exhibit 1 at 3; testimony of Parent, Psychology Expert.
[36] Testimony of Parent.
[37] *Id.*
[38] Testimony of Parent, SEC.
[39] *Id.*
[40] Respondent Exhibit 5 at 3 (January 19, 2012, Non-Public Unit Student Attendance Intervention Plan).
[41] *Id.*
[42] *Id.*
[43] Respondent Exhibit 5 at 5 (February 22, 2012, Non-Public Unit Student Attendance Intervention Plan).
[44] *Id.*
[45] *Id.* at 7.
[46] *Id.*
[47] Testimony of SEC.

and his failure to comply with the truancy contracts.[48] The purpose of the meetings was to obtain a commitment from Petitioner that he would return to and regularly attend school.[49]

15. Petitioner did not comply with the January 19, 2012, attendance contract or the February 22, 2012, contract.[50] Instead, between January 19, 2012, and March 30, 2012, he had thirty unexcused absences.[51] By mid-April 2012, he had stopped attending school altogether.[52]

16. On April 20, 2012, Respondent held a meeting in which Petitioner, the Parent, the SEC, the Psychology Expert, the Monitor, and the Case Manger participated.[53] The meeting participants discussed Petitioner's IEP.[54] They also discussed his transition plan. They decided that, because Petitioner expressed interest in becoming a chef, his transition plan should focus on preparing him for a career in culinary arts.[55]

17. The meeting participants developed an IEP for Petitioner that provided academic goals in mathematics, reading, and written expression.[56] They also developed goals in the area of emotional, social, and behavioral development.[57]

18. The meeting participants agreed that Petitioner should receive full-time, specialized instruction outside the general education setting because he had difficulty attending and participating in large classes.[58] In developing the April 20, 2012, IEP, the meeting participants agreed that Petitioner would receive 25.5 hours per week of specialized instruction and two hours per week of behavioral support services outside the general education setting.[59]

19. At the April 20, 2012, meeting, the participants discussed Petitioner's failure to attend school.[60] They discussed the reasons Petitioner had stopped attending school, including his concerns about the Parent's illness, his refusal to go to school when the Parent was ill, and his dislike for his classroom teacher.[61]

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[48] *Id.*
[49] *Id.*
[50] Petitioner Exhibit 3 at 1.
[51] Respondent Exhibit 1 at 1-2.
[52] Petitioner Exhibit 3 at 2 (April 20, 2012, IEP Meeting Notes); testimony of SEC, Parent, Monitor; Respondent Exhibit 1 at 2.
[53] Testimony of SEC, Parent, Monitor; Petitioner Exhibit 1 at 1.
[54] Petitioner Exhibit 1 at 3-4.
[55] *Id.* at 4.
[56] Petitioner Exhibit 4 at 3-7 (April 20, 2012, IEP).
[57] *Id.* at 7-8.
[58] Testimony of SEC.
[59] Petitioner Exhibit 4 at 9.
[60] Petitioner Exhibit 1 at 1.
[61] Petitioner Exhibit 3 at 1.

20. Because he had failed to comply with the January 19, 2012, and February 22, 2012, attendance contracts, the meeting participants discussed his location of services as specified in the contracts.[62] The Monitor opined that the Nonpublic School was not appropriate for Petitioner because it had been unable to convince him to attend school.[63] She added that, if Petitioner remained in the Nonpublic School, he would not earn the credits he needs to graduate because he was unwilling to attend school.[64]

21. At the April 20, 2012, meeting, the Parent and the Advocate requested that Petitioner remain at the Nonpublic School.[65] Petitioner then stated that, because there were only two months left in the school year, he did not see the point of returning to school that year.[66] Petitioner also stated that he no longer wanted special education services.[67] He said he would not attend school or abide by an attendance contract.[68]

22. At the April 20, 2012, meeting, the Monitor announced that DCPS planned to place Petitioner in a DCPS alternative school designed for at-risk, adult students ("DCPS School 1") for the remainder of the 2011-2012 school year.[69] DCPS School 1 is designed for students who need only five or six credits to obtain their high school diplomas.[70] It would be able to implement Petitioner's IEP and provide the small setting and individualized attention that he requires to access the curriculum.[71]

23. The Monitor informed the meeting participants that Petitioner also could attend one of the DCPS "Stay" programs.[72] Stay programs are evening programs designed for older students to obtain the credits necessary to earn a high school diploma.[73] Stay programs offer small classes with low student-teacher ratios.[74]

24. The Stay program at DCPS School 2 provides special-education classes that enable students to earn Carnegie units toward a diploma.[75] DCPS School 2 also offers a career technical program that prepares students for post-graduation careers.[76]

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[62] Petitioner Exhibit 1 at 1.
[63] *Id.* at 2. Pursuant to its contract with DCPS, the Nonpublic School is responsible for ensuring that the students funded by DCPS attend school regularly. Testimony of Monitor.
[64] Petitioner Exhibit 1 at 2.
[65] Petitioner Exhibit 1 at 1-2.
[66] Petitioner Exhibit 1 at 2.
[67] Petitioner Exhibit 3 at 1.
[68] Testimony of Monitor.
[69] Testimony of SEC, Monitor.
[70] Testimony of SEC.
[71] Testimony of Monitor.
[72] *Id.*
[73] *Id.*
[74] Testimony of Monitor.
[75] *Id.*

25. The Stay program at DCPS School 3 offers one of the highest quality, special-education programs within DCPS.[77] It also offers vocational programs in the areas cosmetology, barbering, and auto repair.[78] Students who attend this Stay program also may earn credits toward a high school diploma.[79]

26. The Case Manager had previously proposed that, beginning in August 2012, Petitioner could participate in a career-technical program to fulfill his transition plan.[80] The Parent objected to these proposals as she believed the Nonpublic School could best serve Petitioner's needs.[81]

27. At the end of the meeting, the participants discussed whether Petitioner would receive ESY for the 2012 summer.[82] The SEC and the Parent proposed that Petitioner attend the combination ESY-summer school that the Nonpublic School offered during the 2012 summer.[83] The Nonpublic School's ESY-summer school program started on June 25, 2012, and ends on August 22, 2012.[84]

28. The SEC informed the meeting participants that, in terms of Petitioner's social, emotional, and behavioral needs, as well as his need for continued academic instruction, he would benefit from the Nonpublic School's ESY-summer school.[85] The SEC informed the meeting participants that, by attending the ESY-summer school over the summer, Petitioner would be able to earn two credits toward his diploma.[86]

29. The SEC stated that, for Petitioner, the Nonpublic School's ESY-summer school program would focus on math and science, the credits he requires to earn his diploma, as well as the services required to fulfill his transition plan.[87] He added that Petitioner would receive counseling during the ESY-summer school program.[88]

30. The SEC asserted that, due to his excessive absences, it was imperative that Petitioner return to an organized learning environment in order to refresh and maintain his academic skills and pursue his transition goals.[89] The Psychology Expert added that, by

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Testimony of Monitor.
[81] Testimony of Parent.
[82] Petitioner Exhibit 1 at 4.
[83] Testimony of SEC, Parent.
[84] Testimony of SEC.
[85] *Id.*
[86] Testimony of SEC.
[87] *Id.*
[88] *Id.*
[89] *Id.*

attending the Nonpublic School's summer program, the Student would be able to catch up on the schoolwork he had missed during the 2011-2012 school year.[90]

31. The Monitor informed the meeting participants that DCPS would not authorize ESY for Petitioner due to his failure to attend school during the regular school year.[91] She explained that, because Petitioner did not attend school during the regular school year, it was not possible to determine whether ESY would be appropriate for him.[92] The Monitor explained that, although DCPS would not authorize ESY for Petitioner, he would be able to attend a DCPS summer school.[93] The other meeting participants objected to the Monitor's decision.[94]

32. The Monitor then informed Petitioner and the Parent that she would mail them a copy of Petitioner's IEP as well as a prior written notice ("PWN") discharging Petitioner from special education services.[95] After the meeting, the Monitor sent this PWN to Petitioner by certified mail.[96] The PWN did not identify a location of services for Petitioner.[97]

33. Because Petitioner had stated that he no longer wanted to receive special education services, the Monitor did not believe that the PWN should identify a school for the Student to attend.[98] At no time following the April 20, 2012, meeting did the Monitor issue a PWN identifying a location of services for Petitioner.[99] However, Petitioner does not need a PWN to enroll in one of the DCPS Stay programs or his neighborhood school.[100]

34. By the end of the 2011-2012 school year, Petitioner had missed ninety-eight days of school.[101] Most of these absences were unexcused.[102]

35. The Parent testified credibly in all respects. She was forthright in acknowledging Petitioner's truancy as well as his difficulties in school. Other witnesses who testified at the hearing corroborated her testimony.

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[90] Testimony of Psychology Expert.
[91] Petitioner Exhibit 1 at 4.
[92] Testimony of Monitor.
[93] *Id.* Petitioner's April 20, 2012, IEP does not provide ESY for the 2012 summer. Petitioner Exhibit 4 at 12.
[94] Testimony of SEC.
[95] Petitioner Exhibit 3 at 5.
[96] Testimony of Monitor.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*; Respondent Exhibit 1 at 2 (DCPS Attendance Summary, August 15, 2011, to June 22, 2011).
[102] *Id.*

36. The SEC testified credibly about Petitioner's performance in school, his academic history, and his eligibility for special education services. He testified credibly about Petitioner's decline in attendance beginning in February 2012 and failure to attend school after April 2012. He also testified credibly about the discussion at the April 20, 2012, meeting.

37. While the Mentor and the Counselor testified credibly, their testimony was not relevant to the issues in this case.

38. The testimony of the Psychology Expert was not entirely credible. The Psychology Expert testified credibly about the content of Petitioner's November 5, 2011, comprehensive psychological evaluation. He testified credibly that Petitioner requires a small learning environment in order to make academic progress. He also testified credibly that Petitioner did not make academic progress during the last half of the 2011-2012 school year because of his failure to attend school.

39. The Psychology Expert was not credible when he testified that, due to his low cognitive functioning, Petitioner did not understand that he must attend school to earn a diploma. Although the Psychology Expert provided numerous opinions on Petitioner's functioning and needs, he failed to provide any basis for those opinions. Thus, the Parent's testimony that Petitioner fully understood he must attend school to earn his diploma was more credible than the Psychology Expert's opinion on this issue. The Psychology Expert also provided no basis for his opinion that Petitioner would be harmed by being moved to another location of services, and would have difficulty applying himself in a new environment. Thus, in these areas, the Psychology Expert's testimony was not credible.

40. The Monitor testified credibly on Petitioner's failure to attend school and Respondent's efforts to encourage him to attend by drafting attendance contracts. She also testified credibly about the April 20, 2012, meeting, Petitioner's statements that he did not want to attend school, and that the Nonpublic School had been unsuccessful in its attempts to improve his attendance. She also testified credibly about the DCPS decision-making process that led to its decision to deny ESY services to Petitioner and its decision to remove him from the Nonpublic School. She also testified credibly about the Stay programs offered by DCPS.

## V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[103] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[104]

FAPE is defined as:

> Special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program.[105]

A school district need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only "trivial advancement."[106]

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.[107] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[108]

The burden of proof is properly placed upon the party seeking relief.[109] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[110] 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.[111] In other words,

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[103] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).
[104] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[105] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[106] *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).
[107] 34 C.F.R. § 300.513 (a)(2).
[108] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[109] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[110] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).
[111] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[112] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[113] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[114]

## VI. DISCUSSION

### A. Petitioner Failed to Prove that Respondent Denied Him a FAPE on April 20, 2012, by Discontinuing His Funding to Attend the Nonpublic School.

The term "educational placement" refers to the type of educational program prescribed by the IEP.[115] "Educational placement" refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the "bricks and mortar" of the specific school.[116]

Placement decisions must be made in conformity with the child's IEP.[117] The decision to place a student before developing an IEP on which to base that placement violates the IDEA regulations.[118] It also violates the spirit and intent of IDEA, which emphasizes parental involvement.[119] After the fact involvement is not enough.[120] Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.[121]

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

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[112] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).
[113] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[114] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[115] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[116] *Id.*
[117] 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Reg. tit. 5-E § 3013 (2006); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988).
[118] *Spielberg*, 853 F.2d at 258.
[119] *Id.*
[120] *Id.*
[121] *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.[122]

The question of what constitutes a change in educational placement is, necessarily, fact specific and thus, "in determining whether a given modification in a child's school day should be considered a 'change in educational placement,'" the "touchstone" is whether the modification "is likely to affect in some significant way the child's learning experience."[123] In determining whether a "change in educational placement" has occurred, the LEA must determine whether the proposed change would substantially or materially alter the child's educational program.[124]

In determining whether the change in location would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.[125] In other words, if the proposed change substantially or materially affects the composition of the educational program and services provided the student, it is a change in placement.[126]

In contrast, a simple change in location is limited to the physical characteristics associated with a particular site. A transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location only.[127] Simple changes in the location of a building or facility are not generally viewed to be a change in placement where there are no significant changes in the educational program.[128]

Here, Petitioner has been enrolled in the Nonpublic School from his seventh-grade

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[122] *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202). *See also* D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).
[123] *J.R. v. Mars Area Sch. Dist.*, 318 Fed. Appx. 113, 119 (3d Cir. Pa. 2009).
[124] *Letter to Fisher*, 21 IDELR 992 (Office of State Education Programs ("OSEP")), July 6, 1994).
[125] *Id.*
[126] *Letter to Flores*, 211 IDELR 233 (OSEP Aug. 18,1980); *Letter to Fisher*, 21 IDELR 992.
[127] *See*, e.g., *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1980).
[128] *Letter to Flores*, 211 IDELR 233. *See also A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.)

year through the end of the 2011-2012 school year. His April 20, 2012, IEP provides that he is to receive 25.5 hours per week of specialized instruction outside the general education setting. The April 20, 2012, IEP further provides that he is to receive two hours per week of behavioral support services outside the general education setting. He has to earn just five Carnegie units to earn his high school diploma.

Petitioner's attendance in school declined from February 2012 through April 2010, when he stopped attending school altogether. Part of the reason Petitioner did not attend school during this time is that the Parent has been ill and he was unwilling to leave her side.

As a result of Petitioner's lapse in attendance, Respondent decided to change his location of services to a public evening program for adult students who are just a few credits shy of earning their diplomas. Respondent also proposed that Petitioner participate in a part-time, career training program to complete his transition plan and become prepared for post-secondary employment.

Respondent issued a PWN following the April 20, 2012, meeting. In the PWN, Respondent failed to identify a location of services for Petitioner because the Monitor did not think it was necessary because Petitioner had stated that he no longer wanted to receive special education services.[129] However, Petitioner's statement at the April 20, 2012, meeting did not release Respondent from the obligation to provide Petitioner a FAPE.[130]

At the due process hearing, Petitioner proved that the placement that he requires to access the curriculum is full-time, specialized instruction outside the general education

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[129] As of his eighteenth birthday, Petitioner assumed the right to make decisions regarding the provision of special education and related services. *See* 34 C.F.R. § 300.520 (a). The IDEA regulations, as revised in 2008, provide that, if, at any time subsequent to the initial provision of special education and related services, the parent of a child, or an adult student with a disability, revokes consent *in writing* for the continued provision of special education and related services, the public agency may not continue to provide special education and related services to the child, but must provide prior written notice before ceasing the provision of special education and related services. 34 C.F.R. § 300.300 (b)(4) (2008)(emphasis added). If the parent or adult student revokes consent in writing, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services. *Id.* at § 300.300 (b)(4)(iii-iv).

[130] Respondent must evaluate Petitioner before it considers terminating his special education services. 34 C.F.R. § 300.305. Respondent also must provide Petitioner with prior written notice before terminating his eligibility for special education services. 34 C.F.R. § 300.503 (a)(a public agency must give written notice to a parent, or adult student, before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child).

setting. However, Petitioner failed to prove that Respondent changed his placement at the April 20, 2012, meeting, when it proposed removing him from the Nonpublic School and placing him in DCPS School 1 or one of the Stay programs.

First, Petitioner presented no evidence that, on April 20, 2012, Respondent made any material changes to his IEP. Petitioner did not disclose his prior IEP, or introduce any evidence about the content of this IEP or the services he received prior to the April 20, 2012, meeting. As a result, this Hearing Officer was unable to ascertain whether the participants in the April 20, 2012, meeting made any changes to his IEP.

Second, Petitioner presented no evidence that either DCPS School 1 or the DCPS Stay programs could not implement the April 20, 2012, IEP. Petitioner also did not present any evidence to rebut the Monitor's testimony that DCPS School 1 would be able to implement Petitioner's IEP and provide the small setting and individualized attention that he requires to access the curriculum.

Third, Petitioner presented no evidence that, if he were to attend DCPS School 1 or one of the Stay programs, he would have more exposure to his nondisabled peers than at the Nonpublic School. Thus, Petitioner presented no evidence that, if Respondent placed him in DCPS School 1, or Petitioner were required to attend one of the DCPS Stay programs, it would substantially or materially alter his educational program.

Petitioner did present testimony from the Psychology Expert that Petitioner would be harmed by being moved to another location of services, and would have difficulty applying himself in a new environment. However, the Psychology Expert failed to provide any factual basis for his opinion, and Petitioner presented no other testimonial or documentary evidence to explain how he would be harmed by having to leave the Nonpublic School so close to the end of his 2011-2012 school year, which should have been his last year in high school.[131] In other words, Petitioner failed to prove that he would suffer academic or emotional harm by being placed in another location of services for the following year or until he receives his diploma.

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[131] Petitioner cited *Block v. District of Columbia*, 748 F Supp. 891, 895-96 (D.D.C. 1990) (finding that "while a school may be appropriate for a student if he begins the school year there, it is not necessarily appropriate to inject the student into that school part-way through the school year") and *Holmes v. District of Columbia*, 680 F. Supp. 40, 41-42 (D.D.C. 1988) (inappropriate to change student's placement in the middle of the school year; rather, "[t]he appropriate place for this youngster is to permit him to finish the remaining seven months of his high school education in the environment that he has been accustomed to over the past three years") in arguing that Respondent denied him a FAPE by removing him from the Nonpublic School when he was just five credits away from graduating. However, the *Holmes* and *Block* cases did not hold that a student *never* may be removed from a school when he is close to graduating. As discussed herein, the Student was not making progress at the Nonpublic School and Respondent's actions did not deny him a FAPE.

What Petitioner proved was that the Nonpublic School had failed to ensure that he attended school regularly enough to make academic progress. Thus, Petitioner proved that Respondent was justified in deciding to remove the Student from the Nonpublic School, as it was not an appropriate location of services for him.

Finally, Petitioner asserts that the May 2, 2011, HOD required Respondent to fund the Student's costs of attending the Nonpublic School through the end of the 2011-2012 school year. Considering that the hearing officer referred to an "interim placement" and the "remainder" of the school year in this HOD, this Hearing Officer can conclude only that, the hearing officer intended to place the Student in the Nonpublic School for the remainder of the 2010-2011 school year, not for the entirety of the upcoming 2011-2012 school year. For this reason, this Hearing Officer is not persuaded by Petitioner's argument that this HOD barred Respondent from removing Petitioner from the Nonpublic School after it became evident that the Nonpublic School could no longer meet his needs.

Thus, Petitioner failed to prove that Respondent denied him a FAPE on April 20, 2012, when it decided to discontinue his funding to attend the Nonpublic School.

**B. Petitioner Failed to Prove that Respondent Denied Him a FAPE on April 20, 2012, by Failing to Authorize Extended School Year Services for the 2012 Summer.**

ESY services are organized, educational programs designed for disabled children that occur outside the regular school year, e.g., summer programs.[132] Each public agency must ensure that extended school year services are available as necessary to provide FAPE.[133] Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.[134] A public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.[135]

The IDEA regulations, the District of Columbia Code, and the District of Columbia Municipal Regulations do not include specific criteria for determining whether a child qualifies for ESY services,[136] other than the requirement that ESY be provided if it is necessary to provide FAPE to a child.[137] Many states design ESY services to address a

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[132] M.M. v. School District of Greenville County, 303 F.3d 523, 528 n. 9 (4th Cir. 2002).
[133] 34 C.F.R. § 300.106 (a).
[134] 34 C.F.R. § 300.106 (a)(2). *See also* D.C. Mun. Reg. tit. 5-E § 3017.1.
[135] 34 C.F.R. § 300.106 (a)(3); D.C. Mun. Reg. tit. 5-E § 3017.3.
[136] *See*, e.g., *Letter to Myers*, 213 IDELR 255 (OSEP 1989) (stating that IDEA regulations neither establishes standards for ESY programs nor specifies the circumstances in which ESY is needed).
[137] Comments to IDEA regulations, 71 Fed. Reg. 46582 (2006).

child's problems with regression and recoupment.[138] These states focus on a child's "likelihood of regression or retention" and difficulties recouping previously learned concepts in making ESY eligibility determinations.[139]

Thus, in many states, ESY Services are only necessary when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.[140] Other states determine that that ESY Services are warranted only when they prevent significant regression of skills or knowledge that would seriously affect a disabled child's progress toward self-sufficiency.[141]

States may use recoupment and retention as their sole criteria, but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services.[142] While children with disabilities need not actually experience regression in their skills before an IEP team may find them eligible for ESY, the IEP team must have a reasonable basis for concluding that regression would occur without the provision of summer programs or services.[143]

Nonetheless, the determination whether services beyond the regular school day are essential for the child to receive educational benefit is necessarily fact and case specific.[144] Because a showing of actual regression is not required, a disabled child's need for ESY Services may be established by expert testimony, based on a professional individual evaluation.[145] However, the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.[146] ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress."[147]

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[138] *Letter to Myers*, 213 IDELR 255; Comments to IDEA regulations, 71 Fed. Reg. 46582 stating that these concepts are derived from well-established judicial precedents). *See*, e.g., *Johnson* v. *Bixby Independent School District 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983).
[139] *Letter to Myers*, 213 IDELR 255.
[140] *M.M. v. School District of Greenville County*, 303 F.3d. 523, 537-38. See also *Alamo Heights Indep. Sch. Dist. v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990).
[141] *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990).
[142] 71 Fed. Reg. 46582; Letter to Myers,
[143] *See Letter to Anonymous*, 22 IDELR 908 (OSEP 1995).
[144] *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).
[145] *M.M.*, 303 F.3d at 538.
[146] *Id.*
[147] *Id.* (citing *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3rd Cir. 1988)).

Here, Petitioner presented no evidence, other than the testimony of the SEC and the Psychology Expert that he required ESY services. The SEC testified that the Nonpublic School's combination ESY-summer school program would enable Petitioner to earn two credits toward his diploma, receive the services required to fulfill his transition plan, and receive counseling. At the April 20, 2012, meeting, the SEC asserted that, due to his excessive absences, it was imperative that Petitioner return to an organized learning environment in order to refresh and maintain his academic skills and pursue his transition goals. The Psychology Expert added that, by attending the Nonpublic School's summer program, the Student would be able to catch up on the schoolwork he had missed during the 2011-2012 school year.

This testimony is the only evidence Petitioner presented to show that Respondent denied him a FAPE by denying him ESY services for the 2012 summer. Petitioner presented no testimony or documentary evidence to show that he would experience regression as a result of not receiving specialized instruction and related services over the 2012 summer. Nor did Petitioner present any evidence that such regression will substantially thwart his ability to make "meaningful progress" or that he would have difficulty recouping previously learned concepts.

Thus, Petitioner failed to prove that Respondent denied him a FAPE by failing to authorize ESY services for the 2012 summer.

## ORDER

Based upon the findings of fact and conclusions of law herein, it is this twenty-second day of July hereby ordered that the Complaint is dismissed with prejudice.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

## NOTICE OF APPEAL RIGHTS

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