

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

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

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STUDENT, <sup>1</sup>	)	
	)	
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 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 an \_\_\_\_\_ year-old student with a disability. On September 13, 2011, Petitioner's mother filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.<sup>2</sup> On September 15, 2011, this Hearing Officer was appointed to preside over this case. Respondent filed a Response to the Complaint on September 27, 2011.<sup>3</sup>

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<sup>1</sup> Personal identification information is provided in Attachment A.  
<sup>2</sup> At the time Petitioner's mother filed the Complaint, Petitioner was \_\_\_\_\_ years old. On the day of the due process hearing, Petitioner turned eighteen, assumed all rights under IDEA, and became the petitioner in this case.  
<sup>3</sup> Respondent did not challenge the sufficiency of the Complaint.

On September 19, 2011, the parties participated in a resolution meeting. The parties were unable to resolve the Complaint. The parties agreed to continue to work to resolve the Complaint through the end of the resolution session.

The forty-five day, due process hearing timeline began on October 14, 2011. On October 18, 2011, this Hearing Officer held a prehearing conference. Counsel for Petitioner, and \_\_\_\_\_ counsel for Respondent, participated in the prehearing conference.

\_\_\_\_\_ the parties agreed to reschedule the prehearing conference. The prehearing conference reconvened on October 25, 2011. This Hearing Officer held a second prehearing conference on November 7, 2011.

This Hearing Officer issued a prehearing order on November 2, 2011. On November 16, 2011, the parties filed their respective five-day disclosures. Petitioner disclosed four witnesses and fifteen documents. Respondent disclosed two witnesses.

The due process hearing convened at 9:30 a.m. on November 23, 2011.<sup>4</sup> At the outset of the hearing, this Hearing Officer admitted into evidence Petitioner's exhibit 2-15, except for pages 1-4 of Petitioner's Exhibit 11. This Hearing Officer also admitted an additional document, which Petitioner disclosed at the outset of the due process hearing, as Petitioner's Exhibit 16.

At the due process hearing, Petitioner testified and presented three witnesses on his behalf, his mother ("Parent"), his educational advocate ("Advocate"), and a representative of KidLink, a residential facility clearinghouse ("KidLink Representative"). Respondent presented two witnesses, a truancy case manager ("Truancy Case Manager") and a social worker/program therapist at the Non-Public School Petitioner most recently attended ("Non-Public School Therapist"). After the parties presented oral closing arguments, the due process hearing concluded at 1:00 p.m. on November 23, 2011.

#### **IV. ISSUE PRESENTED**

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

Whether Respondent denied Petitioner a free, appropriate, public education ("FAPE") during the 2011-2012 school year by failing to provide Petitioner a residential placement at public expense, as recommended by Petitioner's psychiatric evaluation and his individualized educational program ("IEP") team.

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<sup>4</sup> The due process hearing was scheduled for 9:00 a.m. on November 23, 2011. However, counsel for Respondent was under the mistaken impression that the hearing started at 9:30 a.m.

Petitioner requests relief in the form of an order funding his placement in a residential facility at public expense for the remainder of the 2011-2012 school year.

## V. FINDINGS OF FACT

1. Petitioner is an \_\_\_\_\_ year-old student with multiple disabilities, i.e. emotional disturbance and learning disorder.<sup>5</sup> Since September 2008, he has attended a non-public school ("Non-Public School") for students with emotional disturbance.<sup>6</sup>

2. Petitioner's full scale IQ is 81, which is in the dull-normal range.<sup>7</sup> It is likely that his true intellectual potential is higher than this score indicates and that his abilities are in the average range.<sup>8</sup> However, because of his persistent pattern of avoidance and his extreme resistance and oppositional behavior, he has not been able to sustain his efforts in school sufficiently to earn passing grades.<sup>9</sup>

3. Petitioner's academic performance in broad reading is equivalent to a student aged eleven years and two months who is in the eighth month of fifth grade.<sup>10</sup> His performance in broad math is equivalent to a student aged ten years and five months who is in the first month of fifth grade.<sup>11</sup> His academic skills, academic fluency, and academic knowledge are similarly far below his age and grade level.<sup>12</sup> His actual abilities may be higher than his performance indicates due to his difficulties staying on tasks and poor concentration.<sup>13</sup>

4. There are indications that Petitioner has perceptual and visual-motor coordination deficits.<sup>14</sup> These difficulties raise the possibility of a neurological basis for his academic problems.<sup>15</sup>

5. Petitioner has been diagnosed with attention deficit hyperactivity disorder ("ADHD").<sup>16</sup> He struggles with short attention span and poor concentration.<sup>17</sup> He also has

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<sup>5</sup> Petitioner Exhibit 2 at 1, 4 (March 14, 2011, IEP).

<sup>6</sup> Petitioner Exhibit 5 at 1 (June 7, 2010, Psychological Evaluation Report); testimony of Advocate.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> Petitioner Exhibit 6 at 2 (May 13, 2010, Summary and Score Report of Woodcock-Johnson III Normative Update Tests of Achievement).

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

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

<sup>13</sup> *Id.* at 1.

<sup>14</sup> Petitioner Exhibit 5 at 2.

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

<sup>16</sup> Petitioner Exhibit 5 at 1.

<sup>17</sup> *Id.* at 3.

significant problems with hyperactivity.<sup>18</sup> He acknowledges that he has ADHD but has refused to take medication.<sup>19</sup>

6. Petitioner also exhibits indications of a longstanding emotional instability.<sup>20</sup> He can be very impulsive.<sup>21</sup> In general, he relies on others to set limits on his behavior, even though he resents being confronted by authority figures.<sup>22</sup> He has a low tolerance for the frustrations that he experiences in an academic setting.<sup>23</sup> Thus, even though he is in need of specialized instruction and strategies to address his learning problems, he strenuously avoids engaging in the support and assistance provided.<sup>24</sup> Due to his lack of interest, based on his pattern of avoidance, he is unable to organize his efforts and his planning is very poor.<sup>25</sup> His reaction to underlying feelings of anxiety is to suppress these feelings and then act out, at times with the potential for explosive and unpredictable behaviors.<sup>26</sup>

7. Petitioner is particularly stressed in his dealings with adults.<sup>27</sup> He may not be able to readily converse or compromise with them.<sup>28</sup> Much of his anxiety and underlying feelings of inadequacy are based on the uncertainties he has about his mental and physical competencies.<sup>29</sup> His moods are quite variable and he exhibits sensitivities to the reactions of his peers.<sup>30</sup>

8. Petitioner has significant problems with aggression, conduct issues, depression, and study skills.<sup>31</sup> Executive functioning also is problematic for him.<sup>32</sup> He has difficulty adapting to changing situations and it takes longer for him to recover from problem situations than others his age.<sup>33</sup> In general, he has difficulty with resiliency and has a tendency to react negatively when faced with changes in his everyday activities and routines.<sup>34</sup> He bullies and threatens to hurt others, is easily annoyed by others, and hits

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

<sup>19</sup> Petitioner Exhibit 5 at 1; Petitioner Exhibit 7 at 2 (April 12, 2011, Psychiatric Review).

<sup>20</sup> Petitioner Exhibit 5 at 2.

<sup>21</sup> *Id.*

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

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

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

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

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

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

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

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.*

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

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

other adolescents.<sup>35</sup> He smokes tobacco at school.<sup>36</sup>

9. Petitioner has a good understanding of the behavior that is expected of him and is able to mask issues that are known by others to present difficulties for him.<sup>37</sup> He is attracted to sensation seeking, which may allow him temporary relief from any negative thoughts and feelings he might be having in his everyday life.<sup>38</sup> He on a regular basis and has used

10. Petitioner has been diagnosed with conduct disorder, parent-child relational disorder,<sup>40</sup> and learning disorder not otherwise specified.<sup>41</sup> His clinical presentation is that of an out-of-control teenager enamored with power, control, violence, and the street life.<sup>42</sup> He can be a danger to himself and others, especially if he is confronted with pro-social structure and expectations.<sup>43</sup>

11. At school, Petitioner can be engaged in his work but there also are episodes where he is uncooperative and irritable.<sup>44</sup> He has a history of refusing to take the school bus and often is late for school.<sup>45</sup> He has admitted that he does no work in school.<sup>46</sup> He also admitted to having no interest in school.<sup>47</sup>

12. Petitioner's current IEP, developed on March 14, 2011, provides that he is to receive 32.25 hours per week of specialized instruction outside the general education setting.<sup>48</sup> The IEP also provides that he is to receive forty hours per week of behavioral support services outside the general education environment.<sup>49</sup> It provides that he was to receive extended school year services during July 2011.<sup>50</sup>

13. Petitioner's current IEP provides that his least restrictive environment is a highly structured, small, therapeutic setting with individual counseling, behavior

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

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

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

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

<sup>39</sup> *Id.*; Petitioner Exhibit 7 at 2.

<sup>40</sup> At home, Petitioner exhibits distractible, impulsive, oppositional behaviors, and substance abuse. Petitioner Exhibit 7 at 1.

<sup>41</sup> Petitioner Exhibit 7 at 2.

<sup>42</sup> *Id.* at 3.

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

<sup>44</sup> Petitioner Exhibit 7 at 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> Petitioner Exhibit 2 at 6 (March 14, 2011, IEP).

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

<sup>50</sup> *Id.* at 8.

management, and a high staff-to-student ratio.<sup>51</sup> It provides that he requires supplemental aides in order to be maintained in this environment, including clinical crisis intervention, frequent behavioral feedback, anger management training, management of his low frustration tolerance, frequent verbal redirection, and reduction of external stimuli.<sup>52</sup> The IEP provides that Petitioner requires cognitive restructuring, increased staff support, daily monitoring of his behavior, frequent rewards for positive behavior, and therapeutic restraint in emergency situations.<sup>53</sup> It provides that therapeutic restraint will be used only in situations of imminent danger and will be the intervention of last resort.<sup>54</sup>

14. Petitioner's IEP further provides that he requires aids and services in the form of social skills training, training in self-regulation skills, repeated oral directions, step-by-step written directions, simplified directions, reduced length and breadth of assignments, modified pacing of materials, frequent academic feedback, and rephrasing and simplification of questions and materials.<sup>55</sup> The IEP provides that Petitioner requires the full-time support of a dedicated aide.<sup>56</sup>

15. In the classroom at the Non-Public School, Petitioner often refuses to complete assignments and becomes disruptive.<sup>57</sup> He often refuses to participate in class.<sup>58</sup> This causes him to lose credit and significantly impacts his grades, even to the point of failing his classes.<sup>59</sup> He struggles to utilize the therapeutic and academic supports provided to him.<sup>60</sup> He engages in attention-seeking behaviors and is off-task in class on average three times per class period.<sup>61</sup> Due to his off-task behaviors, he fails to complete classroom assignments.<sup>62</sup>

16. On several occasions during the 2010-2011 school year, Petitioner was aggressive to other students and staff at the Non-Public School.<sup>63</sup> These incidents included threatening staff and peers, cursing, throwing a plastic door stop at another student, picking up a \_\_\_\_\_ and \_\_\_\_\_ it at a staff \_\_\_\_\_ a staffer with

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<sup>51</sup> *Id.* at 6.

<sup>52</sup> *Id.* at 5.

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

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

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

<sup>56</sup> *Id.*

<sup>57</sup> Petitioner Exhibit 2 at 2.

<sup>58</sup> *Id.* at 2-3.

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

<sup>60</sup> *Id.* at 4.

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

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

<sup>63</sup> Petitioner Exhibit 10 at 5, 14, 18, 22, 26, 34, 46 (Critical Emergency Incident Reports created between September 29, 2010, and May 6, 2011).

such force that the staffer's leg buckled, pushing staff, kicking a desk, and throwing punches at another student.<sup>64</sup> On one occasion, he threw water on a female peer, pushed her desk into her, threw her onto the floor, removed her shoes, and hit her with the shoes.<sup>65</sup> Petitioner also routinely broke school rules, including carrying a cell phone in school and leaving school without permission.<sup>66</sup>

17. During the 2010-2011 school year, Petitioner was absent from school on thirty-five of 154 days, an 81.5 percent attendance record.<sup>67</sup> He was suspended on two of the days counted as absences and truant on nineteen of the days.<sup>68</sup> Petitioner attributes his failure to attend school to temptations outside the school and distractions.<sup>69</sup> He often got into trouble outside of school, including arguments with his classmates.<sup>70</sup>

18. In school-wide, drug testing administered by the Non-Public School, Petitioner tested positive for drugs at least twenty times.<sup>71</sup> The Non-Public School gave him services to address his drug use.<sup>72</sup>

19. The Non-Public School also implemented a behavior implementation plan ("BIP") for Petitioner, with inconsistent success.<sup>73</sup> This BIP was designed to address Petitioner's aggression, defiance, depression, hyperactivity, poor motivation, and distraction.<sup>74</sup> Due to Petitioner's ongoing behavioral difficulties, the Non-Public School provides him a full-time, one-to-one aide.<sup>75</sup> The Non-Public School also provides crisis intervention and support as he needed.<sup>76</sup>

20. The additional services and dedicated aide helped stem Petitioner's behavioral problems.<sup>77</sup> Overall, the Non-Public School also addressed Petitioner's academic needs during the 2010-2011 school year.<sup>78</sup>

21. In April 2011, an independent psychiatrist conducted a psychiatric review of

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.* at 26, 30, 34, 38, 42.

<sup>67</sup> Petitioner Exhibit 11 at 5 (School Year to Date 2010-2011 Individual Student Attendance Report).

<sup>68</sup> *Id.* at 5-9.

<sup>69</sup> Testimony of Petitioner.

<sup>70</sup> *Id.*

<sup>71</sup> Testimony of Petitioner.

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

<sup>73</sup> Testimony of Advocate.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Testimony of Non-Public School Therapist.

<sup>77</sup> Testimony of Petitioner.

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

Petitioner.<sup>79</sup> The psychiatrist recommended that Petitioner be placed in a structured, twenty-four-hour, residential treatment facility that emphasizes education, pro-social vocational support, substance abuse treatment, and positive coping skills.<sup>80</sup>

22. When the Student's IEP team reviewed the April 12, 2011, report of the psychiatric review, the Parent and the Advocate requested that the Petitioner, then a minor, be placed in a residential treatment facility.<sup>81</sup> While the DCPS psychologist present at the meeting agreed with the Parent and the Advocate, the Non-Public School members of the IEP team did not agree that Petitioner should be placed in a residential facility.<sup>82</sup> The Non-Public School members of the IEP team expressed their opinion the Non-Public School can provide all the services that Petitioner requires.<sup>83</sup> One or more of the Non-Public School IEP team members may have referred the Parent's request to the DCPS Central Office for consideration.<sup>84</sup>

23. At the end of the 2010-2011 school year, Petitioner had failed four of his seven classes, and received one D and two Cs in the remaining three.<sup>85</sup> By the middle of the first quarter of the 2011-2012 school year, Petitioner was failing all of his classes.<sup>86</sup> This is primarily due to his failure to attend school and his substance abuse.<sup>87</sup>

24. Petitioner stopped attending school at the beginning of the 2011-2012 school year because of temptations outside of school and an argument he had with someone outside of school.<sup>88</sup> His fears for his safety following his argument with someone at a bus stop on his way to school also contributed to his failure to attend school.<sup>89</sup>

25. The Non-Public School provided Petitioner Metro fare cards each week.<sup>90</sup> He often used these fare cards for personal use instead of using them to travel to the Non-Public School.<sup>91</sup> After the Non-Public School started providing the fare cards on a daily basis, instead of weekly, Petitioner stopped attending school altogether.<sup>92</sup> In all,

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<sup>79</sup> Petitioner Exhibit 7; testimony of Advocate.

<sup>80</sup> Petitioner Exhibit 7 at 3.

<sup>81</sup> Testimony of Parent, Advocate, Non-Public School Therapist.

<sup>82</sup> Testimony of Advocate, Non-Public School Therapist.

<sup>83</sup> Testimony of Non-Public School Therapist.

<sup>84</sup> *Id.*; testimony of Advocate.

<sup>85</sup> Petitioner Exhibit 12 at 2 (School Year 2010-2011 Fourth Quarter Report Card).

<sup>86</sup> *Id.* at 1 (School Year 2011-2012 Interim Report).

<sup>87</sup> Testimony of Non-Public School Therapist.

<sup>88</sup> Testimony of Petitioner.

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

<sup>90</sup> Testimony of Truancy Case Manager.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

Petitioner attended only ten days of school during the 2010-2011 school year.<sup>93</sup> On the days he attended, he either arrived very late or left early.<sup>94</sup>

26. In September or October 2011, the Truancy Case Manager held a meeting with the Parent to discuss transportation options to ensure the Student arrived at the Non-Public School each day.<sup>95</sup> The Truancy Case Manager offered to send a school bus to pick up Petitioner, but the Parent rejected the offer.<sup>96</sup> The Truancy Case Manager then informed the Parent that the Non-Public School offered to pick up Petitioner in its vehicle.<sup>97</sup> The Parent agreed that this might be a good option and promised to discuss it with Petitioner and then provide his response to the Truancy Case Manager. The Parent never provided this response.<sup>98</sup> When the Truancy Case Manager contacted the Parent, the Parent said she could not discuss transportation with her.<sup>99</sup> Thus, the Non-Public School never implemented its plan to drive the Student to school.<sup>100</sup>

27. Due to his lack of investment in school and his resistance to the supports that have been offered to him, Petitioner's performance has declined in relation to his peers.<sup>101</sup> He will continue to require a great deal of support with his schoolwork and in developing academic skills and organizational strategies.<sup>102</sup> He may require one-to-one tutorial assistance.<sup>103</sup> He requires a high degree of support and structure in school.<sup>104</sup>

28. Petitioner needs a school that has a strong therapeutic and behavioral intervention component that will address his drug use, provide medication monitoring, and provide academic instruction.<sup>105</sup> He has been accepted for admission into a residential treatment facility ("RTC") in Newport News, Virginia.<sup>106</sup> The RTC provides these services and can provide services to address the Student's academic, behavioral, and social-emotional needs.<sup>107</sup>

29. Petitioner has been involved in the juvenile justice system on numerous

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Testimony of Truancy Case Manager.

<sup>96</sup> *Id.*; testimony of Petitioner; testimony of Parent.

<sup>97</sup> Testimony of Truancy Case Manager.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Petitioner Exhibit 5 at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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

<sup>106</sup> Testimony of KidLink Representative.

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

occasions, both in the District of Columbia and in Virginia.<sup>108</sup> After being convicted of a crime on November 18, 2011, Petitioner is currently detained in the Fairfax County, Virginia Juvenile Detention Center.<sup>109</sup> His sentencing is on January 9, 2011.<sup>110</sup>

30. Petitioner provided credible testimony at the due process hearing. His testimony was consistent with the documentary evidence. He admitted to his drug use and involvement in the justice system. He also admitted that most of his problems attending school were due to temptations in the community, not issues within the school.

31. The Parent provided inconsistently credible testimony. She rationalized and made excuses for Petitioner's threatening and aggressive behavior and apparently did not realize the extent of his contribution to these incidents. She provided credible testimony regarding Petitioner's repeated truancy and tendency to leave school without permission. She also provided credible testimony regarding the efforts of Respondent to improve Petitioner's attendance and her requests that Respondent place Petitioner in a residential facility. She was unable to explain why she believed that Petitioner should be placed in a residential treatment facility.

32. The Advocate provided credible testimony. He was familiar with Petitioner's evaluations, his IEP, his educational and attendance history, and his problems in the community and at home. He was unconvincing, however, in explaining the reasons why Petitioner requires a residential placement considering that Petitioner admitted that many of his problems stem from temptations in the community, including his truancy and drug use.

33. The Non-Public School Therapist provided generally credible testimony, although her testimony shed little light on the issue in this case. Her testimony was limited to her interactions with Petitioner and her vague recollection of the meetings she attended. She was unable to elucidate the underlying reasons for Petitioner's truancy and poor academic performance. She did recall that Petitioner and the Advocate requested that the IEP team place the Student in a residential facility.

34. The KidLink Representative provided credible testimony. She was familiar with Petitioner's evaluations, his IEP, and his educational and attendance history. She also was well versed in the services provided by the Proposed Residential Facility and how she believed it would meet Petitioner's needs.

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<sup>108</sup> Petitioner Exhibit 5 at 3; Petitioner Exhibit 7 at 1; testimony of Petitioner.

<sup>109</sup> Testimony of Petitioner.

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

## 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.<sup>111</sup> FAPE is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”<sup>112</sup> FAPE “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.”<sup>113</sup>

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.”<sup>114</sup> 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.<sup>115</sup> The IEP is the centerpiece of special education delivery system.<sup>116</sup>

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.<sup>117</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.<sup>118</sup>

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<sup>111</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>112</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

<sup>113</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

<sup>114</sup> 34 C.F.R. § 300.101.

<sup>115</sup> *Rowley* at 206-207.

<sup>116</sup> *Lillbask v. Conn. Dep’t of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

<sup>117</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>118</sup> *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

The burden of proof is properly placed upon the party seeking relief.<sup>119</sup> A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>120</sup> 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.<sup>121</sup> In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.<sup>122</sup> Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,<sup>123</sup> except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.<sup>124</sup>

## VII. DISCUSSION

### A. Petitioner Failed to Prove that Respondent Denied Him a FAPE by Failing to Provide a Residential Placement for the 2011-2012 School Year.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,<sup>125</sup> establishes annual goals related to those needs,<sup>126</sup> and provides appropriate specialized instruction and related services.<sup>127</sup> The program must be implemented in the least restrictive environment ("LRE").<sup>128</sup> For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."<sup>129</sup>

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

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education because procedural faults did not cause the child to lose any educational opportunity).

<sup>119</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>120</sup> 20 U.S.C. § 1415 (i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

<sup>121</sup> *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

<sup>122</sup> *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).

<sup>123</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

<sup>124</sup> *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

<sup>125</sup> 34 C.F.R. § 300.320 (a) (1).

<sup>126</sup> 34 C.F.R. § 300.320 (a) (2).

<sup>127</sup> 34 C.F.R. § 300.320 (a) (4).

<sup>128</sup> 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

<sup>129</sup> *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

nondisabled.<sup>130</sup> In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.<sup>131</sup> 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.<sup>132</sup>

The term “educational placement” refers to the type of educational program prescribed by the IEP.<sup>133</sup> “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.<sup>134</sup>

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.<sup>135</sup> 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.<sup>136</sup>

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia.<sup>137</sup>

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.<sup>138</sup>

Here, Petitioner has shown that he is an emotionally disturbed young man with a history of behavioral difficulties, drug use, and school avoidance. He is violent and oppositional in school.

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<sup>130</sup> 34 C.F.R. § 300.116 (c).

<sup>131</sup> 34 C.F.R. § 300.116 (d).

<sup>132</sup> *Id.* at (e).

<sup>133</sup> *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

<sup>134</sup> *Id.*

<sup>135</sup> 34 C.F.R. § 114 (a)(2)(i).

<sup>136</sup> *Id.* at 114 (a)(2)(ii).

<sup>137</sup> D.C. Code § 38-2561.02.

<sup>138</sup> *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

Petitioner has had similar difficulties at home and in the community. He regularly uses \_\_\_\_\_ and has tried \_\_\_\_\_. He is oppositional at home and has a troubled relationship with his mother. His street lifestyle has embroiled him in the juvenile justice system with at least three arrests. He is currently detained in a juvenile facility in Virginia after being convicted of a crime that warranted his pre-sentencing incarceration.

In all, Petitioner has proved that he requires a school that has a strong therapeutic and behavioral intervention component that will address his drug use and provide the intense academic instruction he needs to make progress. Petitioner also has proved that most of his problems in school are the result of his behavioral difficulties, refusal to participate in class, and his truancy.

Petitioner admits that he wants to be placed in a residential treatment facility to save him from the troubles he experiences in the community, notably his drug use and involvement in criminal activity. He is not requesting placement in a residential treatment facility to address his academic needs. Rather, as Petitioner acknowledges, the Non-Public School provides all of the services that he requires, including a dedicated aide who helped stem his behavioral problems. Petitioner also acknowledges that the Non-Public School addressed his academic needs during the 2010-2011 school year, the last time he attended school on a consistent basis. The Non-Public School also addressed his drug use through regular drug testing and drug counseling.

Petitioner has not proved that, due to the nature and severity of the his disability, his specialized educational needs, or the extent to which the placement represents the least restrictive environment, a residential setting would be an appropriate placement for him. Petitioner certainly has not proved that he is unable to make academic progress in a less restrictive environment. Rather, Petitioner has proved only that his truancy, drug use, and failure to participate in the classroom has impeded his academic progress.

Thus, Petitioner has failed to prove that Respondent denied him a FAPE by failing to place him in a residential setting for the 2011-2012 school year.

### ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 27th day of November, it is hereby:

**ORDERED** that the Complaint is DISMISSED WITH PREJUDICE.

By: /s/ Frances Rashin  
Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

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