OSSE
Student Hearing Office
February 06, 2013

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

Parent, on behalf of STUDENT, [1]	)	**Case No. 2012-0783**
Petitioner,	)	
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	**Hearing Officer: Frances Raskin**

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of a [redacted] student ("Student") with a disability who attends a public middle school in the District of Columbia. On November 20, 2012, Petitioner filed a due process complaint ("Complaint") against Respondent, the District of Columbia Public Schools ("DCPS"), alleging violations of IDEA.

On November 26, 2012, this Hearing Officer was assigned to preside over this case. On November 29, 2012, Respondent filed a timely response ("Response") to the Complaint.[2]

On December 4, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties did not agree to start the forty-five day, due process hearing period on that date. Thus, the resolution period ended on December 20, 2012.

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

On December 17, 2012, this Hearing Officer held a prehearing conference in which Roberta Gambale, counsel for Petitioner, and Maya Washington, counsel for Respondent, participated. During the prehearing conference, both counsel agreed that the forty-five day, due process hearing timeline began on December 20, 2012. This Hearing Officer informed counsel that the end of the forty-five-day timeline, i.e., the deadline for the hearing officer determination ("HOD"), was February 3, 2013.

Due to counsel for Respondent's limited availability for a due process hearing, the parties agreed that the due process hearing would take place from 9:30 am. to 5:00 p.m. on January 29, 30, and 31, 2013.[3] On December 26, 2012, Respondent filed an unopposed motion for seven-day continuance to allow the due process hearing to proceed on these dates. On January 4, 2013, this Hearing Officer granted the motion, which extended the deadline for the hearing officer determination to February 10, 2013.

On January 18, 2013, Petitioner provided a copy of her five-day disclosures to Respondent and this Hearing Officer. On January 22, 2013, Respondent timely disclosed its witness and proposed exhibits.

The due process hearing commenced on January 29, 2013, at 9:30 a.m., in room 2006. At the outset of the hearing, Petitioner withdrew the first issue this Hearing Officer had certified for hearing.

This Hearing Officer entered into evidence Petitioner's proposed exhibits[4] and Respondent's proposed exhibits.[5] The parties stipulated that Petitioner's exhibits six through fourteen had not been provided to Respondent, provided to the Student's school, or reviewed by an IEP team, prior to the five-day disclosure deadline.

After counsel for Petitioner presented an opening statement, Petitioner presented the testimony of three witnesses, an expert in educational and therapeutic programming for students with learning disabilities and emotional disturbance, ("Expert"), the assistant educational director of the Nonpublic School ("Director"), and a social worker ("Social Worker") at the Psychiatric Institute of Washington ("PIW"). Petitioner also testified.

Counsel for Petitioner informed this Hearing Officer that Petitioner's next witness, a social worker employed by the District of Columbia Child and Family Services Agency ("CFSA Social Worker"), was unavailable to testify that day. Counsel for Petitioner informed this Hearing Officer that the CFSA Social Worker would be available to testify from 9:00 a.m. to 10:00 a.m. the following day. The parties agreed to reconvene the due

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[3] This Hearing Officer informed the parties that she would issue the HOD on or before February 8, 2013, to avoid any prejudice to the Student. Counsel for Petitioner then consented to a seven-day continuance of the forty-five day, due process hearing timeline.
[4] This Hearing Officer admitted into evidence Petitioner's exhibits 1-35, inclusive. Neither party objected to the admission of the other party's exhibits.
[5] This Hearing Officer admitted into evidence Respondent's exhibits 1-6, inclusive.

process hearing at 9:00 a.m. on January 30, 2013, half an hour earlier than it was scheduled to reconvene.

The due process reconvened at 9:00 a.m. on January 30, 2013, in room 2006. Petitioner then called her fourth and final witness, the CFSA Social Worker, who intended to testify by telephone. However, the CFSA Social Worker was unable to testify because she was in her car, on her way to pick up a client, and unable to access the five-day disclosures while driving. The CFSA Social Worker stated that she would be available to testify, and would have access to the five-day disclosures, after 12:00 p.m.

Petitioner concluded the remainder of her testimony by 10:30 a.m. Counsel for Petitioner then requested a recess until 12:00 p.m. to allow the CFSA Social Worker to testify. In response to this Hearing Officer's query about the substance of the CFSA Social Worker's testimony, counsel for Petitioner stated that the CFSA Social Worker would testify about the Student's disabilities and her performance in school. Counsel for Petitioner was unable to explain how the testimony of the CFSA Social Worker would differ from or supplement the testimony of Petitioner and the Expert.

This Hearing Officer informed Petitioner that she would not allow the CFSA Social Worker to testify because her testimony would be duplicative. This Hearing Officer reminded the parties that, during the prehearing conference and in the Prehearing Order, she had informed them that she would not allow either party to present duplicative testimony.[6] Petitioner then rested her case.

After counsel for Respondent presented an opening statement, Respondent presented the testimony of five witnesses, a school social worker ("School Social Worker") who works at the school the Student attends ("DCPS School"); an instructional aide ("Aide") who provides assistance to students at the DCPS School; the Student's science and advisory period teacher ("Teacher") at the DCPS School; the special education coordinator ("SEC") of the DCPS School; and an attorney who serves as the Student's guardian *ad litem* ("GAL").

The parties then presented oral closing arguments. The due process hearing concluded at 5:00 p.m. on January 30, 2013.

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[6] This Hearing Officer further informed counsel for Petitioner that, per the prehearing order, she had an obligation to ensure that all witnesses who appear by telephone would testify in a setting that protected the confidentiality of the due process hearing and would have access to the five-day disclosures during their testimony.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:[7]

A. Whether Respondent denied the Student a FAPE by failing to revise her individualized education program ("IEP") to provide her 27.5 hours of specialized instruction and related services, address her sexually explicit behavior and aggression toward peers and staff, and provide a therapeutic environment;[8] and

B. Whether Respondent denied the Student a FAPE by failing to provide the Student an appropriate placement, such as a full-time, therapeutic, special education day school, after her release from a residential facility and in response to Petitioner's November 1, 2012, request.[9]

Petitioner requests relief in the form of an order that would require Respondent to review and revise the Student's IEP to address the Student's sexual behaviors, aggressiveness toward peers and staff, and other behavioral difficulties. Petitioner seeks an order that would require Respondent to place the Student in the Nonpublic School, with transportation at public expense for the remainder of the 2012-2013 school year. Petitioner also seeks compensatory education.[10]

IV. FINDINGS OF FACT

1. The Student is a [redacted] young woman who is in the seventh grade at the DCPS School.[11] The Student began attending the DCPS School at the outset of the

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[7] In the Prehearing Order, this Hearing Officer certified an additional issue, whether Respondent had denied the Student a FAPE by failing to conduct a psychosexual evaluation. Petitioner withdrew this issue at the outset of the due process hearing.

[8] At the outset of the due process hearing, this Hearing Officer reviewed the issues she had certified for adjudication at the hearing. Petitioner then stipulated that the relevant time period that applied to this issue is November 1, 2012, through the present.

[9] Upon further review of these issues, and the testimony and documentary evidence that Petitioner presented at the due process hearing, it became clear that Petitioner sole claim is whether Respondent denied the Student a FAPE by failing to provide her a full-time, out of general education, therapeutic placement in a nonpublic school with adequate supports to address her behavioral difficulties.

[10] During the prehearing conference, counsel for Petitioner asserted that Petitioner sought compensatory education in the form of tutoring. However, upon a review of Petitioner's compensatory education plan, Exhibit 34, and the testimony of the Expert, it became clear that Petitioner seeks compensatory education in the form of applied behavioral analysis, to be provided in the Student's home, and independent counseling/mentoring.

[11] Testimony of Petitioner.

2011-2012 school year, when she was in the sixth grade.[12] She is eligible for special education services as a student with an emotional disturbance.[13]

2. The Student's overall cognitive ability, as reflect in her full-scale IQ score of 79, is in the low average range and exceeds fourteen percent of her same-age peers.[14] Her overall level of academic achievement is in the average range when compared to other students her age and at her grade level.[15] Her language skills are functional for communication and social purposes.[16] She has attention deficits and takes medication designed to treat attention deficit hyperactivity disorder.[17]

3. From an early age, the Student's academic development has been hindered by an early-onset psychotic disorder that has features consistent with schizoaffective disorder.[18] She has a long history of hearing voices, running away, destroying property, stealing, and setting fires.[19] She also has touched and tried to eat feces.[20]

4. The Student has a history of inappropriate behaviors in school, including hallucinations and delusions.[21] She had imaginary friends and would converse with them during school.[22] She would fight with her imaginary friends, which appeared as if she were fighting with herself.[23] When she acted out in school, she claimed her imaginary friends told her to misbehave.[24] She also had tantrums and crying spells.[25]

5. During the 2011-2012 school year, the Student also fixated on sexual topics, including male and female nudity.[26] She often made sexually explicit drawings during

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[12] *Id*.
[13] Petitioner Exhibit 17 at 1 (December 4, 2012, IEP).
[14] Petitioner Exhibit 23 at 6 (December 14, 2010, Comprehensive Psychological Evaluation).
[15] *Id*. at 7.
[16] *Id*.
[17] *Id*.; Petitioner Exhibit 9 at 1 (August 12, 2012, Discharge Summary).
[18] Petitioner Exhibit 25 at 3 (February 7, 2008, Psychiatric Evaluation). Schizoaffective disorder is a psychotic disorder characterized by a severe disorder of thought. Petitioner Exhibit 22 at 1 (Functional Behavioral Analysis).
[19] Petitioner Exhibit 9 at 1.
[20] Petitioner Exhibit 34 at 4 (Compensatory Education Proposal).
[21] Testimony of Expert.
[22] *Id*.; testimony of Petitioner, School Social Worker.
[23] *Id*.
[24] Testimony of Petitioner.
[25] *Id*.; testimony of Expert, School Social Worker.
[26] Testimony of Expert, SEC.

school.[27] She often drew female cartoon characters, either nude of engaging in sex, during her lunch break in the cafeteria.[28]

6. Nonetheless, the Student is able to perform academically.[29] Despite her difficulties, she was academically successful during the 2011-2012 school year.[30] She earned mostly As and Bs and was on the honor roll.[31]

7. In April 2012, the Student started taking Abilify, a psychotropic medication that was prescribed to reduce her psychotic behaviors.[32] Instead, this medication increased her psychotic behaviors.[33] By early summer, she began to decompensate.[34] On June 29, 2012, after she poured hot water on her younger sister, the Student was admitted to PIW.[35]

8. This was the Student's third hospitalization at PIW.[36] Her first hospitalization in PIW was in 2006.[37] Her second hospitalization was in 2009.[38] She remained in PIW for eight weeks.[39]

9. On August 12, 2012, the Student was transferred to an inpatient residential treatment center.[40] Upon arrival in the residential treatment center, the Student presented as psychotic, with auditory and visual hallucinations.[41] She was unstable, unpredictable, and preoccupied with sexually explicit material.[42] She was disorganized in her thoughts, impulsive, and required constant redirection.[43]

10. While in the residential treatment center, the Student required numerous restraints, seclusions, and medications due to her aggressive and threatening behavior.[44] However, the Student continued to perform well academically, earning Bs in seventh grade

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[27] Testimony of SEC.
[28] *Id*.
[29] Testimony of Petitioner.
[30] Testimony of Petitioner, Expert, SEC; Respondent Exhibit 5 (June 14, 2012, Report to Parents on Student Progress).
[31] Testimony of Expert, SEC.
[32] Testimony of Petitioner.
[33] *Id*.
[34] Testimony of GAL.
[35] *Id*.; Petitioner Exhibit 9 at 1.
[36] Testimony of Petitioner; Petitioner Exhibit 9 at 1.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] Petitioner Exhibit 9 at 3.
[41] Petitioner Exhibit 8 at 2.
[42] *Id*.
[43] *Id*.
[44] Petitioner Exhibit 8 at 2.

English, history, and math.[45] She earned Cs in seventh grade science, physical education, and in her career and social skills class.[46]

11. In October 2012, she was diagnosed with psychotic disorder, not otherwise specified, and bipolar disorder with psychotic features, both of which are severe mental illnesses.[47] She also was determined to have a history of pervasive developmental disorder, not otherwise specified, as well as borderline intellectual functioning.[48]

12. Due to her history of pervasive developmental delay, the Student has profound and severe social impediments.[49] She uses inappropriate vocal tones, perseverates, and has extreme difficulty developing social relationships.[50] She also is distractible and impulsive.[51]

13. The Student was released from the residential treatment center on October 19, 2012.[52] At the time of her discharge, the Student was no longer taking Abilify.[53] Her doctors also reduced her ADHD medication.[54] Although the residential treatment facility recommended that she be placed in another residential treatment facility, the Student returned to her home.[55]

14. Petitioner enrolled the Student in the DCPS School on or about Thursday, October 25, 2012.[56] The admissions process took two days.[57] During this time, Petitioner did not request that the DCPS School consider placing the Student in a more restrictive environment.[58]

15. On her first day in school, the Student was in the office and drew a penis on a piece of paper.[59] She wrote the word "penis" on the top of the drawing.[60]

16. On October 31, 2012, the Student had a tantrum in her science class.[61] That same day, she touched the Aide's breasts.[62] The Student had not taken her medication that

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[45] Petitioner Exhibit 15 at 1 (Discharge Transcript).
[46] *Id*.
[47] Petitioner Exhibit 8 at 2 (October 19, 2012, Discharge Summary); testimony of Expert.
[48] *Id*.
[49] Testimony of Expert.
[50] *Id*.
[51] Petitioner Exhibit 34 at 3.
[52] Petitioner Exhibit 15 at 1.
[53] Petitioner Exhibit 8 at 2; testimony of Petitioner.
[54] *Id*.
[55] Testimony of Petitioner.
[56] *Id*.; testimony of SEC.
[57] Testimony of SEC.
[58] *Id*.
[59] Testimony of School Social Worker.
[60] *Id*.

day.[63] The Student's father then brought the medication to the DCPS School.[64] After the Student ingested the medication, she calmed down.[65]

17. On November 1, 2012, the DCPS School convened a meeting of the Student's IEP team.[66] Petitioner, the Expert, the CFSA Social Worker, the School Social Worker, and the SEC attended the meeting.[67] The GAL also attended the meeting.[68] The purpose of the meeting was to determine whether the Student needed additional supports in school.[69]

18. At the time of the meeting, the Student had been in school for two days.[70] However, she was absent from school on the day of the meeting.[71] Petitioner was unaware that the Student was not in school.[72]

19. During the meeting, the SEC shared the information she had gathered while discussing the Student with her doctor at the residential treatment center.[73] The School Social Worker discussed the Student's long history of behavioral difficulties in school, including her hallucinations, delusions, and attempts to harm herself.[74] The meeting participants also discussed the Student's sexually suggestive drawings, history of touching other children sexually, and history of talking to herself and about sex.[75] The participants also discussed the Student's history of tantrums, inappropriate social interactions, and lack of meaningful friendships.[76]

20. During the November 1, 2012, meeting, Petitioner requested that IEP team increase the hours of specialized instruction on the Student's IEP.[77] Petitioner also requested that the DCPS School provide additional behavioral supports to the Student.[78]

21. At the November 1, 2012, meeting, Petitioner and the Expert requested that DCPS place the Student in a full-time, therapeutic setting with intensive treatment and

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[61] Testimony of Expert.
[62] *Id*.; testimony of Aide.
[63] Testimony of SEC.
[64] *Id*.
[65] *Id*.
[66] Testimony of Petitioner, Expert, SEC.
[67] Testimony of Petitioner, Expert, School Social Worker, and SEC.
[68] Testimony of GAL.
[69] Testimony of Petitioner.
[70] Testimony of Expert.
[71] *Id*.
[72] Testimony of SEC.
[73] *Id*.
[74] Testimony of Expert.
[75] *Id*.
[76] *Id*.
[77] Testimony of Petitioner.
[78] *Id*.

supports.[79] The SEC questioned why Petitioner had not followed the recommendations of the residential treatment facility and placed the Student in a residential facility.[80]

22. In recommending a therapeutic setting, the Expert envisioned a school that has social workers and psychologists on staff.[81] The school would provide the Student daily therapy sessions, interventions, and supports.[82] The Student would be in small classes with accommodations.[83] The school would have personnel have knowledge of the students' disabilities and would be trained in assessing and implementing the necessary treatments.[84]

23. The Expert envisioned that, in placing the Student in a therapeutic setting, the goal would be to reduce her atypical behaviors, aggression, and sexual behaviors.[85] The goal would be to reduce her behaviors so that she could access the curriculum, learn, and improve her emotional functioning.[86] She recommended that the DCPS School provide the Student counseling every day and implement behavior interventions.[87]

24. At the November 1, 2012, meeting, the IEP team made no changes to the Student's IEP.[88] The SEC felt that the IEP team could not make any decisions because the Student had just returned to school.[89] The IEP team agreed to reconvene in thirty days.[90] The SEC requested that, in the meantime, Petitioner provide the DCPS School with the Student's records from PIW and the residential treatment facility.[91]

25. On November 2, 2012, the Expert conducted an informal observation of the Student in her office.[92] During this observation, the Student suddenly ran out of the room and down the hall.[93] She also laughed uncontrollably and giggled hysterically.[94] She said that she was laughing at the memory of punching someone in the stomach.[95] She touched her breasts repeatedly and drew a picture of a cartoon character, which she characterized

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[79] Testimony of Expert.
[80] *Id*.; testimony of GAL.
[81] Testimony of Expert.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] Testimony of Expert, SEC.
[89] Testimony of SEC.
[90] *Id*.
[91] Testimony of GAL.
[92] Testimony of Expert.
[93] Testimony of Expert.
[94] *Id*.
[95] *Id*.

as a "tomboy," with penis.[96] She engaged in hiccupping, sneezing, and smiling with her eyes extremely wide.[97] She would suddenly scream the last word of a sentence as loud as she could and then laugh hysterically.[98] She then stared into space for five minutes and would not respond.[99] She also emitted abnormal sounds.[100] She would veer off topic and start discussing something bizarre.[101]

26. During the November 2, 2012, observation, the Expert found it difficult for to engage the Student in a sustained manner and for the Student to continue with the task assigned to her.[102] She would repeat a single word over and over.[103] She did not maintain eye contact, and did not engage appropriately throughout the interview.[104]

27. The Student experienced behavioral difficulties throughout her first week of school.[105] She drew sexually a explicit cartoon and used profanity.[106]

28. Since her first week in school, however, the Student's behavior has improved dramatically.[107] She was assigned a dedicated aide, who helps her remain focused on her schoolwork.[108] She has not made explicit drawings while in school.[109] She does not run through the hallways or act inappropriately around other students.[110]

29. Since the first week of November 2012, the Student has not had any tantrums or other serious behavioral difficulties in school except once when she arrived late.[111] There has been only one incident in which the Student was aggressive to a staff member.[112] This occurred when the Student became upset that her dedicated aide was not at the school that day.[113]

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[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] Testimony of Aide.
[106] *Id*.
[107] Testimony of Aide.
[108] Testimony of SEC.
[109] *Id*.; testimony of SEC, School Social Worker.
[110] Testimony of Aide, SEC, Teacher, School Social Worker.
[111] Testimony of Petitioner, School Social Worker, SEC.
[112] Testimony of School Social Worker.
[113] *Id*.

30. The Student also has not made any sexually suggestive drawings in school since her first day in school.[114] She is doing well in class.[115] While she interacts with other students during class and on class projects, she still does not interact with them in the hallways or during lunch.[116]

31. Although the Student continues to have difficulties attending to her class work, she completes her assignments.[117] She often is the first to complete the assignments.[118] Her work usually is accurate.[119]

32. The School Social Worker checks on the Student on a daily basis and provides counseling to her several times a day.[120] She is available whenever the Student needs assistance.[121] She works with the Student on social skills, reading facial expressions, and making eye contact.[122] The Student also participates in group therapy with three other seventh grade students.[123] The group therapy focuses on social skills.[124]

33. The Student is academically and cognitively superior to many of her peers in the DCPS School.[125] The DCPS School has a rigorous curriculum and the Student performs well if she is prepared, on time for school, and attends school regularly.[126]

34. The Student's inconsistent attendance is one of main impediments to her progress in school.[127] She requires structure to succeed.[128] When she attends class consistently and arrives on time for school, she produces grade-level work, and performs well socially and emotionally.[129] With assistance from her dedicated aide, the Student is able to focus on her work, complete her assignments independently, and keeps up with the curriculum.[130]

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[114] Testimony of Aide, School Social Worker, SEC.
[115] Testimony of School Social Worker.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*..
[123] *Id*..
[124] *Id*.; testimony of Teacher, Aide, SEC.
[125] Testimony of SEC.
[126] *Id*.
[127] Testimony of Teacher, Aide, GAL, SEC.
[128] Testimony of Teacher.
[129] *Id*.
[130] *Id*.; testimony of Expert.

35. Even though Petitioner or the Student's father personally brings the Student to school,[131] she is often quite late for school. The Student often arrives at school after 11:00 a.m., in the middle of her second or third class period.[132] This causes her to miss breakfast, her advisory class, as well as her Spanish class.[133] If she arrives after 11:00, she will miss all or part of her science class.[134]

36. The Student's advisory class focuses on organizational skills and social skills.[135] The students in the class work on building relationships, organizing their school binders, and organizing their school lockers.[136] Thus, her repeated absences in her advisory class have impeded her progress in these areas.[137]

37. When she is late for school, she has difficulty adjusting to school routines and focusing on her schoolwork.[138] She becomes disgruntled and oppositional.[139] She has difficulty catching up with the class on assignments.[140] She has similar difficulties when she misses a day or more of school.[141]

38. The Student also does not regularly turn in her homework.[142] Whenever the Teacher sends homework home with the Student, she does not return the homework the next day.[143] When the Student is absent from class, her in-class assignment becomes homework.[144] If the Student does not turn in this homework, it affects her grades.[145]

39. On December 4, 2012, the DCPS School convened a meeting of the Student's IEP team.[146] Petitioner, counsel for Petitioner, the Expert, the SEC, the Teacher, and the GAL attended the meeting.[147] The December 4, 2012, meeting had been scheduled before Petitioner filed her due process complaint.[148]

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[131] Testimony of Petitioner.
[132] Testimony of Teacher.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] Testimony of Petitioner, SEC, GAL, School Social Worker, Expert.
[147] Respondent Exhibit 1 at 3 (December 4, 2012, RSM Notes).
[148] *Id*. at 1.

40. At the time of the meeting, the Student had been enrolled in the DCPS School for thirty days.[149] She had five unexcused absences during that time.[150] She also had two excused absences.[151] Thus, the Student had missed almost one quarter of the days she had been enrolled in school.

41. During the December 4, 2012, meeting, the IEP team discussed the Student's emotional, behavioral, social, and academic performance.[152] At the time of the meeting, that the Student had greatly improved as a result of a change in her medication.[153] The Student no longer exhibited any emotional issues and was easily redirected.[154] Her improved behavior was due to the change in her medication, which eliminated her delusions.[155] However, the Student continued to have difficulties socializing with the other children in her school.[156]

42. At the December 4, 2012, meeting, the Student's math and reading teacher reported that math was the Student's strongest subject.[157] The Student had not exhibited any behavioral issues in her math or reading classes.[158] However, she was receiving an F in reading because she had not brought a book to school for her book report.[159]

43. The Student had incompletes on most of her assignments in her science class, in part because she had not turned in any of her homework.[160] She performed well when she attended class.[161] Nonetheless, the Student also was failing science due to her excessive absences, which resulted in missed assignments.[162]

44. Between November 1, 2012, and January 22, 2013, the Student had forty-five unexcused absences from class.[163] She also had missed eleven days of school.[164]

45. At the December 4, 2012, meeting, the IEP team developed an IEP for the Student.[165] The IEP team developed annual goals in the areas of mathematics and

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[149] Testimony of SEC.
[150] *Id*.
[151] Respondent Exhibit 1 at 1.
[152] Respondent Exhibit 1 at 1-3.
[153] *Id*. at 2.
[154] *Id*.
[155] Testimony of Expert.
[156] *Id*.
[157] Respondent Exhibit 1 at 2.
[158] *Id*.
[159] *Id*.; testimony of Expert, Petitioner.
[160] Respondent Exhibit 1 at 2.
[161] *Id*.
[162] Testimony of Expert.
[163] Respondent Exhibit 4 at 13 (Attendance Summary).
[164] *Id*.
[165] Petitioner Exhibit 17 at 1 (December 4, 2012, IEP).

reading.[166] They also developed annual goals in the area of emotional, social, and behavioral development.[167] The IEP team determined that the Student would receive ten hours per week of specialized instruction in the general education setting and 180 minutes per month of behavioral support services.[168] The IEP team also decided that the Student should continue to receive the assistance of a dedicated aide.[169]

46. At the December 4, 2012, IEP meeting, Petitioner and the Expert again requested that DCPS place the Student in a therapeutic, special education day school.[170] The Expert explained that, in her opinion, the Student required Applied Behavioral Analysis ("ABA") to address her pervasive developmental delay.[171] She explained that a therapeutic, special education day school could provide this therapy to the Student.[172] The DCPS members of the IEP team did not agree that the Student should be placed in a nonpublic school.[173]

47. Since the December 4, 2012, meeting, the Student has turned in all of her homework in each of her classes.[174] Her dedicated aide verifies that the Student has a copy of her homework assignments.[175] The dedicated aide places the homework assignment in the Student's book bag to ensure she takes it home.[176]

48. The Student is now performing well academically in her classes, including her reading class.[177] Although she continues to have incompletes on some of her science assignments, the Student earned a perfect grade on her virus research quiz, science fair project, and classroom assignment on DNA.[178]

49. The Nonpublic School is a therapeutic, special education day school.[179] It serves 109 students who are eligible for special education services as students with emotional disturbance.[180] The Nonpublic School has small classes with a low student-teacher ratio.[181]

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[166] *Id*. at 3-4.
[167] *Id*. at 5-6.
[168] *Id*. at 7.
[169] *Id*.
[170] Petitioner Exhibit 1 at 2.
[171] Testimony of Expert.
[172] *Id*.
[173] *Id*.
[174] Testimony of Petitioner.
[175] *Id*.
[176] *Id*.
[177] *Id*.
[178] *Id*.
[179] Testimony of Director.
[180] *Id*.
[181] *Id*.

50. The Nonpublic School provides crisis management and employs clinical psychologists who provide individual, group and art therapy to the Students at the Nonpublic School.[182] The Nonpublic School employs eight clinical psychologists, All Nonpublic School students are on behavioral contracts, and their behavior is assessed in each class each school day.[183] When a student is compliant with his behavior contract, the Student earns points that translate into rewards.[184]

51. The Nonpublic School also provides ABA therapy to some of its students.[185] Because most of the students at the Nonpublic School have language-based deficits, the Nonpublic School provides language-based, instruction, including multisensory instruction.[186] The curriculum at the Nonpublic School is based on the curriculum of each student's home state, including the District of Columbia.[187]

52. The tuition at the Nonpublic School is $293.00 per day.[188] The Nonpublic School's school year is 180 days.[189] The District of Columbia State Superintendent of Education ("OSSE) has issued a certificate of approval to the Nonpublic School.[190] OSSE also has approved the Nonpublic School's tuition rates.[191]

53. The Nonpublic School has interviewed Petitioner and the Student, and reviewed the Student's records.[192] However, because the Student has not yet visited the Nonpublic School and participated in its classes for a day, the Nonpublic School has not accepted the Student for admission into its program.[193]

54. Petitioner generally provided credible testimony. She testified forthrightly about the Student's emotional instability and struggles with delusions, as well as her emotional and behavioral progress since returning to the DCPS School in late October 2012. She also testified forthrightly about the Student's organizational difficulties, which contributed to her failure to turn in her homework. However, Petitioner did not testify credibly about the Student's attendance record, and her role in failing to ensure the Student is on time for school.

55. The Expert testified credibly about the Student's disability and her struggles in school. The Expert also testified credibly about the November 1, 2012, and December 4,

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[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *Id*.

2012, meetings. However, the Expert did not provide credible testimony about the services the Student requires, or her need for a therapeutic, special education day school. The Expert also did not testify credibly about the reason for the Student's excessive absences in that she attempted to tie these absences to the Student's disability and need for outside services.

56. The Admissions Director testified credibly about the curriculum, class sizes, and therapeutic supports for students at the Nonpublic School. This Hearing Officer finds the Admissions Director especially credible considering that she admitted that, because the Nonpublic School has not yet accepted the Student, it could not provide her services until she completed the application process. The testimony of the Admissions Director was uncontroverted by any of the other witnesses who testified.

57. Each of the DCPS witness testified credibly. They were forthright about the Student's academic, social, and behavioral difficulties, as well as the progress she has made in the 2012-2013 school year. These witnesses provided credible and consistent testimony about the Student's academic challenges, including the assignments she has missed and the failing grades she has received as a result of her failure to turn in her homework.

V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[194] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[195] FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)."[196]

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

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[194] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).
[195] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[196] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

benefits.[197] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[198]

The burden of proof is properly placed upon the party seeking relief.[199] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[200]

VI. DISCUSSION

Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Provide Her a Therapeutic, Full-Time, Special Education Placement.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[201] establishes annual goals related to those needs,[202] and provides appropriate specialized instruction and related services.[203] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[204]

Unless the IEP of a child with a disability requires some other arrangement, the child should be educated in the school that he or she would attend if nondisabled.[205] 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.[206] 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.[207] 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.[208]

The term "educational placement" refers to the type of educational program

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[197] 34 C.F.R. § 300.513 (a)(2).
[198] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[199] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[200] 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).
[201] 34 C.F.R. § 300.320 (a) (1).
[202] 34 C.F.R. § 300.320 (a) (2).
[203] 34 C.F.R. § 300.320 (a) (4).
[204] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[205] 34 C.F.R. § 300.116 (c).
[206] 34 C.F.R. § 300.116 (d).
[207] *Id*. at (e).
[208] *Id*. at 114 (a)(2)(ii).

prescribed by the IEP.[209] "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.[210]

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.[211]

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.[212]

Here, the Student has multiple, serious, and often debilitating disabilities. During the 2011-2012 school year, she had visual and auditory hallucinations, severe behavioral difficulties, and sexual ideations. Yet, she performed well academically at the DCPS School and finished the school year on the honor roll.

During the 2012 summer, the Student's emotional state worsened.[213] After she poured hot water on her sister, the Student was hospitalized in a psychiatric facility. She was then transferred to a residential treatment facility. In all, the Student spent four months in psychiatric treatment facilities.

In October 2012, the residential treatment facility recommended that Petitioner place the Student in a second residential treatment facility. Instead, the Student returned home and enrolled in the DCPS School.

During her first week in school, the Student had difficulties adjusting to her new environment. She produced an explicit sexual drawing, was aggressive toward the Aide, and used profanity. She also had difficulty interacting with her peers.

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[209] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[210] *Id*.
[211] D.C. Code § 38-2561.02.
[212] *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202). *See also* D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).
[213] The Student's difficulties were partly the result of her lack of structure during the summer when she was not in school. They also were partly due to a change in her medication.

Since that time, the Student has made remarkable emotional and behavioral progress, with one exception. On this occasion, the Student became upset that her dedicated aide was not at school to assist her. Otherwise, the Student has performed well in her classes, interacted with her classmates during class, and refrained from inappropriate behavior.

Unfortunately, the Student has not been performing up to her potential because she is often late to school and fails to turn in her homework. The Student's failures, however, have little to do with her school environment, the content of her IEP, or the amount of behavioral support she receives during the school day. Rather, the Student is late to school because Petitioner and the Student's father fail to ensure she is on time even though they personally bring her to school.

As a result of Petitioner's failures to ensure the Student is on time for school, the Student often misses her advisory class and her Spanish class. On occasion, she also misses her science class.

The Student's advisory class is especially important because it focuses on organizational skills and social skills. The students in the class work on building relationships, organizing their school binders, and organizing their school lockers. The Student's repeated absences in her advisory class have impeded her progress in these areas, each of which is key to her academic, social, and behavioral progress.

Additionally, when she is late for school, the Student has difficulty adjusting to school routines and focusing on her schoolwork. She becomes disgruntled and oppositional. She has difficulty catching up with the class on assignments. She has similar difficulties when she misses a day or more of school.

Petitioner failed to prove that the Student's forty-five unexcused absences from class between November 1, 2012, and January 22, 2013, were due to either the inappropriateness of her IEP, the inappropriateness of her placement, or any actions by the staff of the DCPS School. Rather, the evidence in this case is that that Petitioner and the Student's father are responsible for her poor attendance.

Additionally, the Student's failure to turn in her homework is also to blame for the decline in her grades. While it is not clear whether Petitioner or the DCPS School is responsible for the Student's failure to turn in her homework, this issue does not warrant removing the Student from her nondisabled peers and placing her in a more restrictive environment.

Additionally, it appears that the Student's dedicated aide has devised a solution to this problem. She now ensures that the Student's homework is in her binder before she leaves each class. As a result, the Student has turned in all of her homework since the December 4, 2012, IEP meeting.

Moreover, the Student performs well when she is on time for school and consistently attends school. As Petitioner admitted, the Student is now performing well

academically in her classes. Although she continues to have incompletes on some of her science assignments, she earned a perfect grade on her virus research quiz, science fair project, and classroom assignment on DNA. This shows that, with the proper structure, accountability, and regular class attendance, the Student is able to access the curriculum in her current placement.

For these reasons, Petitioner failed to prove that that the Student is unable to access the general education curriculum due to Respondent's failure to provide her a full-time, therapeutic, special education placement, i.e., a separate, special education, day school, with social workers and psychologists to provide the Student daily therapy sessions, interventions, and supports. Nor did Petitioner prove that the Student requires 27.5 hours of specialized instruction outside the general education environment, a low student-teacher ratio, and small classes. Rather, to succeed in her current program at the DCPS School, the Student simply needs to arrive at school on time, attend school consistently, and turn in her homework.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this sixth day of February 2013 hereby:

ORDERED that this case is dismissed with prejudice.

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

NOTICE OF APPEAL RIGHTS

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

Distributed to:
Counsel for Petitioners
Counsel for Respondent