DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENTS,**[1] ***Petitioners,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)	**Case No. 2012-0762** **Bruce Ryan, Hearing Officer** **Issued: January 28, 2013**

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Administrative Due Process Complaint (the "Complaint") was filed November 5, 2012, on behalf of a [redacted] adult student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a student with a disability under the IDEA. Petitioners are the Student's parents.

Petitioners allege that DCPS denied the Student a free appropriate public education ("FAPE") in several respects during the 2011-12 and 2012-13 school years, as set forth at pages 9-10 of the Complaint and described further below under the specified hearing issues. DCPS filed a timely Response to the Complaint on November 15, 2012, which denies the allegations.

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

On November 20, 2012, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the resolution period early. Accordingly, the 30-day resolution period ended on December 5, 2012; and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") was originally due to expire on January 19, 2013.

On December 5, 2012, a continuance motion was granted to extend the HOD timeline to January 28, 2013, to allow the parties to schedule the hearing on the agreed dates of January 14 and 18, 2013.

On December 13, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. A Prehearing Order was issued on January 4, 2013, and the parties filed their five-day disclosures on January 7, 2013.

The Due Process Hearing was held as scheduled on January 14 and 18, 2013. Petitioners elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioners' Exhibits: P-1 through P-31.

Respondent's Exhibits: R-1 through R-22.

In addition, the following witnesses testified on behalf of each party:

Petitioners' Witnesses: (1) Father; (2) [redacted], Speech/Language Pathologist; (3) [redacted], Neuropsychologist; (4) [redacted], Educational Consultant; (5) [redacted], Occupational Therapist; and (6) [redacted], Director of Educational Services, [redacted]

Respondent's Witnesses: (1) Special Education Teacher; (2) DCPS Speech/Language Pathologist ("SLP"); (3) [redacted], ABA Coordinator; and (4) [redacted] ABA Coordinator.

Written closing arguments were submitted on January 23, 2013.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513,

and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is January 28, 2013.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing are:

(1) **Failure to Provide Appropriate Placement (2011-12)** — Did DCPS deny the Student a FAPE by failing to provide Student with an appropriate school placement for the 2011-12 school year?

(2) **Procedural/Prior Written Notice** — Did DCPS deny the Student a FAPE by failing to issue a Prior Written Notice ("PWN") for placement that listed the information required by 34 C.F.R. §300.503?

(3) **Failure to Implement IEP** — Did DCPS deny the Student a FAPE by failing to implement the Student's individualized education program ("IEP") from August 29, 2011 to November 2, 2011?

(4) **Failure to Develop Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) on or about November 3, 2011, by reducing the hours of service and changing the delivery model of services in his IEP to partial-inclusion?

(5) **FBA/BIP** — Did DCPS deny the Student a FAPE by failing to conduct an appropriate functional behavioral assessment ("FBA") and develop an appropriate behavior intervention plan ("BIP")?

(6) **Failure to Provide Appropriate Placement (2012-13)** — Did DCPS deny the Student a FAPE by failing to provide Student with an appropriate educational placement for the 2012-13 school year?

Petitioners allege that the Student needs to be placed into a full-time autism program, rather than a self-contained classroom within a general education school. *Complaint,* ¶ 29. As their sole relief, Petitioners request that DCPS be ordered to place and fund the Student at [redacted] a private special education day school located in Maryland, both as compensatory education and as a prospective placement. [2]

At the PHC and again at the outset of the Due Process Hearing, the Hearing Officer confirmed that Petitioners' November 5, 2012 Complaint does not raise any claim or issue

[2] At hearing, Petitioners withdrew their requests for two other forms of relief listed in the Complaint and Prehearing Order – *i.e.*, to order DCPS (a) to submit a referral package to the [redacted] and (b) to fund an independent FBA, inclusive of a classroom observation. Petitioners' counsel stated that the latter request was being withdrawn in light of DCPS' recently completed FBA.

regarding any actions or refusals by DCPS subsequent to the June 2012 PWN proposing a change in placement for the 2012-13 school year. Specifically, no claim or issue was raised regarding the appropriateness of the November 3, 2012 IEP, any other DCPS actions or inactions at the 11/03/2012 MDT meeting, or DCPS' failure to convene a meeting to review the IEP prior to that date (*e.g.*, in response to August-October 2012 requests by Petitioners). Thus, such issues could not be raised at the Due Process Hearing. *See* 34 C.F.R. § 300.511 (d).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a [redacted] student who resides with his parents, the Petitioners, in the District of Columbia. *See Father Test.; P-1.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. His primary disability is Autism Spectrum Disorder ("ASD"). *See Father Test.; P-1; P-4.*
3. The Student was first diagnosed with ASD and identified as a student with a disability by DCPS' Early Stages unit in October 2010, when he was almost three years old. Early Stages completed psychological, speech-language pathology ("SLP"), and occupational therapy ("OT") assessments, which found that the Student had significant developmental delays.[3] His ASD diagnosis was later confirmed by the Center for Autism and Related Disorders at [redacted] *See P-13.*
4. The Student's initial IEP dated 10/25/2010 provided 25.5 hours per week of specialized instruction, four hours per month of SLP services, and four hours per month of OT services, all in a setting outside of general education.

[3] Among other things, the Student manifested significant impairments in the areas of communication and social emotional functioning; and he demonstrated characteristics associated with autism, including limited eye contact, minimal interactions with others, and mouthing non-food items. *P-8* (psychological report), p. 5. He presented with significant delays in the areas of receptive, expressive and pragmatic language. *P-9* (SLP report), p. 3. He also presented with global sensory concerns that have affected his ability to modulate and self-regulate to a quiet alert state needed for learning, as well as sensory seeking behaviors that have affected his ability to access and manipulate age appropriate classroom-based tools. *P-10* (OT report), p. 8.

5. From January to April 2011, the Student attended DCPS School A, a public elementary school. He was placed in a full-time, self-contained classroom for autism students, which DCPS determined was able to implement his 10/25/2010 IEP.
6. In April 2011, Petitioners removed the Student from DCPS School A and enrolled him at Charter School, a D.C. public charter school that served as its own local education agency ("LEA") under the IDEA. Petitioners did so because they were not satisfied with the special education services provided at School A and did not believe the Student's needs were being met there, which ultimately resulted in corrective action ordered on a state-level complaint. *See Father Test.; P-26.*
7. On or about May 27, 2011, Charter School convened an MDT/IEP team meeting to review and revise the Student's IEP. Charter School developed revised IEP goals and services. The revised IEP provided 24.5 hours per week of specialized instruction, 90 minutes per week of SLP services, and 90 minutes per week of OT services, all in a setting outside of general education. The IEP also provided 30 minutes per month of consultative OT and SLP services. *See P-1,* ¶ 9*; P-3; R-15* (MDT meeting notes).
8. Petitioners actively participated in the development of the Charter School IEP. At the time it was developed, the Student was on the wait list for the DCPS School B program, and Petitioners informed the MDT at Charter School that they intended to enroll him there if he got in. Petitioners wanted everything to be spelled out in the IEP document as much as possible, but they also understood that it would be necessary to review the IEP again at another meeting with DCPS if the Student changed schools. *R-15* (MDT meeting notes), *p. DCPS 0146, 0151-52. See also Father Test.* Petitioners signed the IEP document agreeing with its contents on June 9, 2011. *P-3, p. 2.*
9. Petitioners re-enrolled the Student with DCPS for the 2011-12 school year. At Petitioners' request, the Student attended DCPS School B, where he was placed into an inclusion classroom comprised of eight (8) typically developing, non-disabled students and six (6) disabled students who had been identified as having ASD. [4] This inclusion classroom constituted a general education setting, despite the fact that the Charter School IEP provided for services to be delivered in an outside general education setting.

[4] *See Father Test.; Spec. Ed. Teacher Test.* There is no record of DCPS' issuing any Prior Written Notice ("PWN") regarding this placement.

10. At the start of the 2011-12 school year, Petitioners wrote to DCPS' LEA/School Representative as follows:

> "This email is to put in writing our consent that [Student] remain in an inclusive classroom setting. We are aware that his current IEP calls for him to be educated outside of the general education population. However, we are very interested in seeing how [Student] performs in an inclusion setting under [DCPS School B's] classroom model. We see no need to amend this part of his current IEP, as we have spoken in person with ... (Sp. Ed. Coordinator at [School B]) about the difference between what is in his IEP and the type of classroom he is in now at [School B]. We look forward to a standard IEP review meeting sometime in the fall of 2011." *R-19, p. DCPS 160.*

11. During the fall of 2011, Petitioners maintained close communications with the Student's Special Education Teacher and related services providers at School B. They frequently discussed the Student's progress at school, and they coordinated in meeting his needs across the home and school environments on a day-to-day basis. *See R-19, pp. DCPS 160-203; Sp. Ed. Teacher Test.; Father Test.* At Petitioners' request, School B staff also coordinated with outside services providers retained by Petitioners. *Id.*
12. By late October 2011, based on their observations and work with the Student over the first couple months of the 2011-12 school year, the Special Education Teacher and SEC were recommending to Petitioners that the Student receive a significant portion of his specialized instruction outside the general education setting in order to better meet his needs. *R-19, pp. DCPS 188-90; Sp. Ed. Teacher Test.*
13. On or about November 3, 2011, DCPS convened an MDT/IEP team meeting to review and revise the Student's IEP. The meeting was attended by both parents, the Student's Special Education Teacher, LEA/School Representative, General Education Teacher, Speech Language Pathologist, Occupational Therapist, Educational Support Specialist, and Applied Behavioral Analysis ("ABA") Coordinator. *R-11.*
14. In developing the November 2011 IEP, the team obtained information regarding the Student's present levels of performance ("PLOPs") in the areas of Reading, Math, Adaptive/Daily Living Skills, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development based on record review, parent and teacher interviews, classroom observations, and services session data,

as well as more formal assessments such as the Verbal Behavior Milestones Placement Program ("VB-MAPP) conducted in September 2011. *See P-4; P-17.* The team then developed annual goals for each area of concern, which are not disputed by Petitioners, and a series of specific classroom aids to enable the Student to access the curriculum. *Id.*

15. The 11/03/2011 IEP changed the Student's specialized instruction services to 7.5 hours per week outside general education and 15 hours per week inside general education. The revised IEP also provided four hours per month of SLP services and six hours per month of OT services outside general education, two additional hours of SLP services inside general education, and 30 minutes per month of OT consultation services. *P-4, p. 14.* The team appropriately justified the Student's removal from the general education classroom to receive a portion of his specialized instruction as follows: "[Student] presents with intense sensory needs, limited ability to attend to tasks, and significant language delays which impact his ability to benefit from full-time instruction in the general education setting." *P-4, p. 16.*
16. Petitioners participated in the development of the IEP and signed the IEP document. *R-11.* Petitioners did not voice any disagreement with this IEP at the time it was created.
17. Following the November 2011 meeting, Petitioners continued to stay in close contact with the Student's Special Education Teacher and related services providers at School B to monitor the Student's progress under the revised IEP. *See R-19; Sp. Ed. Teacher Test.; Father Test.* In December, Petitioners began a rigorous in-home Verbal Behavior ("VB") program based on ABA principles, which required them to remove the Student from school early for 3-4 days each week, as they believed that he had been responding well to more limited verbal behavioral therapy at home. *R-19, p. DCPS 200-203.* At Petitioners' request, School B staff coordinated schedules with Petitioners to ensure that the Student still received the bulk of his in-school instructional time and related services. *Id. See also Father Test.;* [redacted] *Test.*
18. By early March 2012, the Special Education Teacher recommended that additional changes to the Student's educational program and placement should be considered. While the Student had made some progress with the increased services under the November 2011 IEP and additional home therapy, the Teacher believed that his needs would be better met in a classroom with a lower student-teacher ratio, where the

"intensity of instruction and level of attention [Student] would receive with this lower ratio would more closely match what he is receiving at home." *R-19, pp. DCPS 212-13.* Petitioners expressed disappointment and were hesitant to agree with this recommendation, replying that a "big part of the reason we moved [Student] to [School B] in the first place was because of the combined autistic/normal kids mixed classroom and the (theoretical) opportunity to have more good peer modeling on which to build a base." *Id., p. DCPS 212. See also Sp. Ed. Teacher Test.; Father Test.*

19. A few days later, the Special Education Teacher elaborated further at Petitioners' request. She reported that the Student "continues to need maximum support throughout all parts of the school day (transitions, group time, using toys)" and "requires maximum support and supervision in classroom (rooting for food, climbing furniture, running out of classroom into hallway or into playground)." *R-19, p. DCPS 218* (03/11/2012 email). The Teacher stated that she hadn't "seen the kind of growth/progress we had hoped for in order to demonstrate that [Student] had benefited from the current setting" and "believe his needs would better be met in a classroom with a lower adult-child ratio." *Id., p. 219.* She explained that in the latter type of setting, "the teacher has more control over routines and structures and they can be tailored to meet the needs of each individual child, build on their strengths, and challenge them. The classroom has fewer distractions, noise, people ... [and] would more closely match the level of instructional intensity that [Student] is receiving at home." *Id.*
20. Several days later, following further conversations, Petitioners stated that they believed there needed to be a "better case" for moving the Student into a more restrictive environment, including more data and discussion regarding the benefits of such setting to the Student compared to his current partial-inclusion setting at School B. *Id., p. DCPS 215* (03/16/2012 email). The Special Education Teacher responded to this request by providing information about the VB-MAPP Barriers and Transitions Assessment and engaging in further discussion. *Id., p. DCPS 220* (03/22/2012 email)*; Sp. Ed. Teacher Test.* DCPS' ABA Coordinator also joined the discussion and helped set up parental visits to other schools offering a more restrictive setting, including a tour of two pre-school classrooms at DCPS School C. *See R-19, p. DCPS 219-17; Garbarini Test.*

21. In May 2012, the Student's MDT/IEP team met to formally discuss the concerns regarding the Student's progress and continued placement at DCPS School B. Based upon that discussion and parent/teacher concerns with Student's progress, the Team agreed that the Student's needs would be better met in a more restrictive setting. *See R-10* (5/11/2012 PWN).[5] At around this same time, Petitioners discovered that the Student had "eloped" from the school building on a few occasions, prompting significant safety concerns which reinforced the need for a more restrictive setting. *Father Test.; P-18.*
22. On or about May 31, 2012, DCPS amended the Student's IEP to change his present levels of performance in the Motor Skills/Physical Development area of his IEP. *P-4.*
23. On or about June 8, 2012, DCPS issued a PWN proposing a change of placement to a self-contained classroom at DCPS School C. The 06/08/2012 PWN states that the Team agreed that the Student "requires more support and his needs would be better [met] in a self-contained classroom." *R-9.* The PWN also states that "[t]he family accepted the placement." *Id. See also Father Test.*
24. In August 2012, Petitioners requested an MDT/IEP team meeting to address concerns with the Student's IEP. Petitioners stated that the IEP needed to provide full-time special education hours and to include a plan for addressing the Student's elopement risk.
25. In September 2012, Petitioners provided DCPS with an independent speech/language evaluation. *P-14.*
26. In October 2012, Petitioners provided DCPS with an independent neuropsychological evaluation and an independent OT evaluation. Petitioners also reiterated their request for an MDT/IEP team meeting. *P-15; Father Test.*
27. On or about November 1, 2012, DCPS convened an MDT/IEP team meeting to conduct an annual IEP review, which reviewed the goals and the individual evaluations provided by the parents. *R-3.* The team then drafted a revised IEP to increase the Student's hours of specialized instruction to 25 hours per week in an outside general education setting. *See P-7.* Parents agreed to meet again within the next 30 days to consult and develop a behavior plan with the Autism Program team. *R-3,* p. DCPS 023. Petitioners do not disagree with the November 2012 IEP. *Father Test.* (cross examination).

[5] The PWN also stated that the team agreed not to change the IEP, except that parents would collaborate with the OT to amend IEP goals in that area. *P-6.*

28. According to the most recent evaluative data, the Student continues to meet criteria for ASD. He has a well-documented history of impairment in social interaction and communication skills, and symptoms of repetitive behavior, restricted interests, and abnormalities in sensory processing. He displays significant executive functioning impairments, social functioning deficits, and extremely low adaptive skills. Cognitive testing could not be completed due to severe behavior dysregulation and inattention. *See R-3; P-15;* [redacted] *Test.*
29. On or about November 21, 2012, subsequent to the filing of the Complaint in this matter, DCPS completed an FBA at the parents' request to determine the functions of the Student's aggressive behaviors. *See R-2.* The targeted behaviors consisted of "any attempt or success of biting, scratching, pinching, or grabbing with force." *Id.,* p. 2.
30. On or about December 21, 2012, subsequent to the filing of the Complaint and holding of the PHC in this matter, DCPS developed a BIP to address the aggressive behaviors assessed in the 11/21/2012 FBA primarily through prompting of verbalizations. *See R-1.*
31. DCPS' failure to issue a Prior Written Notice ("PWN") for placement of the Student at DCPS School B for the 2011-12 school year has not been shown to have harmed the Student or resulted in any substantive deprivation of FAPE. Petitioners did not prove that such procedural violation, if any, impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit.
32. To the extent the Student's inclusion classroom setting at DCPS School B from 08/30/2011 to 11/02/2011 was inconsistent with the terms of the Student's June 2011 IEP, Petitioners expressly consented to such temporary variance as consistent with the reasonably perceived educational needs and goals for the Student at that time.
33. The Student's IEP was reasonably calculated to confer meaningful educational benefit on the Student as of November 3, 2011, based on the information available at the time it was created.
34. DCPS School C was capable of implementing the Student's IEP and was an appropriate school/program in which to place the Student, as of June 8, 2012, based on the information available at the time the placement was determined and accepted.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioners were required to proceed first at the hearing and carried the burden of proof on the issues specified above. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). The Hearing Officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioners have failed to meet their burden of proof on the issues presented for hearing.

A. Relevant Legal Background

FAPE means "special 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)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "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)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia,* 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988). The "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,* 109 LRP 18615 (D.D.C. 2009).

Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective").

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia,* 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, statutory law in the District of Columbia requires that "DCPS shall place a student with a disability in an appropriate special education school or program" in accordance with the IDEA. D.C. Code 38-2561.02 (b). *See also Branham v. District of Columbia,* 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith,* 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school").

Educational placement under the IDEA must be "based on the child's IEP." 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. The IDEA requires each public agency to ensure that "[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled," and that "removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability 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); 34 C.F.R. §300.114 (a) (2). *See also* 5-E DCMR §3011.1; *e.g., Daniel R.R. v. El Paso,* 874 F.2d 1036 (5th Cir. 1989).

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. *See* 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.,*

200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*"); *S.S. ex rel. Shank v. Howard Road Academy,* 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

When a child with an IEP in effect in a previous public agency in the same State (*e.g.*, an LEA Charter) transfers to a new public agency in the same State (*e.g.*, DCPS), and enrolls in a new school within the same school year, the new public agency – in consultation with the parents – "must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either – (1) adopts the child's IEP from the previous public agency; or (2) develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324." 34 C.F.R. §300.323(e). *See also* 5-E DCMR §3019.5 (d) (receiving LEA is responsible upon enrollment).

B. Issues/Alleged Denials of FAPE

Petitioners claim that DCPS denied the Student a FAPE by: (1) failing to provide Student with an appropriate school placement for the 2011-12 school year; (2) failing to issue a Prior Written Notice ("PWN") for placement at DCPS School B that listed the information required by 34 C.F.R. §300.503; (3) failing to implement the Student's IEP from August 29, 2011 to November 2, 2011; (4) failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) on or about November 3, 2011, by reducing the hours of service and changing the delivery model of services in his IEP to partial-inclusion; (5) failing to conduct an appropriate functional behavioral assessment ("FBA") and develop an appropriate behavior intervention plan ("BIP"); and (6) failing to provide Student with an appropriate educational placement for the 2012-13 school year.

Issue 1: Failure to Provide Appropriate Placement (2011-12)

Petitioners complain that "[i]n advance of the 2011/12 school year, DCPS placed [Student] in the inclusion preschool class at [DCPS School B], despite the fact that [his] IEP called for full-time outside general education services." *P-1,* p. 6, ¶ 32. Yet this is exactly the placement that Petitioners sought and requested for the Student at the end of the 2011 summer,

and to which they specifically consented when they wrote to DCPS on August 30, 2011, as follows:

> "This email is to put in writing our consent that [Student] remain in an inclusive classroom setting. We are aware that his current IEP calls for him to be educated outside of the general education population. However, we are very interested in seeing how [Student] performs in an inclusion setting under [DCPS School B's] classroom model. We see no need to amend this part of his current IEP, as we have spoken in person with ... (Sp. Ed. Coordinator at [School B]) about the difference between what is in his IEP and the type of classroom he is in now at [School B]. We look forward to a standard IEP review meeting sometime in the fall of 2011." *R-19, p. DCPS 160.*

Despite this clear understanding, Petitioners now argue that a "placement decision based on a request by the parents is contrary to the requirements of the IDEA." *Pets' Written Closing Argument,* p. 1. This argument is not factually or legally supported on the record of this case.

First, as noted above, the IDEA requires each public agency to ensure that "[t]o the ***maximum extent appropriate***, children with disabilities ... are educated with children who are nondisabled," and that "removal of children with disabilities from the regular educational environment occurs ***only if the nature and severity of the disability 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); 34 C.F.R. §300.114 (a) (2) (emphasis added). [6] When DCPS (as receiving LEA) became responsible upon enrollment for ensuring the provision of FAPE to the Student, DCPS also had to ensure that any removal was consistent with Congress's preference for inclusion-based education. The evidence shows that DCPS proceeded appropriately in light of this statutory preference and with full parental input and consent. It was not until late in the 2011-12 school year that DCPS was able to determine that the Student's education in regular classes with the use of supplementary aids and services (including the pull-out instruction added in November 2011) could not be achieved satisfactorily. As Petitioners note, "[p]arental choice may be considered provided it is consistent with ... 34 C.F.R. §300.114 - §300.118," which include the LRE requirements. *Pets' Written Closing Argument,* p. 1; *see also Letter to Burton,* 17 IDELR 1182 (OSERS 1991), p. 3.

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[6] *See also* 5-E DCMR §3011.1; *e.g., Daniel R.R. v. El Paso,* 874 F.2d 1036 (5th Cir. 1989); *N.T. v. District of Columbia,* 112 LRP 2066 (D.D.C. 2012).

Second, this is not a case where "parent preference" became the "sole criterion for placement" that was allowed to "override the decision of the child's [IEP] team." *Pets' Written Closing Argument,* p. 1 (citing OSERS letters). While parent preference undoubtedly was a factor, the evidence shows that such preference was reasonably based on a desire for the Student to benefit from good peer modeling within a classroom servicing both autistic and non-disabled students. Both the parents and DCPS special educators believed this approach had merit, as modeling can often be a primary benefit of educating autistic and other disabled children in regular education classrooms. *See Sp. Ed. Teacher Test.; Father Test.;* [redacted] *Test.* In addition, information provided by the parents based on their experience in a more restrictive setting at the LEA Charter indicated that the Student was higher functioning. *Id.* Placement at School B was appropriate based on these factors, as well as previous Early Stages evaluations DCPS School B was also much closer to the Student's home then his previous DCPS school, *Father Test.,* which is an express placement criterion under the IDEA. *See* 34 C.F.R. 300.116 (b) (3) (LEA must ensure that child's placement is "as close as possible to the child's home").

Finally, to the extent Petitioners' argument addresses a placement "in advance of the 2011/12 school year," it appears to miss the mark. Pursuant to OSSE regulations, DCPS only became responsible for the Student's special education services "upon enrollment," at the start of the 2011-12 school year. 5-E DCMR §3019.5 (d). Prior to that date, it lacked authority to act as the Student's LEA.

The Hearing Officer concludes that the placement of the Student at DCPS School B at the start of the 2011-12 school year was appropriate and reasonably calculated to provide meaningful educational benefit, based on the information available to DCPS when it became responsible for providing a FAPE in August 2011. The DCPS' witnesses' testimony supports this conclusion. *See Sp. Ed. Teacher Test.;* [redacted] *Test.* Moreover, the evidence shows that DCPS acted reasonably in responding to new information regarding the child's performance, behavior, and disabilities once he arrived, which ultimately led to a revised IEP in November 2011 and a decision to change his placement back to a more restrictive setting in Spring 2012. *See Findings,* ¶¶ 11-20; *cf. Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010).

Accordingly, Petitioners did not prove by a preponderance of the evidence that DCPS failed to provide Student with an appropriate school placement for the 2011-12 school year.

Issue 2: Procedural/Prior Written Notice

Petitioners also complain that DCPS failed to issue a Prior Written Notice ("PWN") for placement at DCPS School B that listed the information required by 34 C.F.R. §300.503. Section 300.503 (a) requires that written notice meeting the requirements of 300.503 (b) be given to parents "a reasonable time before the public agency – proposes to initiate or change the ... educational placement of the child." 34 C.F.R. §300.503 (a) (1). Again, since DCPS did not become responsible as the LEA until the Student enrolled, it is not clear how DCPS could have complied with such advance notice requirement at the time Petitioners claim that it should have done so. Moreover, the evidence indicates that the change in enrollment was initiated by the parents, not DCPS.

Even assuming *arguendo* that DCPS should have issued a notice upon enrollment, a "hearing officer's determination of whether a child received a FAPE must be based on substantive grounds." 34 C.F.R. § 300.513 (a) (1). In this case, any procedural inadequacy relating to the issuance of a notice has not been shown to have (i) impeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or (iii) caused a deprivation of educational benefit. *Id.,* § 300.513 (a) (2); *see Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006).

To the contrary, as noted in the parents' August 30, 2011 written communication to DCPS, the parents were well aware of the requirements of the Student's then-current IEP; they had visited School B and spoken in person with the SEC B about the differences between the prior IEP/placement and the type of classroom in which he was being placed at School B. The School B program had also been previously explained to the parents at an Early Stages MDT meeting in December 2010, and they were in constant contact with School B staff as the new school year began. *See R-17; R-19, p. DCPS 160; Father Test.* (cross examination); *Findings,* ¶¶ 10-11.

The purpose of a PWN is to ensure that parents have knowledge of changes in their child's educational program. In this case, Petitioners not only knew of the change in placement, but specifically requested and agreed that the Student be placed in a general education inclusion

classroom at School B. Accordingly, Petitioners did not prove their claim under Issue 2 by a preponderance of the evidence.

Issue 3: Failure to Implement June 2011 IEP

Under Issue 3, Petitioners claim that DCPS denied the Student a FAPE by failing to implement his Charter School IEP from August 30, 2011 through November 2, 2011, because his IEP services were provided in an inclusion classroom rather than an outside general education setting for this two-month period. This claim reformulates the inappropriate placement claim (Issue 1) under a slightly different legal theory based on essentially the same facts.

Because DCPS was effectively receiving the Student as a transfer from an in-State LEA pursuant to the principles set forth in 5-E DCMR §3019.5 (d) and 34 C.F.R. §300.323 (e), [7] it needed to address the Student's special education needs either by (1) adopting the existing IEP or (2) developing and implementing a new IEP. However, neither the IDEA nor OSSE regulation establishes a specific timeframe for the new public agency to take one of these actions in a transfer situation. Thus, DCPS was only required to act within a reasonable period of time, in order to avoid any undue interruption in the provision of services.

In this case, DCPS elected to develop, adopt, and implement a new IEP, with the parents' express consent and participation. The evidence shows that DCPS acted reasonably promptly under the circumstances by convening an MDT/IEP meeting within approximately 60 days of the Student's enrollment. The evidence shows that the MDT/IEP Team (including Petitioners) then carefully considered the Student's needs as of November 3, 2011, based on his experience at School B, and adjusted his program to include substantial hours of pull-out instruction. *Findings,* ¶¶ 12-13.

Moreover, the evidence shows that during the two-month transitional period, the Student was provided all of his special education and related services under the IEP, albeit in a different classroom setting. DCPS witnesses also testified that the IEP team at School B implemented the goals as developed and written by the Charter School team. *See Sp. Ed. Teacher Test.; IEP Progress Reports.* Under the circumstances, the Hearing Officer concludes that any deviation from IEP requirements was not material. *Cf. Catalan* v. *District of Columbia,* 478 F. Supp. 2d at

[7] *But see Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010) (§300.323(f)'s interstate transfer rules held not to apply where student transfers schools during the summer).

76 (noting failure to implement claims require "contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements").

Assuming *arguendo* that the Student's inclusion classroom setting at School B did deviate materially from the terms of his IEP for a two-month transitional period, the Hearing Officer concludes that Petitioners expressly consented to such temporary variance as consistent with the educational needs and goals for the Student at that time. Petitioners' August 30, 2011 email to DCPS could hardly be clearer on this point: "We see no need to amend this part of his current IEP, as we have spoken in person with ... (Sp. Ed. Coordinator at [School B]) about the difference between what is in his IEP and the type of classroom he is in now at [School B]. We look forward to a standard IEP review meeting sometime in the fall of 2011." *R-19, p. DCPS 160.*

Finally, assuming *arguendo* that DCPS failed to timely convene and conduct an MDT meeting to develop a new IEP prior to the start of the 2011-12 school year, *see* 34 C.F.R. §323(a), such failure would establish no more than a procedural violation of the statute. Petitioners' IDEA claim would be viable only if such procedural violation affected the Student's or Petitioners' substantive rights. *See, e.g., Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006); *Kruvant v. District of Columbia,* 99 Fed. Appx. 232 (D.C. Cir. 2004); 34 C.F.R. §300.513 (a) (2). For the same reasons discussed under Issue 2 above, Petitioners have failed to make such showing here. [8]

Accordingly, under the particular circumstances present here, the Hearing Officer concludes that Petitioners have not met their burden of proving a denial of FAPE based on a material failure to implement IEP requirements for the two-month period alleged.

Issue 4: Failure to Develop Appropriate (Nov. 2011) IEP

Under Issue 4, Petitioners claim that DCPS denied the Student a FAPE by failing to develop an appropriate IEP (*i.e.,* one that was reasonably calculated to confer educational benefit) on or about November 3, 2011, by (a) reducing the hours of service and (b) changing the

[8] Petitioners' expert SLP did testify that she found no meaningful progress occurred between September 2011 and March 2012, and that some regression in echoic scores occurred during that time. [redacted] *Test.* But evidence was lacking to attribute any particular harm to the transitional two-month period at the beginning of the 2011-12 school year.

delivery model of services in his IEP to partial-inclusion, as compared with his June 2011 IEP at Charter School. Petitioners do not challenge any of the goals in the November 2011 IEP, nor any other contents including related services, classroom aids or accommodations.

As noted above, in consultation with the parents, DCPS did not adopt the existing IEP developed by the prior LEA. Hence, Petitioners' comparison to the June 2011 IEP is not really the appropriate reference point for this claim. The November 2011 IEP actually moved the Student into a ***more*** restrictive environment than the full-inclusion classroom in which he had been initially placed with parental consent by adding 7.5 hours of pull-out instruction in an outside general education setting. This change was made based on DCPS' observations and experience with the Student over his initial 60 days at School B and the Student's progress during that time, and with the detailed review and input from his parents. *See* 34 C.F.R. §§300.305, 300.324; *Findings,* ¶¶ 12-15.

While Petitioners now allege that DCPS should have known it needed to move the Student into a full-time, outside general education setting as of November 3, 2011, the evidence shows that Petitioners themselves were calling for more data and justification for exactly such a change four months later. As discussed above, the IDEA requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who are not disabled "to the maximum extent appropriate." 20 U.S.C. §1412 (a) (5) (A); *see* discussion, pp. 11-13, *supra.* Petitioners have failed to prove that this statutory preference had been convincingly overcome during DCPS' stewardship as of the date of the 11/03/2011 MDT meeting.

Petitioners also appear to argue that the Student's subsequent lack of progress under a partial-inclusion IEP proves the inappropriateness of the IEP at the time it was developed. *See Pet's Written Closing,* pp. 4-5. However, as the District Court recently made clear: "While the District of Columbia is required to provide [disabled] students with a[n appropriate] public education, it does not guarantee any particular outcome or any particular level of education." *N.T. v. District of Columbia,* 112 LRP 2066 (D.D.C. 2012), slip op. at 3, citing *Rowley,* 458 U.S. at 192. *See also Dorros v. District of Columbia,* 510 F. Supp. 2d 97, 100 (D.D.C. 2007). Nor can subsequent evaluations not available to the 11/3/2011 team be used to demonstrate the inappropriateness of this IEP. As noted above, judicial and hearing officer review of IEPs is

"meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective").

Looking solely at the data and information available to the Student's MDT/IEP team as of 11/03/2011, Petitioners have failed to prove that the IEP was not reasonably calculated to confer educational benefit on the Student. The team obtained information regarding the Student's present levels of performance ("PLOPs") in the areas of Reading, Math, Adaptive/Daily Living Skills, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development based on record review, parent and teacher interviews, classroom observations, and services session data, as well as more formal assessments such as the Verbal Behavior Milestones Placement Program ("VB-MAPP) conducted in September 2011. *See P-4; P-17;SLP Test.* The team then developed annual goals for each area of concern, which are not disputed by Petitioners, and a series of specific classroom aids to enable the Student to access the curriculum. *Id.* On the basis of its review, the team determined that the Student required 7.5 hours per week of specialized instruction outside the general education setting, along with 15 hours of specialized instruction within the general education classroom. *Id.* The team appropriately justified the Student's removal from the general education classroom to receive a portion of his specialized instruction as follows: "[Student] presents with intense sensory needs, limited ability to attend to tasks, and significant language delays which impact his ability to benefit from full-time instruction in the general education setting." *P-4, p. 16.* Petitioners did not voice any disagreement with this IEP at the time it was created.

At hearing, Petitioners primarily relied upon the testimony of [redacted] (an SLP and ABA/VB expert) and [redacted] (expert neuropsychologist at the center for Autism Spectrum Disorders). [redacted] testified that the Student needed intensive instructional supports, including 1:1 instruction, to access the curriculum. [redacted] *Test.* However, while she began seeing the Student in August 2011, she did not conduct her full evaluation until August 29, 2012 while he was attending School C. *P-14.* Thus, DCPS did not have the benefit of this data when it developed the November 2011 IEP, and the results of her

testing cannot properly be used to prove the inappropriateness of such IEP at the time it was created.[9] *See Schaffer* v. *Weast,* 554 F.3d at 477 (citing *Rowley,* 458 U.S. at 207). The same is true with respect to Dr. Atmore's very comprehensive neuropsychological evaluation, which was not completed until September 20, 2012. *P-15.* In her case, the Student was not even initially referred until he was already attending School C.

Accordingly, the Hearing Officer concludes that Petitioners failed to meet their burden of proving by a preponderance of the evidence that the November 2011 IEP was not reasonably calculated to confer educational benefit on the Student at the time it was created, due to the partial-inclusion setting for his specialized instruction.

Issue 5: FBA/BIP Claim

Petitioners next claim that DCPS denied the Student a FAPE by failing to conduct an FBA and develop a BIP prior to the 2012-13 school year to address his elopement risk. *P-1, p. 8 ¶43.* In their written closing, they also argue for the first time that an FBA was needed "to address biting, scratching, pinching and other aggressive behaviors which increased through November 2012." *Pet's Written Closing,* p. 6. Neither argument prevails.

The testimony and other evidence shows that the elopement risk became an increased concern late in the 2011-12 school year and was addressed directly by ensuring closer staff supervision following an incident where the Student left the school grounds. DCPS witnesses explained that this course of action was more appropriate and effective than conducting an FBA, which generally takes several weeks to complete and analyze. *See Test.* Petitioners did not demonstrate otherwise.

DCPS has now completed an FBA and BIP to address the Student's aggressive behaviors, and Petitioners are not challenging their appropriateness with respect to that issue. *R-1; R-2.* The evidence shows that such behaviors increased significantly last Fall after the Student moved to

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[9] [redacted] also testified that, in her opinion, 15 hours of specialized instruction would not have been appropriate for the Student in November 2011 given his VB-MAPP scores at that time ([redacted] *Test.*), but the Hearing Officer finds this *post-hoc* opinion testimony to have less weight and credibility than the contemporaneous opinions and testimony of the DCPS educators who were working day to day with the Student in concert with the parents and outside therapists to address the Student's evolving educational needs. *See, e.g., Sp. Ed Teacher Test.; SLP Test.;* [redacted] *Test.*

School C,[10] and that the IEP team then decided to conduct an FBA and develop a BIP following discussion at the November 2012 MDT meeting.[11] Petitioners' neuropsychological expert testified that the BIP at *R-1* is "pretty comparable" to the behavior plan implemented at home as part of the Student's home-based ABA program. [redacted] *Test.* (cross examination). Petitioners also have not proved that DCPS unreasonably delayed that process, which was completed in less than two months, or that DCPS' failure to conduct an FBA/BIP in this area earlier has deprived the Student of educational benefit.

Accordingly, the Hearing Officer concludes that Petitioners did not prove their claim under Issue 5 by a preponderance of the evidence.

Issue 6: Failure to Provide Appropriate Placement (2012-13)

Under Issue 6, Petitioners claim that DCPS denied the Student a FAPE by failing to provide him with an appropriate educational placement for the 2012-13 school year. As discussed above, DCPS proposed this placement near the end of the 2011-12 school year, by means of a 06/08/2012 PWN. To prevail on this claim, Petitioners must prove that such placement was inappropriate and not reasonably calculated to confer educational benefit, ***as of the date of the action being challenged by the instant due process complaint.*** The Hearing Officer concludes that Petitioners have not done so.

Petitioners failed to prove that School C was unable to implement the requirements of the Student's November 3, 2011 IEP (as amended in May 2012). The evidence shows that School C can provide all of the services, aids and supports specified in the IEP within the specified settings. When Petitioners were presented with options for a more restrictive program for the Student, they visited several DCPS autism programs and chose School C because of its Sensory Room. School C also provides a self-contained classroom for five students with ASD[12] and has

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[10] *See, e.g.,* [redacted] *Test.* (testifying to "big spike" in aggressive behaviors in October 2012); *P-30* (ABA data sheets).

[11] *See generally* 34 C.F.R. 300.324 (a)(2)(i) ("The IEP Team must – in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.").

[12] Petitioners' expert neuropsychologist testified that she believed the maximum group of students for the Student to be able to learn was six, with an opportunity for some 1:1 instruction. *See* [redacted] *Test.*

a low student/adult ratio with one teacher [13] and two instructional aides. The evidence shows that the Student receives OT and SLP services in both push-in and pull-out settings pursuant to his IEP. *R-5; R-6; SLP Test.* The Student also has limited interaction with general education peers outside of his academic instruction, which offers an opportunity for appropriate modeling but does not interfere with his education.

Petitioners' Complaint alleges that School C's self-contained autism class does not provide an appropriate setting because it is inconsistent with the September 20, 2012 neuropsychological evaluation by [redacted], which "recommends a school environment that is completely adapted to meet the needs of children with Autism." *P-1, p. 9 ¶ 49; see P-15,* p.6. But this evaluation was not conducted until over three months after DCPS determined placement for the 2012-13 school year, and thus cannot serve to demonstrate that DCPS' action was inappropriate and a denial of FAPE. [14] Nor can the subsequent regressions in the Student's aggressive behaviors recently addressed by the FBA/BIP process. *P-1, ¶ 51.* DCPS' actions can only be judged based on the information it had available at the time a particular decision was made.

Petitioners' theory seems to be that a school placement can be challenged in a due process hearing on an ongoing basis, as a sort of "continuing violation" (*Pet's Written Closing, p.* 6) – without regard to any specific actions or refusals to act by the LEA. However, that is not how the IDEA is supposed to work. A parent may file a due process complaint alleging that a public agency's (1) ***proposal*** to initiate or change the identification, evaluation or ***educational placement*** of the child, or (2) ***refusal*** to initiate or change the identification, evaluation or educational placement of the child constitutes a denial of FAPE. *See* 34 C.F.R. 300.503, 300.507. Hearing officers then adjudicate only these specific claims. 34 C.F.R. 300.511 (d).

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[13] Petitioners have sought to raise an issue regarding the certification or licensure of the special education teacher assigned to this classroom, but such issues are properly addressed in a state-level complaint. *See generally* 34 C.F.R. 300.156. Moreover, unlike the case cited by Petitioners (*Damien J. v. Sch. Dist. of Philadelphia*, 49 IDELR 161 (E.D. Pa. 2008)), Petitioners have not alleged that a lack of qualified teachers resulted in a failure to implement the services specified in the Student's IEP during the current school year.

[14] [redacted] conceded on cross examination that she could not express an opinion regarding the Student's specific placement needs prior to her September 2012 evaluation, and that there is often an adjustment period with any new setting. *See* [redacted] *Test.* (cross examination).

In this case, DCPS' action proposing a change of placement occurred in June 2012 through its issuance of the PWN challenged in the Complaint. Petitioners have not asserted any claim that DCPS specifically refused to change the Student's placement, in response to parent request and based on updated evaluative data and other relevant information. Nor have they alleged that DCPS issued or should have issued any additional prior notice with respect to such action. At least that is not how Petitioners have pleaded their case. [15] Petitioners also concede that they are not challenging the appropriateness of the November 2012 IEP. *Pets' Written Closing, p. 6.*

By proposing to place the Student into a self-contained autism classroom at School C on June 8, 2012, DCPS met its IDEA obligation to offer placement in an appropriate school or program that could fulfill the requirements set forth in the IEP, and Petitioners accepted that proposal. *See* D.C. Code § 38-2561.02 (b); *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). The Hearing Officer concludes that this action was appropriate and did not deny the Student a FAPE as of that date. "If there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *N.T. v. District of Columbia,* 112 LRP 2066 (D.D.C. 2012), *quoting Jenkins v. Squillacote,* 935 F. 2d 303, 305 (D.C. Cir. 1991). Thus, "[i]t is irrelevant that [Trellis School] may be better suited to serve [Student] than [School C]. The IDEA 'does not necessarily guarantee the child [with a disability] the best available education.' Nor does it guarantee that the child will receive the education that the parent thinks is best." *O.O. v. District of Columbia, supra.*

Accordingly, the Hearing Officer concludes that Petitioners failed to meet their burden of proof under Issue 6.

[15] This limitation was made crystal clear by the Hearing Officer at the PHC and again at the outset of the due process hearing. It was specifically observed that any independent evaluations and other information that post-dated the June 2012 PWN could only be relevant to remedy issues, not as evidence of unpled denials of FAPE not ripe to be heard under 34 C.F.R. 300.511 (d).

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As noted above, this HOD adjudicates only the propriety of DCPS' actions or refusals prior to the start of the 2012-13 school year, including the placement decision made in June 2012. The Hearing Officer expresses no opinion regarding the appropriateness of either the November 2012 IEP or of any proposed change or refusal to change the Student's placement, based on any new evaluative data or information developed or considered since the start of the 2012-13 school year, because Petitioners have not properly presented such issues for hearing. *See* 34 C.F.R. § 300.511 (d). Petitioners may still file a separate due process complaint addressing these matters if they believe the facts support it. *Id.*, § 300.513 (c).

VI. ORDER

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

1. Petitioners' requests for relief in their Administrative Due Process Complaint filed November 5, 2012, are hereby **DENIED;** and

2. The Complaint is **DISMISSED, With Prejudice.**

Dated: January 28, 2013

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415 (i) (2).