

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

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

Parent, on behalf of)	
STUDENT,¹)	
)	
Petitioner,)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
)	
Respondent.)	

Hearing Officer: Frances Raskin

OSSE
STUDENT HEARING OFFICE
1 SEP -19 AM 10:18

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of a _____ year-old student ("Student") with a disability. On June 22, 2011, Petitioner filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA").

This Hearing Officer was appointed to preside over this case on June 24, 2011. Respondent DCPS filed a response to the Complaint on July 6, 2011.² Respondent filed its Response two days after the deadline established by IDEA.³

¹ Personal identification information is provided in Attachment A.

² Respondent did not challenge the sufficiency of the Complaint.

The parties participated in a resolution meeting on July 14, 2011. The parties were unable to resolve the Complaint and agreed to work to resolve the Complaint through the end of the resolution session. Thus, the resolution period ended on July 22, 2011. The parties agreed that the forty-five day, due process hearing timeline began on July 23, 2011.

During the prehearing conference, the parties agreed to schedule the due process hearing for August 30, 2011.

At the outset of the hearing, in the absence of any objections, this Hearing Officer entered the parties' respective five-day disclosures into evidence.⁴

After the parties provided opening statements, Petitioner testified and called two witnesses, her educational advocate ("Advocate") and the assistant educational director of the Non-Public School ("Director"). Respondent then presented one witness, the compliance case manager ("CCM"). The due process hearing concluded at 1:50 p.m. on August 30, 2011.

IV. ISSUES PRESENTED

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on June 2, 2011, by failing to revise his individualized educational program ("IEP") to provide him 27.5 hours of specialized instruction and related services, as requested by Petitioner and in light of the fact that the Student failed all of his classes in the 2010-2011 school year; and

B. Whether Respondent denied the Student a FAPE on June 2, 2011, by failing to provide him a therapeutic environment and sufficient emotional support to address his truancy issues, as required by a May 18, 2011, Hearing Officer Determination ("HOD").

Petitioner requests relief in the form of an order requiring Respondent to convene an IEP meeting and revise the IEP according to the order in the HOD and fund the Student's tuition at a non-public school with the accommodations and/or interventions specified in the HOD. Petitioner also seeks an order that requires Respondent to provide compensatory education to the Student.

³ If the Local Education Agency ("LEA") has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response. 34 C.F.R. § 300.508(e) (emphasis added). During the prehearing conference, counsel for Petitioner asserted that Petitioner was not prejudiced by Respondent's failure to file a timely response.

⁴ This Hearing Officer entered into evidence Petitioner's Exhibits 2-6, 9-12, and 14-18. This Hearing Officer entered into evidence Respondent's Exhibits 1-6.

V. FINDINGS OF FACT

1. The Student's general intellectual ability is 88, which is in the low average range when compared to other students his age.⁵ This cognitive score suggests that he will have difficulty in keeping up with typically developing peers on a wide variety of verbal and non-verbal reasoning tasks.⁶

2. In 2010, the Student's broad reading abilities were equivalent to a twelve-year-old student in the sixth month of sixth grade, which was in the low average range when compared to his same-age peers.⁷ The Student's performance in broad written language was equivalent to a twelve-year-old student in the fifth month of sixth grade, which was in the low average range when compared to his same-age peers.⁸ The Student requires specialized instruction in reading and written expression.⁹

3. The Student's performance in broad math was equivalent to a student aged ten years and eight months in the third month of fifth grade, which was in the low range when compared to his same-age peers.¹⁰ The Student requires specialized instruction in mathematics due to his weaknesses in this area.¹¹

4. The Student has a variety of emotional and behavioral difficulties that have been evident in the home and school environment since he was seven years old.¹² For the past six years, he has been plagued by depressed mood.¹³

5. For the past two years, he used _____ every day to self-medicate and ease his symptoms of depression.¹⁴ The Student's teachers reported that he came to school under the influence of _____. Although Petitioner threatened the Student, he continued to use marijuana.¹⁶ The Student stopped _____ on his birthday in July 2011.¹⁷

6. The Student has been diagnosed with attention deficit hyperactivity disorder ("ADHD").¹⁸ He often fails to pay close attention to details and makes careless mistakes in his

⁵ Petitioner Exhibit 4 at 12 (October 4, 2010, Report of Comprehensive Psychological Evaluation). The general intellectual ability score is similar to an IQ score. *Id.*

⁶ *Id.*

⁷ *Id.* at 12, 18

⁸ *Id.*

⁹ *Id.* at 13.

¹⁰ *Id.* at 12, 18.

¹¹ *Id.* at 12.

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ *Id.*; stipulation of parties.

¹⁵ Stipulation of parties.

¹⁶ *Id.*

¹⁷ Testimony of Petitioner.

¹⁸ Petitioner Exhibit 4 at 13.

schoolwork, and has difficulty sustaining attention.¹⁹ He does not follow through on instructions, has difficulty organizing tasks, and often loses things necessary for tasks and activities.²⁰ The Student also is easily distracted by external stimuli and often is forgetful in daily activities.²¹ He is overactive and talks excessively.²²

7. The Student was found eligible for specialized instruction and related services on November 10, 2010, due to his specific learning disability (“SLD”) and ADHD, i.e., other health impairment.²³ Petitioner and the Advocate attended the November 10, 2010, meeting.²⁴ Petitioner agreed with the eligibility decision.²⁵

8. On November 10, 2010, Respondent developed an initial IEP for the Student that reflects that his primary disability is SLD.²⁶ The IEP includes a disability worksheet that indicates that the Student also meets the eligibility criteria for OHI.²⁷

9. The November 10, 2010, IEP provides that the Student is to receive fifteen hours per week of specialized instruction in math, written expression, and reading outside the general education setting.²⁸ The IEP also provided one hour of behavioral support services per week.²⁹ The IEP includes annual goals in reading, writing and mathematics.³⁰ It also includes annual goals in emotional, social, and behavioral development.³¹

10. Respondent determined that the Student’s IEP would be implemented at a public high school (“DCPS School 1”).³² Petitioner and her educational advocate disagreed with the amount of specialized instruction on the Student’s IEP and the decision to place the Student in the public high school but agreed to allow Respondent to implement this IEP.³³

11. The Student did not perform well at DCPS School 1 during the 2010-2011 school year.³⁴ He did not attend class and received failing grades in every course, even though he received academic support in all of his classes except ROTC and music.³⁵ The Student’s biggest

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Stipulation of parties; Petitioner Exhibit 3 at 2 (November 10, 2010, Advocate’s Notes).

²⁴ Petitioner Exhibit 2 at 6 (November 10, 2010, IEP).

²⁵ *Id.*

²⁶ *Id.* at 1; stipulation of parties.

²⁷ Stipulation of parties.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*;

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

problem was his failure to attend class.³⁶

12. The attendance counselor at DCPS School 1 met with Petitioner and developed an attendance contract for the Student.³⁷ This contract, though implemented, failed to improve the Student's attendance.³⁸ The Student's attendance summary, compiled by Respondent, reflects that, he was present for only thirty-four of the ninety school days between August 16, 2010, and April 21, 2010.³⁹ The special education coordinator at the DCPS School 1 did not know the Student personally and was not aware of his truancy issues.⁴⁰

13. During the 2010-2011 school year, there were more than 700 students enrolled in DCPS School 1.⁴¹ More than 200 special education students were enrolled in the school.⁴²

14. On March 31, 2011, the Non-Public School accepted the Student for enrollment for the 2010-2011 school year.⁴³ The letter stated that the Student would receive services as specified in his November 10, 2010, IEP until evaluations/recommendations can be made at an initial review meeting.⁴⁴

15. On May 18, 2011, a hearing officer issued an HOD regarding the Student following a due process hearing on April 28, 2011.⁴⁵ In the HOD, the hearing officer found that Petitioner had failed to meet her burden of proving that the November 10, 2010, IEP was not reasonably calculated to provide educational benefit.⁴⁶ The hearing officer found that Petitioner had failed to prove that Respondent denied the Student a FAPE by failing to develop an IEP that provides full-time specialized instruction.⁴⁷

16. In the May 18, 2011, HOD, the hearing officer found that the Student likely would not succeed in a large school with special education classes in a separate area of the school.⁴⁸ The hearing officer found that a better option for the Student would be a self-contained class in a therapeutic setting where all of the students are receiving "some level of services" and the school community wants the Student to succeed.⁴⁹ The hearing officer found that the Student requires a therapeutic environment where he can receive emotional support to address his depressive

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Stipulation of parties.

⁴⁰ *Id.*

⁴¹ Stipulation of parties.

⁴² *Id.*

⁴³ Petitioner Exhibit 16 at 1 (March 31, 2011, letter from Non-Public School to Petitioner).

⁴⁴ *Id.*

⁴⁵ Petitioner Exhibit 11 at 2 (May 18, 2011, HOD); Respondent Exhibit 1 (same).

⁴⁶ *Id.* at 8.

⁴⁷ *Id.*

⁴⁸ *Id.* at 3.

⁴⁹ *Id.*

tendencies, negative feelings about himself and ADHD symptoms.⁵⁰

17. The hearing officer found that Petitioner had met her burden of demonstrating that Respondent had denied the Student a FAPE by failing to provide him an appropriate location of services where his special education and related services needs can be met.⁵¹ However, the hearing officer concluded that it would be inappropriate to place the Student in a full-time, special education school that has no nondisabled children, especially since Petitioner had failed to prove that the Student required the full-time, specialized instruction that the private school provides all of its students.⁵²

18. In the May 18, 2011, HOD, the hearing officer found that the Student was not entitled to compensatory education.⁵³ The hearing officer found that the Student's failure to attend class routinely was the primary cause of any educational detriment that he suffered.⁵⁴ The hearing officer further found that Respondent made available the required specialized instruction and behavioral support services and the Student chose not to access those services.⁵⁵

19. The hearing officer ordered Respondent to convene an IEP meeting within twelve school days.⁵⁶ The hearing officer ordered that, at this meeting, Respondent must provide Petitioner with one or more locations of services that can implement the Student's IEP while also offering a therapeutic environment and sufficient emotional support to address the Student's extreme truancy issues.⁵⁷

20. On June 2, 2011, Respondent convened a meeting of the Student's IEP team at DCPS School 1.⁵⁸ The purpose of the meeting was to discuss and determine a new location of services for the Student pursuant to the May 18, 2011, IEP. The Advocate and the CCM attended the meeting in person.⁵⁹ Petitioner attended the meeting by phone.⁶⁰ No one from DCPS School 2 attended the meeting.⁶¹

21. At the June 2, 2011, meeting, Respondent informed Petitioner that the Student had failed all of his classes and would be retained in the _____ grade.⁶² The Student had been failing his classes during the entire 2010-2011 school year.⁶³ It was no surprise that, at the end of the

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Id.* at 8.

⁵³ *Id.* at 9.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 9.

⁵⁸ Respondent Exhibit 3 at 1 (June 2, 2011, IEP Meeting Notes).

⁵⁹ Testimony of Advocate.

⁶⁰ *Id.*

⁶¹ Testimony of CCM.

⁶² Testimony of Petitioner, Advocate, CCM.

⁶³ Testimony of Advocate.

school year, he had failed every class.⁶⁴ Additionally, the Student had been _____ for the last three weeks of the school year because of his failure to attend class.⁶⁵

22. At the June 2, 2011, meeting, the Advocate requested that Respondent provide the Student a full-time IEP and a therapeutic setting.⁶⁶ Students with full-time IEPs are to receive 27.5 hours per week of specialized instruction and related services outside the general education environment.⁶⁷ Students with full-time IEPs do not have contact with their non-disabled peers during the school day.⁶⁸

23. A therapeutic setting is a small, structured setting designed for students with behavioral issues.⁶⁹ A therapeutic setting has a crisis intervention room where students may go to deescalate after they become angry or defiant.⁷⁰ A therapeutic setting places behavioral technicians in each classroom to assist the classroom teacher and manage students with behavioral difficulties.⁷¹ A therapeutic setting also places behavioral technicians in each of the halls to ensure that students attend class and do not wander the halls.⁷² A therapeutic setting also employs a clinical psychologist to be available to students experiencing behavioral problems.⁷³ Students in therapeutic settings generally have full-time IEPs.⁷⁴

24. At the June 2, 2011, meeting, Respondent denied the Advocate's request to revise the Student's IEP to provide 27.5 hours per week of specialized instruction outside the general education setting.⁷⁵ Respondent also denied Petitioner's request to fund the Student's enrollment at the Non-Public School.⁷⁶

25. At the meeting, Respondent informed Petitioner that it would be issuing a prior written notice for the Student to attend DCPS School 2.⁷⁷ The CCM selected DCPS School 2 because it had a smaller student population than other DCPS high schools.⁷⁸ He interpreted the May 18, 2011, to require only that Respondent provide the Student a school with a smaller student population than the population at DCPS School 1.⁷⁹ As of June 2011, DCPS School 2

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Testimony of Advocate.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Testimony of Advocate.

⁷⁶ Testimony of Petitioner.

⁷⁷ Testimony of Advocate; Respondent Exhibit 3 at 2.

⁷⁸ Testimony of CCM.

⁷⁹ *Id.*

had only 173 students.⁸⁰

26. Petitioner objected that DCPS School 2 was not a small, therapeutic setting.⁸¹ Petitioner expressed concern that the Student would continue to skip class.⁸² The Advocate informed the IEP team that Student needed a small, therapeutic setting where he will not be allowed to roam the halls.⁸³ The Advocate expressed concern that DCPS School 2 is a large building like DCPS School 1 with plenty of spaces in which the Student could hide.⁸⁴ DCPS School 2 is not a therapeutic setting.⁸⁵

27. Respondent asserted that it was starting a new program at DCPS School 2.⁸⁶ Respondent explained that DCPS School 2 would enroll only ninth graders and be a much smaller environment than DCPS School 1.⁸⁷

28. The special education coordinator from DCPS School 2 was not present at the June 2, 2011, meeting, and no one present at the meeting could describe the setting, programs offered, or other aspects of DCPS School 2.⁸⁸ No one at the meeting could provide Petitioner and the Advocate information about the Student's classrooms, the students who would be in those classrooms, or the teachers who would teach his classes.⁸⁹

29. At the June 2, 2011, meeting, the Advocate asked Respondent whether DCPS School 2 had a crisis intervention room.⁹⁰ Respondent replied that the May 18, 2011, did not require it to provide a crisis intervention room at the new location of services.⁹¹

30. On June 3, 2011, meeting, Respondent issued a prior written notice for the Student to attend DCPS School 2 beginning on July 5, 2011.⁹²

31. During the week of August 22, 2011, the Advocate visited DCPS School 2.⁹³ He met with the special education coordinator ("SEC") of the school.⁹⁴ The SEC gave the Advocate a tour of DCPS School 2 and showed the Advocate the classes in which the Student would receive instruction.⁹⁵ All of the Student's classes would be on a single floor of the building.⁹⁶

⁸⁰ *Id.*

⁸¹ Testimony of Advocate.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Respondent Exhibit 2 (June 3, 2011, Prior Written Notice, email from CCM to Advocate).

⁹³ Testimony of Advocate.

⁹⁴ *Id.*

⁹⁵ *Id.*

The SEC provided the Advocate a mock schedule for the Student, and informed the Advocate of the services the Student would receive.⁹⁷ The SEC also informed the Advocate that the Student would take classes in multiple classrooms throughout the school day.⁹⁸

32. The SEC expressed concern to the Advocate that the Student would be the oldest student in the school and may become a dominant figure in the student body.⁹⁹ The SEC expressed concerns about the Student's history of truancy and that he might encourage other students to skip class.¹⁰⁰ The SEC expressed concern that the Student would wander the halls at DCPS School 2 and stated that the school did not have a program to address students who wander the halls.¹⁰¹

33. On August 8, 2011, Petitioner enrolled the Student at DCPS School 2.¹⁰² On August 19, 2011, the SEC at DCPS School 2 contacted Petitioner and informed her that the Student could not begin attending DCPS School 2 on August 22, 2011, the first day of the 2011-2012 school year.¹⁰³ The SEC stated that Petitioner would have to attend a meeting before the Student could begin attending DCPS School 2.¹⁰⁴ The CCM then telephoned Petitioner and informed her that he would invite her and the Student to a meeting with the staff of DCPS School 2 to discuss when the Student could begin attending DCPS School 2 and the services the school would provide him.¹⁰⁵ The CCM informed Petitioner that the Student would be allowed to attend school after the meeting.¹⁰⁶

34. At 4:34 p.m. on August 29, 2011, the CCM emailed counsel for Petitioner and informed him that the meeting was not going to take place.¹⁰⁷ The CCM informed counsel for Petitioner that the Student could begin attending school the following day.¹⁰⁸ This was the first time the CCM notified Petitioner or her counsel that the Student could begin attending school.¹⁰⁹

35. The Non-Public School is a private, therapeutic day program.¹¹⁰ The Non-Public School serves a 110 students between the ages of five and twenty-one.¹¹¹ All of the students at the Non-Public School have full-time IEPs.¹¹² The students have no contact with non-disabled

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Testimony of Petitioner.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Testimony of CCM.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Testimony of Director.

¹¹¹ *Id.*

¹¹² *Id.*

peers during the school day.¹¹³

36. Classes at the Non-Public School contain no more than ten students, and one to three adults, including at least one special education teacher.¹¹⁴ All of the students are on a behavior contract, and this contract includes incentives for regular attendance in class.¹¹⁵ The Non-Public School has behavioral technicians in each classroom and in the hallways.¹¹⁶ Students are not allowed in the halls unaccompanied by an adult.¹¹⁷ The Non-Public School has two crisis intervention rooms.¹¹⁸

37. The Advocate provided credible testimony. He easily recalled the details of the meetings he attended, the content of the Student's IEP, and his difficulties in school. Although the Advocate's viewpoint differed from that of the CCM, he was an equally credible witness. His testimony was uncontroverted and supported by the documentary evidence.¹¹⁹

38. Petitioner was a credible witness. She was forthright about the Student's drug use and behavioral difficulties. She also provided an accurate recollection of the meetings she attended, her conversations with the SEC and the CCM, and her visit to the Non-Public School. Her testimony was uncontroverted.

39. The Assistant Director provided in-depth testimony about the services that the Non-Public School provides. Her testimony had no bearing on the issues in this case, only the remedy requested, and was uncontroverted. Thus, she was a credible witness.

40. The CCM was a credible witness. He provided in-depth testimony about his efforts to secure a school that would comply with the requirements of the May 18, 2011, HOD. He was forthright about the shortcomings of the other DCPS senior high schools. He also admitted that Respondent provided the Student only a few of the aspects of a therapeutic environment as defined in the May 18, 2011, HOD. In other words, he admitted that DCPS School 2 does not meet the definition of therapeutic environment defined in the May 18, 2011, HOD.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ The Advocate's testimony differed from the CCM's testimony on the issue of whether the SEC of DCPS School 2 had concerns about whether the Student would receive the services he required at DCPS School 2, whether the school could address the Student's truancy, and whether the Student would be a bad influence on other students at the school. It is possible that the SEC expressed concerns to the Advocate but later downplayed those concerns to the CCM. Or the SEC could have changed his mind after speaking to the Advocate. Thus, this Hearing Officer finds that both the Advocate and the CCM were credible witnesses although they had different impressions of the position of the SEC on the Student's attending DCPS School 2.

VI. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.¹²⁰ FAPE is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”¹²¹ It “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”¹²²

Each local education agency (“LEA”) is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”¹²³ In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable him/her to receive educational benefits.¹²⁴ The IEP is the centerpiece of special education delivery system.¹²⁵

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.¹²⁶ In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.¹²⁷

¹²⁰ 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

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

¹²² *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

¹²³ 34 C.F.R. § 300.101.

¹²⁴ *Rowley* at 206-207.

¹²⁵ *Lillbask v. Conn. Dep’t of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

¹²⁶ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹²⁷ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *See also C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student’s rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).

The burden of proof is properly placed upon the party seeking relief.¹²⁸ A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹²⁹ 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.¹³⁰ In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.¹³¹ Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,¹³² except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.¹³³

VII. DISCUSSION

Claim preclusion seeks to "[protect] litigants from the burden of re-litigating an identical issue with the same party or his privy and [promote] judicial economy by preventing needless litigation."¹³⁴ The doctrine focuses on whether the same cause of action is implicated in both the initial and subsequent lawsuits, meaning that the two lawsuits "share the same nucleus of facts."¹³⁵

In determining whether the same nucleus of facts is at issue, "the court should consider 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of the business understanding or usage.'"¹³⁶ Ultimately, the successful application of the claim preclusion doctrine requires three things: "(1) the presence of the same parties or privies in the two suits; (2) claims arising from the same cause of action in both suits; and (3) a final judgment on the merits in the previous suit."¹³⁷ Although courts were initially hesitant to use *res judicata*,

¹²⁸ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹²⁹ 20 U.S.C. § 1415 (i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

¹³⁰ *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

¹³¹ *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).

¹³² *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

¹³³ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

¹³⁴ *Theodore v. District of Columbia*, 2011 U.S. Dist. LEXIS 31962 at 12 (D.D.C. March 28, 2011) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).

¹³⁵ *Id.* (citing *Serpas v. Dist. of Columbia*, 2005 U.S. Dist. LEXIS 44536, *12-13 (D.D.C. 2005)).

¹³⁶ *Id.* (citation omitted).

¹³⁷ *Id.* at 13 (citing *Friendship Edison Public Charter School v. Suggs*, 562 F. Supp. 2d 141, 148 (D.D.C. 2008)).

i.e., claim preclusion, in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits.¹³⁸

A. Petitioner Failed to Prove that DCPS Denied the Student a FAPE on June 2, 2011, by Failing to Revise His IEP to Provide Him 27.5 Hours of Specialized Instruction and Related Services.

The IEP is the centerpiece of special education delivery system.¹³⁹ The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."¹⁴⁰ IDEA does not require that the services provided maximize each child's potential.¹⁴¹

In developing an IEP, the IEP team must consider the strengths of the child; the parents' concerns for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.¹⁴²

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,¹⁴³ establishes annual goals related to those needs,¹⁴⁴ and provides appropriate specialized instruction and related services.¹⁴⁵ The IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.¹⁴⁶ The services provided to the child in the IEP must address all of the child's identified special education and related services and must be based on the child's unique needs and not on the child's disability.¹⁴⁷ For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."¹⁴⁸

Here, the May 18, 2011, HOD found that the November 10, 2010, IEP was reasonably calculated to provide educational benefit. Petitioner presented no evidence to show that the

¹³⁸ *Id.* (citing *Hobby v. Hodges*, 215 F.2d 754, 759 (10th Cir. 1954); *Robinson v. Heckler*, 593 F. Supp. 737, 741 (D.D.C. 1984); *Mannerfrid v. Brownell*, 145 F. Supp. 55, 56 (D.D.C. 1956); *Rhema Christian Center v. Dist. of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 192 (D.C. 1986) (finding that final administrative decisions that operate as a judicial proceeding generally will be accorded preclusive effect by courts)).

¹³⁹ *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

¹⁴⁰ *Rowley*, 458 U.S. at 201 (1982).

¹⁴¹ *Id.* at 198.

¹⁴² 34 C.F.R. § 300.324 (a).

¹⁴³ 34 C.F.R. § 300.320 (a) (1).

¹⁴⁴ 34 C.F.R. § 300.320 (a) (2).

¹⁴⁵ 34 C.F.R. § 300.320 (a) (4).

¹⁴⁶ 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

¹⁴⁷ D.C. Mun. Reg. tit. 30 § 3002.1(f).

¹⁴⁸ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Student's circumstances had changed since the close of the record in that case on April 28, 2011. While Petitioner proved that the Student failed all his classes after April 28, 2011, and that Petitioner learned that the Student would not be promoted from the ninth grade on June 2, 2011, the Advocate testified that this was no surprise. The Advocate also testified that the Student had been failing all of his classes throughout the 2010-2011 school year.

Petitioner failed to present any new evaluative data or other information to show that, since April 28, 2011, there were new facts to justify increasing the Student's IEP to full-time. Rather, Petitioner attempts to relitigate the same claim adjudicated in the May 18, 2011, HOD. For this reason, this claim is barred by *res judicata*.

Thus, Petitioner is not the prevailing party on this claim.

B. Whether Respondent Denied the Student a FAPE on June 2, 2011, by Failing to Provide Him a Therapeutic Environment and Sufficient Emotional Support to Address the Student's Truancy Issues, as Required by a May 18, 2011, HOD.

The IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.¹⁴⁹ Special classes separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁵⁰

In other words, a student's IEP must be implemented in the student's LRE.¹⁵¹ In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.¹⁵² A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.¹⁵³ The term "educational placement" refers to the type of educational program prescribed by the IEP.¹⁵⁴ "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.¹⁵⁵

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

¹⁴⁹ 34 C.F.R. § 300.116 (c).

¹⁵⁰ 34 C.F.R. § 300.114 (a)(2)(ii).

¹⁵¹ 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

¹⁵² 34 C.F.R. § 300.116 (d).

¹⁵³ *Id.* at (e).

¹⁵⁴ *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

¹⁵⁵ *Id.*

environment.¹⁵⁶

In the District of Columbia, special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia.¹⁵⁷

In the May 18, 2011, HOD, the hearing officer ordered DCPS to provide the Student a “therapeutic environment and sufficient emotional support to address his extreme truancy issues.” In the findings of fact, the hearing officer found that the Student likely would not succeed in a large school with special education classes in a separate area of the school.¹⁵⁸ The hearing officer further explained that a better option for the Student would be a self-contained class in a therapeutic setting where all of the students are receiving “some level of services” and the school community wants the Student to succeed.¹⁵⁹ The hearing officer found that the Student requires a therapeutic environment where he can receive emotional support to address his depressive tendencies, negative feelings about himself and ADHD symptoms.¹⁶⁰

Yet, Respondent failed to provide the Student a therapeutic environment, instead believing that a smaller setting would be sufficient. Although the specific characteristics of a therapeutic environment are not included in the order section of the HOD, they are spelled out in the findings of fact. Respondent should have first reviewed the entire HOD to ascertain the hearing officer’s intention before deciding on its own that a therapeutic environment required only that it provide the Student a school with a smaller enrollment than his previous school.

Additionally, Respondent failed to provide the Student any school, or implement his IEP from the first day of the 2011-2012 school year through the day before the due process hearing on August 30, 2011. Despite providing a PNOP in June 2011, Respondent informed Petitioner in August 2011, that the Student could not begin attending DCPS School 2 on the first day of school. Respondent waited until the eve of the due process hearing to inform Petitioner that the Student could begin attending DCPS School 2.

The Blackman/Jones Consent Decree establishes a rebuttable presumption of harm to a student when DCPS fails to implement an HOD.¹⁶¹ Here, Respondent presented no evidence to show that the Student was not harmed by its failure to provide him a therapeutic environment. Thus, this Hearing Officer finds that DCPS denied the Student a FAPE by failing to comply with the May 18, 2011, HOD.

¹⁵⁶ *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

¹⁵⁷ D.C. Code § 38-2561.02.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Blackman-Jones* consent decree, 97-cv-02402 at *66-67 (D.D.C. Aug. 24, 2006).

C. Petitioner Failed to Prove that the Student is Entitled to Compensatory Education.

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place."¹⁶² Because compensatory education is a remedy for past deficiencies in a student's educational program, a finding as to whether a student was denied a FAPE in the relevant time period is a "necessary prerequisite to a compensatory education award."¹⁶³

This inquiry is only the first step in determining whether the Student is entitled to compensatory education. A compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." *Reid*, 401 F.3d at 518, 523. A compensatory education "award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d at 524. This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity." *Id.* at 524.

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.¹⁶⁴ Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.¹⁶⁵

Here, Petitioner presented no evidence regarding compensatory education at the due process hearing. Petitioner failed to present a compensatory education plan, testimony about the amount or type of compensatory education to which the Student is entitled, or any testimony about the type of detriment the Student suffered from the denials of FAPE alleged in the Complaint.

Thus, Petitioner failed to prove that the Student is entitled to compensatory education.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 5th day of September 2011, it is hereby:

ORDERED that Respondent shall place the Student in a school that provides a small, structured setting designed for students with behavioral difficulties; a crisis intervention room where students may go to deescalate; and behavioral technicians in each classroom and in each

¹⁶² *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

¹⁶³ *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

¹⁶⁴ *Reid*, 401 F.3d at 524.

¹⁶⁵ *Id.* See also *Thomas v. District of Columbia*, 407 F.Supp.2d 102, 115 (D.D.C. 2005) (noting that it is conceivable that no compensatory education may be required for a denial of FAPE if, for example, the student would not benefit from the additional services).

of the halls to ensure that students attend class; and

IT IS FURTHER ORDERED that Respondent shall place the Student in a self-contained class in a school where every student is receiving some services pursuant to an IEP.

By: /s/ Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

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