District of Columbia
Office of the State Superintendent of Education

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

STUDENT[1], **By and through PARENT,** ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	Case No. 2012-0654 Impartial Hearing Officer: Charles M. Carron Date Issued: November 9, 2012 Representatives: Donovan W. Anderson, Esq. for Petitioner William B. Jaffe, Esq. for Respondent

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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

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

The DPC was filed September 19, 2012, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student's Parent, against Respondent, District of Columbia Public Schools ("DCPS").

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On September 20, 2012, the undersigned was appointed as the Impartial Hearing Officer.

On September 24, 2012, Respondent filed its timely Response, stating that Respondent has not denied the Student a free appropriate public education ("FAPE").

Two Resolution Meetings were scheduled, but both were cancelled by Respondent. The statutory 30-day resolution period ended on October 19, 2012. The 45-day timeline for the Hearing Officer's Determination ("HOD") started to run on October 20, 2012 and will conclude on December 3, 2012.

The undersigned held a Prehearing Conference ("PHC") by telephone on October 5, 2012, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by October 29, 2012 and that the Due Process Hearing ("DPH") would be held on November 5, 2012.

No motions were filed by either party and the DPH was held on November 5, 2012, at the Student Hearing Office, 810 First Street, NE, Room 2004, Washington, DC 20002. Petitioner elected for the hearing to be closed. At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-5

Respondent's Exhibits: R-1 through R-5

Impartial Hearing Officer's Exhibits: HO-1 through HO-6

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

(a) The Parent

(b) The Student's Guardian Ad Litem ([redacted]) (by telephone)

(c) [redacted], Expert Witness

(d) [redacted], Admissions and Customer Relations Liaison, Children's Guild (by telephone)

Respondent did not call any witnesses at the DPH.

The parties did not file written closing arguments or briefs.

II. JURISDICTION

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

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the "Attending School"). The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA.

Petitioner asserts that Respondent has denied the Student a FAPE by failing to develop an appropriate individualized education program ("IEP") for the Student and by placing him at the Attending School. Respondent asserts, *inter alia*, that Student's IEP, placement, location and site of services are appropriate.

IV. ISSUES

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

(a) Did Respondent deny the Student a Free Appropriate Public Education ("FAPE") by developing an inappropriate IEP for the Student in May 2012?

(b) Did Respondent deny the Student a FAPE by placing him at the Attending School rather than a full time therapeutic program?

V. RELIEF REQUESTED

Petitioner requests the following relief:[2]

(a) an order that Respondent place and fund the Student to attend a program that can provide him with the academic and behavioral supports he requires; and

(b) an order that Respondent reconvene the Student's Multidisciplinary Team ("MDT") to develop an appropriate full-time IEP for the Student.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male, Current Age. P-1-1.[3]

2. The Student resides with his foster parent in Maryland. Testimony of Parent; Testimony of GAL.[4]

3. The Parent hopes that the Student will return to live with her although the timing of such "reunification" is not currently known. *Id.*

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[2] In the DPC, Petitioner also requested reimbursement of attorneys' fees, which the undersigned lacks the authority to award. In the DPC, Petitioner also requested an award of compensatory education. In a Prehearing Order issued October 5, 2012, the undersigned advised Petitioner that Petitioner must file its Compensatory Education Plan ("Plan") in its five day disclosures, or this request for relief would be considered waived. Petitioner's five day disclosures did not include a Plan; accordingly, this request is waived, as Petitioner's counsel confirmed in his opening statement at the DPH.

[3] When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

[4] At the DPH, counsel for Respondent stated that if Respondent wished to challenge its responsibility to provide the Student a FAPE based upon the fact that the Student currently resides with his foster parent in Maryland, Respondent would so advise Petitioner's counsel and the undersigned via email no later than 9:00 a.m. on November 6, 2012. Respondent did not provide such notice; accordingly, Respondent has waived this potential defense.

4. The Attending School has not sent the Parent the Student's report cards or advisories since the spring of 2012 (Testimony of Parent); however, the Parent has not forfeited nor been divested of her right to make educational decisions regarding the Student (*Id.*; Testimony of [redacted]).

5. The Student has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. P-1-1, R-1-1.

October 2010

6. On October 5, 2010, [redacted] conducted a Neurodevelopmental Pediatric Assessment of the Student due to behavioral concerns, *i.e.*, that the Student lost his anger (sic temper) easily and actively defied adult requests. P-4-4.[5]

7. [redacted] diagnosed the Student as having ADHD, Combined Type, and Oppositional Defiance Disorder ("ODD"). P-4-4, -5.

8. [redacted] recommended (a) that the Student be seen by a child psychologist to determine the need for behavior management counseling, (b) that Respondent provide the Student a [Rehabilitation Act Section] 504 Plan for behavioral interventions and accommodations, and (c) a trial medication to address the Student's ADHD symptoms. P-4-5.

9. The Student was suspended from the Attending School and the school he previously attended for misconduct that included taking matches and a cell phone to school. P-3-2.[6]

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[5] Petitioner incorrectly numbered Exhibit P-4 in the lower right corner of the pages, denoting the first page as P-4 and the second page as P-4-1. The page numbers cited in this HOD are the corrected page numbers, which are the single-digit numbers in the lower right corners of the pages.

[6] Petitioner incorrectly numbered Exhibit P-3 in the lower right corner of the pages, denoting the first pages as P-3 and the second page as P-3-1. The page numbers cited in this HOD are the corrected page numbers, which are the single-digit numbers in the upper right corners of the pages, located just under the facsimile page transmission numbers.

March 2011

10. In March 2011, the Student verbalized suicidal ideations (*i.e.*, he threatened to stab himself) and was hospitalized for a week. *Id.*, P-4-3.

May 2011

11. In May 2011, the Student was again hospitalized for a week for walking away from his mother while in the community. P-3-2, P-4-3.

July 2011

12. In July 2011, the Student was evaluated by [redacted], M.Ed., District of Columbia Public Schools ("DCPS") School Psychologist. P-3-1.

13. After testing, [redacted] found that the Student's current level of academic skills was consistent with his cognitive ability. P-3-8.

14. Despite the Student's significant emotional and behavioral issues in both the home and school settings, [redacted] determined that it was premature to conclude that the Student met the criteria for special education as a child with an Emotional Disturbance or Other Health Impairment "without additional attempts to address his behaviors specifically and *consistently* through his [Rehabilitation Act Section] 504 Plan, and the systematic application of research-based cognitive and/or behavioral strategies implemented in the classroom and throughout the school day. Given that sufficient data concerning the effectiveness of interventions is not available for consideration at this time, [the Student] does not appear to present with the conditions to meet eligibility criteria for special education services as a student with an Emotional Disturbance or Other Health Impairment." P-3-8, -9.

15. [redacted] recommended a Functional Behavior Assessment ("FBA") of the Student "in order to specifically identify the most troubling behaviors as well as the

associated precipitants and consequences in order to increase the effectiveness of a Behavior Intervention Plan (BIP)...." P-3-9.

16. [redacted] also recommended that the Student's teachers check in with him periodically to ensure that he remained "on task" and that he remembered what he was supposed to be doing. *Id.*

17. [redacted] also recommended that the Student be taught to "stop, think, and do when approaching a situation. He will need to learn concrete strategies for monitoring his own thinking and re-directing himself to the task at hand." *Id.*

18. [redacted] also recommended that the Student continue with targeted counseling at school, focused on teaching him the skills needed to improve control over his anger, attention, focus, and on-task behavior. *Id.*

19. [redacted] observed that to avoid emotional outbursts, the Student might benefit from being given permission to take a "time out" when needed or to leave a situation and seek an identified adult with whom he can discuss his feelings. *Id.*

October 2011

20. In October 2011, an FBA was conducted on the Student because of his non-compliance with school staff and failure to respond to redirection of negative behaviors such as leaving the classroom without permission, running in the hallways, using profanity, engaging in verbal and physical fights with peers, and demonstration of physical aggression toward adults. P-2-1.

21. The Student was hyperactive, fidgety, highly distractible, restless, aggressive, and generally off-task; had inconsistent and short concentration, unfocused attention level, difficulty following directions, and atypical peer relations; failed to follow rules; and related poorly with others. *Id.*

22. The Student's IEP Team concluded that when he was asked to follow the rules of the environment (not walk out of class, attend resource class as scheduled, or terminate

a preferred activity), the Student became defiant, oppositional, and verbally and at time physically aggressive, in order to avoid/escape the assignment, gain personal attention, and be able to go to another class. P-2-3.

23. On October 24, 2011, the Student was evaluated by [redacted] Psy.D. of the Youth and Family Services Division ("YFSD") of the Department of Mental Health, Government of the District of Columbia, to assess the Student's current level of cognitive and emotional functioning. P-4-1.

24. [redacted] suggested that despite the Student's average cognitive functioning and average academic functioning, his inability to establish and maintain appropriate relationships with peers and teachers would eventually impact his school performance. *Id.*

25. [redacted] recommended that the Student would benefit from structured therapeutic services, which should be able to manage his behavior concerns. *Id.*

26. Specifically, [redacted] recommended school based counseling, individual counseling to address pro-social skills, a psychiatric medication reassessment and possible family therapy. *Id.*

April 2012

27. The Attending School Psychologist received [redacted] report in April 2012. P-4-1.

28. The Student had emotional outbursts almost daily; at time, he could be redirected but at other times he became so frustrated that he had "meltdowns" that required 20 to 30 minutes to resolve. P-4-5.

29. The Attending School Psychologist observed the Student in the classroom. P-4-6. She observed him leaving the room without permission, blurting out answers without raising his hand, using profanity, and walking around the class. P-4-7.

30. The Attending School Psychologist concluded that the Student's deficits in the social emotional area "are hindering him from making adequate progress academically in school." P-4-9.

31. The Attending School Psychologist made recommendations regarding structuring the classroom environment for the Student to reduce distracting stimuli; providing the Student clear and concise directions through multiple channels; providing the Student extended time to complete tests or other testing modifications; providing the Student extended time to complete in-class assignments; advising the Student in advance when he will be provided extended time; and providing regular reinforcement of the Student's on-task behavior. P-4-11, -12.

32. The Attending School Psychologist made recommendations regarding reading instruction for the Student. P-4-12.

33. The Attending School Psychologist recommended that the Student receive a behavior contract, a BIP, and counseling to address following classroom and school rules. P-4-13.

34. The Attending School Psychologist recommended that the Student become involved in organized programs in the community to help him build better social skills, such as sports, youth clubs, and recreation center programs. *Id.*

35. The Attending School Psychologist recommended that the Student receive continuing monitoring from his psychiatrist, continued mental health report, and a medical consultation to address medication management. *Id.*

May 2012

36. As of May 2012, the Student had trouble with reading comprehension, which affected his other academic tasks. P-1-1.

37. The Student exhibited disruptive behaviors in the classroom and school environment, and could be non-complaint, not responding immediately to redirection. P-1-2.

38. The Student had difficulty with appropriate peer interactions, and often initiated negative interactions with them including several episodes of fighting. P-1-2.

39. The Student often needed to be removed from the environment in order to "deescalate." P-1-2.

40. The Student's impulsive behaviors had a negative impact on his academic performance; lack of self-control and strained peer relationships prevented him from attending to academic tasks. P-1-2.

41. The Student's regular teacher stated that the Student had daily outbursts, that he did not respond to redirection, and that he could take more than 20 minutes to regain control and to be able to attend to instructional tasks. Testimony of GAL.

42. On May 15, 2012, the Student's Multi-Disciplinary Team ("MDT") determined him to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA, based upon a May 2, 2012 Eligibility Meeting. R-1-1.

43. The Student's current IEP, dated May 15, 2012, requires 2.5 hours per week of specialized instruction in the general education setting, 2.5 hours per week of specialized instruction outside the general education setting, and 120 minutes per month of behavioral support services outside the general education setting. P-1-3.

<u>September through November 5, 2012</u>

44. The Student sees a psychologist at the Attending School twice each week, once with his Parent and once alone; however, the psychologist is not an employee of Respondent and the record is unclear as to whether these services constitute the 120

minutes per month of behavior support services in the Student's IEP. Testimony of Parent; Testimony of [redacted].

45. The Student receives no behavioral support services other than the twice-weekly visits with the psychologist. Testimony of Parent.

46. Due to his misbehavior, the Student often is not in his classroom setting; when the Attending School staff members have concerns about the Student's behavior, they bring him to the psychologist's office; accordingly, he frequently is absent from the classroom setting. Testimony of [redacted]

47. At the beginning of the 2012-2013 school year, the Student was suspended two days for cursing in the Attending School cafeteria, walking out of the classroom, not doing class work, and not turning in homework. Testimony of Parent.

48. The Student continues to walk out of the classroom. *Id.*

49. The Student continues to be distracted in the classroom, distracts fellow students, engages in inappropriate behavior, and does not complete his school work. Testimony of [redacted].

50. The Student's regular teacher at the Attending School stated (a) that the Student rarely participates in class, especially in reading, which he currently is failing; (b) that the Student frequently engages in verbal and physical altercations; (c) that the general education classroom is not the appropriate placement for the Student, and (d) that he has recommended a full time out of general education program for the Student. *Id.*[7]

51. The Student is performing at an average level in all academic areas (Testimony of [redacted]) other than reading, where he is performing below the basic level (Testimony of [redacted]).

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[7] Although this testimony by the GAL was hearsay, it was admissible as an admission against interest by an agent of Respondent. In any event, the rules of evidence are not strictly observed in these proceedings.

52. The Student would benefit from having fewer students in his class, more redirection, and more social-emotional support—specifically, someone to pull him out of the general education classroom when needed, such as a classroom-based social worker. Testimony of [redacted]

53. The Student does not have, but needs, a BIP; otherwise he will fall further and further behind. *Id.*

54. DCPS has schools with full time out of general education programs for children with Emotional Disturbance and small class size. *Id.*

VII. BURDEN OF PROOF

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

VIII. CREDIBILITY

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

[redacted]

[redacted] was listed in Petitioner's five day disclosures as the Admissions Director of Children's Guild. However, when she testified she gave her title as Admissions and Customer Relations Liaison.

After testifying that based upon the Student's IEP, "he's a perfect candidate for our program," [redacted] could not explain, in response to a question from the undersigned, how Children's Guild, which has only students with full-time IEPs, could implement the Student's IEP that requires all but 2.5 hours per week of specialized instruction to be provided in the general education setting. Nor could she explain the concept of Least Restrictive Environment ("LRE"). Nor did she know whether a DCPS school could implement the Student's IEP.

It became clear during [redacted] cross-examination, and her questioning by the undersigned, that she has no knowledge of special education that would qualify her to testify as to the appropriateness of the Student's placement at Children's Guild. [redacted] acknowledged that she is not an educator and that her role is limited to processing paperwork, entering documents into Children's Guild's systems, conducting applicant interviews and giving tours of the school. She did not speak with the Student's foster parent, social worker, or anyone on the Student's IEP Team.

On redirect examination, [redacted] testified that the decision to accept the Student was made by the administrative staff of Children's Guild without her participation; she simply was informed of their decision.

Based on all of the above, the undersigned has given no weight to [redacted] testimony as to the appropriateness of Children's Guild as a placement, location and site of services for the Student.

[redacted]

After *voir dire,* the undersigned admitted [redacted] as an expert in instruction, placement and supervision of students with social and emotional problems.

However, as noted by Respondent's counsel, [redacted] is neither a psychologist nor a psychiatrist. Accordingly, the undersigned has discounted her testimony when it conflicted with the reports of psychologists and psychiatrists. In particular, the undersigned gave no weight to [redacted] opinion testimony that the Student's social and emotional problems rate a 9.5 on a scale of 1 to 10 justifying his placement in a full time therapeutic out-of-general education program—which was not supported by any other record evidence.

The value of [redacted] testimony was further limited by the fact that she only had observed the Student once, for an hour, and had not spoken with him, his foster parent, his special education teacher, his social worker, his psychologist, or his psychiatrist.

However, the undersigned did not credit the baseless assertion by Respondent's counsel that [redacted] likely was biased against Respondent because she is a former employee of Respondent whose contract was not renewed.

The Guardian Ad Litem

The [redacted] was not admitted as an expert witness. Accordingly, the undersigned gave no weight to her opinions as to the appropriateness either of the Attending School or of the Children's Guild as a placement, location and site of services for the Student.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR §5-E3000.1.

FAPE

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

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

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

IEP

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

Harris v. District of Columbia, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP in relevant part as follows:

> (i) In general The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—
>
> > (I) a statement of the child's present levels of academic achievement and functional performance, including—
> >
> > > (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
> >
> > * * *
> >
> > (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
> >
> > > (aa) to advance appropriately toward attaining the annual goals;
> > >
> > > (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
> > >
> > > (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
> >
> > (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc); [and]
> >
> > * * *
> >
> > (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications....

20 U.S.C. §1414(d)(1)(A).

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

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

Rowley, 458 U.S. at 201.

5. The LEA "has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE." *Schoenbach v. District of Columbia,* 36 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather, "[i]f the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing." *Id., citing* 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999).

6. When a child's behavior impedes his or her learning or that of others, the child's IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies to address that behavior." 20 U.S.C. §1414(d)(3)(B)(i), 34 C.F.R. §300.324(a)(2)(i), DCMR §5-E3007.3. The child's regular education teacher must, to the extent appropriate, participate in the determination of appropriate positive

behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel. 20 U.S.C. §1414(d)(3)(C), 34 C.F.R. §300.324(a)(3)(i) and (ii).

7. The record in the instant case is devoid of any evidence that Respondent has considered the use of positive behavioral interventions and supports, or other strategies, to address the Student's behavior, nor that the Student's regular education teacher has participated in the determination of such interventions, supports or strategies; accordingly, the undersigned finds that Respondent has failed to meet its obligations under IDEA to address the Student's behavior problems.

8. In the instant case, the undersigned specifically finds that the Student's IEP is not sufficient to provide him a FAPE because his behavior problems are not being adequately addressed through the 120 minutes per month of Behavioral Support Services, resulting in the Student being unable consistently to access the general education curriculum, and in particular resulting in him falling behind in his weakest subject, reading.

Authority of Hearing Officer to Order Prospective Placement in Private School

9. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005).

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

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

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

11. Although an inadequate IEP is a *necessary* condition for private school placement and reimbursement, it is not a *sufficient* condition for such placement and reimbursement. *N.T. v. District of Columbia,* 112 LRP 2066 (D.D.C. 01/11/2012). If a public school could offer a FAPE, and DCPS has not demonstrated unwillingness or inability to modify the student's IEP, then a hearing officer may order a modification in the IEP rather than private school placement or reimbursement:

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

Id., citing *Jenkins v. Squillacote,* 935 F.2d 303, 305 (D.C. Cir. 1991) and *School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985).

Appropriateness of the Attending School and of the School Proposed by Petitioner

12. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the LRE for the Student. *Branham v. District of Columbia, supra.*

13. In the instant case, the undersigned finds that the Student's disability is not so severe as to require him to be segregated from non-disabled peers. As discussed above, if the Student had a BIP and more support at the Attending School, it is reasonable to assume that he would be able consistently to access the general education curriculum—including instruction in reading comprehension.

14. The undersigned also finds that the Student's education needs are not so specialized that they cannot be met at the Attending School. As described in detail in the Order section of this HOD, the Student will be provided the supports that he needs to improve his behavior and his resulting classroom attendance, which when combined with specialized instruction in reading as already provided in his IEP, is reasonably calculated to provide him with an educational benefit.

15. Assuming for the sake of argument that Children's Guild could provide the Student with all of the services that he requires, Children's Guild has a tuition of $60,000 per year, which is an unnecessary expense given the ability of the Attending School to meet the Student's needs.

16. Cost aside, Children's Guild is a full time out-of-general education school and as such is a highly restrictive environment. The IDEA requires that special education be provided in the Student's LRE:

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

20 U.S.C. §1412(a)(5)(A). *Accord,* DCMR §5-E3011.1. *See also,* 34 C.F.R. §300.114(a)(2).

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

18. The undersigned specifically finds that Petitioner has failed to meet its burden of production, much less its burden of proof, that the Student requires an environment as restrictive as Children's Guild; *i.e.*, that Children's Guild is the LRE for the Student.

19. Moreover, District of Columbia regulations require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement. DCMR §5-E3013.1. Based upon all of the evidence in the record, the undersigned finds that with the revisions to the Student's IEP specified in the Order below, the Student can be educated in the Attending School, which is the school he would attend if not disabled.

20. Even if the Attending School could not meet all of the Student's needs—which, as discussed above, has not been established—Children's Guild would not be an appropriate site of services for the Student because it is outside the District of Columbia.

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

> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

DC ST §38-2561.02(c). Although this order of priority is not binding upon a Hearing Officer, a Hearing Officer is not precluded from taking these priorities into consideration in ordering a placement. The undersigned specifically finds that even if the Student required a program as restrictive as Children's Guild, Children's Guild would be in the lowest priority category among appropriate placements. As Petitioner's expert witness acknowledged upon questioning by the undersigned, there are DCPS schools with full time out-of-general education programs for children with Emotional Disturbance. Accordingly, the undersigned finds that, even if the Student required such a program, it could be provided in a DCPS school.

Conclusion

21. Respondent denied the Student a FAPE because the Student's IEP does not adequately address his social-emotional needs. However, the Student does not require a more restrictive environment. With the implementation of a BIP and the provision of the additional services ordered below, the Attending School is an appropriate placement, location and site of services for the Student, and is the LRE for the Student.

X. ORDER

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

1. No later than November 26, 2012, Respondent shall convene an Individualized Education Program Team (IEPT) meeting to review and revise the Student's IEP to provide an appropriate Behavior Intervention Plan (BIP) for the Student which shall include a minimum of one hour per week of behavior support services in lieu of the 120 minutes per month specified in the Student's current IEP. These changes to the Student's IEP shall be implemented beginning no later than December 3, 2012.

2. No earlier than January 14, 2013, nor later than January 28, 2013, Respondent shall convene another IEPT meeting to review the Student's behavior and progress in reading since the last IEPT meeting and to make any appropriate changes in the BIP and/or other aspects of the Student's IEP, including changes in services, placement, location and/or site of services if appropriate.

3. No earlier than March 11, 2013, nor later than March 25, 2013, Respondent shall convene another IEPT meeting to review the Student's behavior and progress in reading since the last IEPT meeting and to make any appropriate changes in the BIP and/or other aspects of the Student's IEP, including changes in services, placement, location and/or site of services if appropriate.

4. Respondent shall ensure that the Student's regular education teacher attends the IEPT meetings described above, and participates in the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school

personnel. The attendance of the Student's regular education teacher will be excused only if he or she is absent from work on the five school days preceding the applicable deadline for the meeting as well as on the day of the deadline.

5. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend the applicable deadline for the IEPT meeting and/or implementation of IEP changes by the same number of days.

6. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

7. Petitioner's other requests for relief are DENIED.

Dated this 9th day of November, 2012.

Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

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