

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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PETITIONER, an adult student,<sup>1</sup>

Date Issued: April 7, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or STUDENT), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In a prior administrative hearing concerning Student, Case No. 2014-0334, Hearing Officer Coles B. Ruff ordered Respondent District of Columbia Public Schools (DCPS) to fund an independent comprehensive psychological evaluation of Student and to convene an Individualized Education Program (IEP) team meeting to review and revise, as appropriate, Student's IEP and educational placement. After the independent evaluation was completed, a DCPS IEP team met on December 12, 2014 to revise

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student's IEP. In his Due Process Complaint in this case, Petitioner alleges that DCPS denied him a free appropriate public education (FAPE) by failing to offer him a full-time IEP and a suitable educational placement at the December 12, 2014 IEP meeting.

Student, an AGE young adult, is a resident of the District of Columbia.

Petitioner's Due Process Complaint, filed on January 23, 2015, named DCPS as Respondent. The parties met for a resolution session on February 3, 2015 and did not reach an agreement. On March 3, 2015, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this final decision began on February 23, 2015. The due process hearing was held before this Impartial Hearing Officer on March 24, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REP and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner testified and called as witnesses SOCIAL WORKER, NONPUBLIC SCHOOL DIRECTOR and CLINICAL PSYCHOLOGIST. DCPS called as witnesses LEA Rep, SCHOOL PSYCHOLOGIST, and SPECIAL EDUCATION TEACHER. Petitioner's Exhibits P-1 through P-12 were admitted into evidence, including Exhibit P-9 which was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-22 were admitted into evidence without objection. Counsel for both parties made closing arguments. Neither party requested leave to file post-hearing written argument.

**JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

**ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the March 2, 2015

Prehearing Order:

- Whether at a December 12, 2014 IEP meeting, DCPS denied Student a FAPE by not offering him a full-time IEP;
- Whether DCPS denied Student a FAPE by offering him an unsuitable placement in January 2015 at CITY HIGH SCHOOL;
- Whether at the December 12, 2014 IEP meeting, DCPS denied the adult Student a FAPE by failing to offer him a meaningful opportunity to participate in the IEP meeting, specifically to discuss hours of services and IEP placement; and
- Whether DCPS denied Student his rights under the IDEA when it issued a Prior Written Notice in January 2015 that did not explain DCPS’ decision to deny Student’s request to be placed at Nonpublic School.

For relief, Petitioner requests that the Hearing Officer order DCPS to convene an IEP meeting and provide Student a full-time IEP and that DCPS be ordered to fund Student’s private placement at Nonpublic School for the remainder of the 2014-2015 school year.

**PRIOR HEARING OFFICER DETERMINATION**

On October 8, 2014, following a due process hearing on September 16, 2014, Hearing Officer Ruff issued his Hearing Officer Determination in Case No. 2014-0334 (the October 8, 2014 HOD). Counsel for the parties have agreed that I may adopt the findings of fact from the prior decision as I deem them relevant to the present case. I adopt the following findings of fact from the October 8, 2014 HOD (Exhibit P-12):

A. Petitioner is an adult student with a disability pursuant to IDEA and classification of SLD. The student is attending a private special education program, Nonpublic School, where he began attending on trial basis in November 2013. Currently the student's attendance at Nonpublic School is not funded by DCPS. Prior to attending Nonpublic School the student had been assigned to three different DCPS high schools but has a history of truancy and earned minimal credits toward a high school diploma.

B. In March 2011, the student was removed from his mother's care by the Child and Family Services Agency (CFSA). He resided in a group home and attended the DCPS high school, City High School, closest to his group home for PRIOR GRADE during SY 2011-2012. The student failed all classes except one during SY 2011-2012 and repeated Prior Grade at City High School for SY 2012-2013. In August 2012, the Department of Youth Rehabilitation Services detained the student at Youth Services Center (YSC) because of his school truancy.

C. In September 2012, a psycho-educational evaluation was conducted of student. The academic testing placed the student's reading skills at a third grade level, his writing and math skills at a fourth grade level.

D. The student remained at YSC until November 2012 when he was returned to the group home and resumed attending City High School. The student's truancy at City High School continued and he was eventually removed from City High School and began attending School C where he was assigned for SY 2012-2013 and for the start of SY 2013-2014.

E. In April 2013, the D.C. Department of Mental Health conducted a neuropsychological evaluation of the student when he was residing in the group home and assigned to School C. The evaluation revealed a full scale IQ of 70 and his adaptive skills were rated in the average range. The student was diagnosed with, among other things, a learning disorder, mood disorder and borderline intellectual functioning. The evaluator recommended that the student have a smaller school with a low student to teacher ratio and a school campus that would make it difficult for him to leave school.

F. On May 9, 2013, DCPS developed an IEP for the student at School C. The IEP prescribed the following of services: 12 hours of specialized instruction: 6.5 hours in general education and 6.5 hours outside general education and 120 minutes per month of behavioral support.

G. During SY 2013-2014, the student was repeating Prior Grade for the third time. Because of his continued pattern of truancy as a result of a request by the student's CFSA social worker, School C convened a multidisciplinary team (MDT) meeting to address the student's failure to attend school. The student attended the meeting along with his social worker and a representative of his group home. The student cited safety concerns as to why he was not attending school. An attendance support plan was put in place.

H. On September 27, 2013, the student's social worker contacted a DCPS official

seeking to have the student transferred to another school in light of his safety concerns and on October 1, 2014, the social worker met with the DCPS official. The student's educational attorney participated by telephone. The social worker stated the student would attend School D if DCPS transferred him there. The DCPS official suggested that instead of School D the student attend a new program within DCPS hosted at two different high schools that was designed for third year repeat ninth graders. The program had smaller classes with more remediation and the student could earn 8 to 12 credits in the school year. The social worker stated she would discuss the options with the student. The student later visited School D and refused to attend School D when he realized it was a school with as large a student population as the previous DCPS schools he had attended.

I. On October 15, 2013, the student's social worker withdrew the student from School C and then pursued two other DCPS schools for the student to attend. Those schools were not available because they were at capacity for the student's grade.

J. The student's social worker then identified Nonpublic School and talked with its staff and later took the student to Nonpublic School for an interview and tour. In November 2013, the student began attending Nonpublic School on trial basis. The student attended school every day during the three-week trial period and has continued to attend since. The student's social worker sought to have DCPS place and fund the student at Nonpublic School and was informed that he would first need to register at City High School, his local DCPS school.

K. On February 4, 2014, Petitioner attempted to enroll the student at City High School, but was unable to complete the enrollment. On February 12, 2014, the student's social worker picked the student up from Nonpublic School and transported him to City High School and submitted enrollment documentation for the student to be enrolled at City High School. They informed City High School that the student would be pursuing a victim's transfer and not attending City High School.

L. On February 21, 2014, the student's educational attorney requested a meeting to review the student's IEP and noted her availability for dates in March 2014. The attorney was later informed that despite the enrollment documents having been submitted the student had not yet been officially enrolled at City High School because the DCPS official whom the social worker contacted in October 2013 had informed City High School not to enroll the student.

M. On March 12, 2014, the student's social worker emailed the DCPS official that she contacted in October 2013 and stated that the student had been attending Nonpublic School consistently for four months and was making progress there and she and the student's educational attorney had attempted to enroll the student at City High School and requested an IEP meeting to pursue the student being placed by DCPS at Nonpublic School.

N. On March 27, 2014, the student's social worker and educational attorney met with the DCPS official regarding the student's school placement and were informed that they

should provide DCPS the student's evaluations, educational records and that DCPS' Office of Specialized Instruction would provide a final response to their request for a placement. The requested documents were then provided to DCPS.

O. During the month of April 2014 the student's educational attorney awaited a response from DCPS but got no information regarding the student's placement from DCPS until April 24, 2014, when she was informed the student needed to enroll at City High School for his needs to be assessed.

P. On May 6, 2014, the student's social worker took the student to City High School to enroll. The student made clear that he would not attend City High School. City High School agreed to waive the requirement that student attend City High School for 30 days prior to convening an IEP meeting and agreed to schedule a meeting the following week. An IEP meeting was scheduled at the school for May 21, 2014. However, the student failed to arrive timely and the meeting was rescheduled for June 17, 2014.

Q. On June 17, 2014, the student finally was registered in City High School and DCPS convened an IEP meeting for the student at which an IEP was developed to be implemented at City High School that prescribes the following services: 10 hours per week of specialized instruction outside general education, 13 hours per week of specialized instruction inside general education and 240 minutes per month of counseling services.

R. The City High School team members strongly believed that with increased services the student would be successful at City High School. However, the student repeatedly stated in his interaction with the City High School staff and the IEP team that he will not attend City High School.

S. The student's representatives at the June 17, 2014 meeting requested the team prescribe full time out of general education services. However, based upon the limited information available to the team to justify that level of service the DCPS team members did not believe full-time services were warranted and would be inconsistent with the requirement that the student be in a least restrictive environment. On September 4, 2014, DCPS convened another IEP meeting in which the student's neuropsychological evaluation was reviewed. City High School attempted to obtain information regarding the student from Nonpublic School to no avail. The team agreed to maintain the same level of services in the student's IEP as was prescribed at the June 17, 2014, meeting. The team agreed to conduct an occupational therapy evaluation and agreed that the student needed transition assessments.

T. Since attending Nonpublic School, prior to the September 2014 due process hearing, the student had made significant progress emotionally and behaviorally and has earned four credits toward his high school diploma. He no longer displayed depressive symptoms and had begun to actively contemplate and plan for his future. He had not absconded from his group home. He trusted the staff at Nonpublic School and had developed significant relationships with the staff.

U. The student has earnestly stated that he feels unsafe in a large DCPS high City High School but he has not stated that he would refuse to attend any school other than Nonpublic School.

In the October 8, 2014 HOD, Hearing Officer Ruff concluded, *inter alia*, that although Student had flourished at Nonpublic School, there was insufficient evidence that Student needed to be totally removed from his nondisabled peers or that Nonpublic School was his least restrictive environment (LRE). Hearing Officer Ruff denied Petitioner's request to order DCPS to fund his placement at Nonpublic School. However, Hearing Officer Ruff ordered DCPS to convene an IEP team to review and revise Student's IEP and placement as appropriate after additional evaluations were completed, including an independent comprehensive psychological evaluation.

#### **ADDITIONAL FINDINGS OF FACT**

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's additional Findings of Fact are as follows:

1. Student, an AGE young man, resides in a group home in the District of Columbia. Testimony of Petitioner. He is a student with a disability in need of special education and related services, as defined by the IDEA. His primary disability classification is Specific Learning Disability. Exhibit P-10.

2. Student is a self-placed private school student at Nonpublic School, where he has attended since November 2013. Student is in a special program at Nonpublic School designed for students with disabilities who have not been successful in a regular school setting. There are 17 students in the program. The physical layout consists of two classrooms, the Director's office, a break area and the kitchen. In addition to Director, the staff includes an English teacher and a Mathematics teacher, both certified in Special Education. Students also receive computer-based instruction in physical

science and world history, which is overseen by Director. There are two teaching assistants. The students have an art class taught by the Nonpublic School art teacher and they have physical education with the other students at Nonpublic School. The classroom student-to-teacher ratio is 3:1. Testimony of Director.

3. All students in the special program at Nonpublic School are students with disabilities. The program affords the students attendance time flexibility, but aims for students to attend for five hours per school day. Testimony of Director.

4. Nonpublic School, including the special program Student attends, holds a Certificate of Approval issued by the DC Office of the State Superintendent of Education (OSSE). The annual tuition charge is \$39,750. All of the 17 students in the special program, except for Student, are funded by DCPS. Nonpublic School has taken Student without payment, with the hope that ultimately DCPS will fund his attendance. Testimony of Director.

5. Student's attendance at Nonpublic School has generally been good. He earned four credits toward his high school diploma in the 2013-2014 school year and is on track to earn five credits in the current school year. Student generally arrives at school around 8:30 to 9:00 a.m. and leaves around 2:00 p.m. Testimony of Director. Student likes it at Nonpublic School. Testimony of Student.

6. In October and November 2014, Clinical Psychologist oversaw a psychoeducational evaluation of Student, as authorized in the October 8, 2014 HOD. Clinical Psychologist works at Nonpublic School. Student was resistant to being evaluated by Clinical Psychologist. A doctoral graduate student in school psychology, who was interning at Nonpublic School, had good rapport with high school students. Clinical Psychologist had the graduate student intern complete the testing of Student

under her supervision. Testimony of Clinical Psychologist.

7. Clinical Psychologist and the intern administered a battery of tests to student, including cognitive, academic achievement, and social/emotional measures and had Social Worker complete ratings scales on Student's Adaptive Functioning and Social/Emotional Functioning. Based upon these tests, and informed by two prior comprehensive psychological evaluations administered to Student, Clinical Psychologist reported that Student's overall intelligence fell in the Very Low range with a full scale IQ of 66. His current academic scores also fell in the Low to Very Low Range. He had considerable difficulty on the Gray Oral Reading Test, Fifth Edition (GORT-5) with his reading comprehension score at the second grade level. Student's scores on academic measures generally ranged from third to fourth grade level. Social Worker's rating scale responses indicated Student had significant deficits in social skills, social judgment and interpersonal communication with scores in the Very Low range. Social Worker's ratings of Student's adaptive functioning indicated that Student had significant deficits in his ability to provide self-care and to manage money, recreation and school tasks. Clinical Psychologist reported that Student's history of extreme avoidance of school and adult authority, as well as his fear of normative peer interactions, were reflective of his traumatic history and that he exhibits a number of behaviors that are typical of children who have experienced chronic trauma. Clinical Psychologist diagnosed Student with Intellectual Disability and with Unspecified Trauma and Stressor-Related Disorder. She reported that Student did not meet diagnostic criteria for anxiety disorder or for attention deficit-hyperactivity disorder (ADHD). Exhibit P-8.

8. DCPS conducted an Occupational Therapy (OT) Assessment of Student on October 14, 2014. Student demonstrated difficulty on the OT standardized test in areas

of visual perception, visual motor skills and motor coordination. In an interview with the OT evaluator, Student stated that he does not like school and goes in to do his work and get out. He reported not being social with a lot of people. He said that classes are small at nonpublic school and that he thought City High School was too big. The OT evaluator reported that Student needed support with visual perceptual skills, visual motor skills, motor coordination and attendance and participation. Exhibit R-12.

9. DCPS conducted a Vocational II Assessment of Student on October 28, 2014. Exhibit R-13.

10. On December 12, 2014, DCPS convened an IEP team meeting for Student at City High School. Student, Social Worker, Clinical Psychologist, Director and Petitioner's Counsel attended the meeting. School Psychologist reviewed Clinical Psychologist's recent psychological evaluation of Student. School Psychologist stated that Student did not meet IDEA criteria for Intellectual Disability and recommended that SLD remain Student's primary disability classification. The IEP team consented to the SLD classification. Exhibit R-15.

11. At the December 12, 2014 IEP team meeting, Student's representatives requested changes to the IEP annual goals. Special Education Teacher revised the goals and, subsequent to the meeting, sent the revised IEP to the entire team to review. Special Education Teacher did not recall that any further requests were made to amend the IEP goals. Testimony of Special Education Teacher.

12. At the December 12, 2014 IEP meeting, Petitioner's Counsel requested that DCPS make a full time placement of Student at Nonpublic School. She and Social Worker noted that Student was not going to attend City High School and that he required a full-time IEP at Nonpublic School. The City High School representatives

noted that City High School was able to educate Student based upon the IEP team discussions and review of Student's assessment. The IEP team agreed that Student would benefit from OT services. Exhibit R-15.

13. Over the disagreement of Student's representatives, the December 12, 2014 IEP team adopted an IEP that would have provided Student 13 hours per week of Specialized Instruction outside general education, 10 hours per week of Specialized Instruction in general education, 240 minutes per month of Behavioral Support Services and 120 minutes per month of Occupational Therapy. Exhibit R-17. DCPS proposed to implement the December 12, 2014 IEP at City High School. Exhibit R-15.

14. Student has been asked at least 30 times whether he would attend City High School. He has repeatedly stated that he will not go to City High School because he does not feel safe there. He repeated at the December 12, 2014 IEP meeting that he would not go to City High School. Testimony of Social Worker. DCPS has not been provided documentation or corroboration of a basis for Student's stated concerns for his safety at City High School. Exhibits R-15, R-18. At the March 24, 2015 due process hearing, Student testified that he was not willing to go to City High School because it is a big school and he does not like so many people. He did not mention safety concerns about City High School, but testified that he did not like School C, which he attended during the 2012-2013 school year, because he "got jumped" there. Testimony of Student.

15. On January 8, 2015, DCPS issued Prior Written Notice (PWN) to Student stating that DCPS would finalize the IEP drafted at the December 12, 2014 IEP meeting. This PWN did not explain why DCPS refused Student's request to change his placement to full-time special education at Nonpublic School. Exhibit P-11.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Analysis

#### A.

– Did DCPS deny Student a FAPE by not offering him a full-time IEP at the December 12, 2014 IEP meeting?

– Did DCPS deny Student a FAPE by offering him an unsuitable placement in January 2015 at City High School?

– Did DCPS deny Student a FAPE by failing to offer him a meaningful opportunity to participate in the December 12, 2014 IEP meeting, specifically to discuss hours of services and IEP placement?

Student is burdened with a sad history of abuse and trauma, family abandonment, multiple group homes and past behavior problems. Since at least the 2011-2012 school year, except for a period in the fall of 2012 when he was detained at the D.C. Youth Services Center, Student has refused to attend public school in the District. In November 2013, due to the dedicated efforts of Social Worker, Student was admitted to Nonpublic School, where, ever since, he has attended school consistently and made educational progress. In Case No. 2014-0334 and in the present case, Student's representatives have sought to obtain DCPS funding for Student to remain at

the private special education school.

If there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). However, “[w]here a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley*, *supra*. See, also, *e.g.*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008).

On December 12, 2014, DCPS convened an IEP meeting for Student at City High School to review evaluations completed after the due process hearing in Case No. 2014-0334 and to develop an updated IEP. Petitioner contends that at the December 12, 2014 IEP meeting, DCPS defaulted on its obligations under the IDEA by not offering him a full-time special education program and an appropriate educational placement. DCPS maintains that Student does not require full-time special education and that its proposed placement of Student at City High School was appropriate.

An IEP is the vehicle used by an IEP team to assess a student’s needs and assign a commensurate learning environment. See, *e.g.*, *Gill v. District of Columbia*, 751 F.Supp.2d 104, 108 (D.D.C.2010). To determine whether a FAPE has been provided, a hearing officer must determine “[f]irst, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed

through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Rowley, supra*, 458 U.S. at 206-07.

At the December 12, 2014 IEP meeting, the parties remained at an impasse over Student's educational placement. Petitioner's representatives wanted DCPS to pay for Student to continue attending Nonpublic School's full-time special education program. The DCPS representatives maintained that Student could receive an appropriate education at City High School with extensive, special education services provided, in part, in the general education setting. Ultimately, DCPS' representatives on the IEP team finalized an IEP, which provided for close to full-time special education services in a combination setting of special education and regular education classes, to be implemented at City High School.

i. Procedural Violation Claim

Petitioner's Counsel claims that at the December 12, 2014 IEP meeting, DCPS violated the IDEA's procedural requirements by limiting Student's participation in the IEP team's decision making. The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent, or adult student, is present or is afforded the opportunity to participate. *See* 34 CFR § 300.322(a). Conduct by the District that seriously infringes upon an adult student's opportunity to participate in the IEP formulation process will result in a denial of a FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005).

Although Student, his education attorney, his social worker and representatives

from Nonpublic School were all present for the December 12, 2014 IEP meeting, Petitioner's Counsel argues that Student's opportunity to participate was unlawfully circumscribed because the school representatives would not consider increasing the hours of specialized instruction in Student's IEP. I find this argument to be disingenuous. LEA Rep testified that there was a discussion about the hours of services offered on the IEP and that Petitioner's Counsel noted her objection to DCPS' proposal. However, what Petitioner's representatives were seeking was for DCPS to place Student at Nonpublic School – not more intensive services at City High School. Student left no doubt that he would not attend City High School, regardless of the hours of specialized instruction in his IEP. As Social Worker testified, Student has been asked “over 30 times” whether he would go to City High School and he has made it clear he will not go there. (He similarly refused to attend School C.) Petitioner's Counsel stated that at the IEP meeting. Although DCPS was unyielding to counsel's request to place Student at Nonpublic School, I find that Student's right to participate in the IEP formulation process was respected. *Cf. T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 420 (2<sup>nd</sup> Cir. 2009) (“The parents' actions suggest that they seek a “veto” over school choice, rather than “input”—a power the IDEA clearly does not grant them.” *Id.*)

ii. IEP Substantive Claims

Having found no procedural violation, I turn to the substantive prong of the *Rowley* inquiry. Was the December 12, 2014 IEP reasonably calculated to enable Student to receive educational benefits? Petitioner contends that the proposed December 12, 2014 IEP was inappropriate because it did not offer him full-time specialized instruction services and because it provided an unsuitable placement at City High School. DCPS responds that with the academic and social emotional supports in

the December 12, 2014 IEP, Student would be able to access the general education curriculum in a public school, but Student has to be willing to give City High School a try.

The purpose of the 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 and prepare them for future education.” 20 U.S.C. § 1400(d)(1)(A). *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 384 (D.D.C.2012). The IDEA’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Rowley*, 458 U.S. at 203. . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, rather than “a potential-maximizing education.” *Id.* at 197 n. 21 . . .” *K.S. v. District of Columbia*, 962 F.Supp.2d 216, 220 (D.D.C.2013). “IDEA also 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 do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A).” *K.S., supra*. It is up to the IEP team to determine the least restrictive environment for each student. 34 CFR § 300.116(a). *See Rodriguez v. Independent School Dist. of Boise City, No. 1*, 2014 WL 1317697, 11 (D.Id. Mar. 28, 2014).

DCPS’ proposed December 12, 2014 IEP would have provided Student almost full-time, 23 hours per week, specialized instruction, including 13 hours outside of general education, as well as 240 minutes per month of behavioral support services and 120 minutes per month of OT. DCPS’ expert, School Psychologist, opined that with the

level of academic and social supports in the December 12, 2014 IEP, Student would be able to access the general education curriculum at City High School. Petitioner's expert, Clinical Psychologist, believes, however, that if Student were placed in an inclusion program at City High School, he would not attend. She opined that Student requires full-time special education services both in the classroom and for other school activities, because she does not think he would cooperate in a mainstream setting. I found both party's experts to be credible, although they were both handicapped by never having observed Student in a general education inclusion setting due to his refusal to attend a large DCPS high school. I found that Clinical Psychologist's opinion that Student needed full-time special education because he would not cooperate in an inclusion setting focused excessively on Student's school avoidance mindset, rather than on services and accommodations needed to support Student's school attendance in a less restrictive environment.

The IDEA's LRE mandate allows "removal of children with disabilities from the regular educational environment . . . only when 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." 20 U.S.C. § 1412(a)(5)(A). In the past, Student has succeeded in an educational environment that was not full-time special education. As Petitioner's Counsel noted at the September 4, 2014 MDT meeting, Student's school attendance and behavior were positive in fall 2012 when he was detained at Youth Services Center and he was given no choice but to attend school. Further, LEA Rep testified that City High School already serves students, like Student, who have histories of trauma and lower cognitive abilities. I conclude that Petitioner has not shown that the nature or severity of his disability is such that his education can only be achieved

satisfactorily in a full-time special education setting.

Petitioner further alleges that following the December 12, 2014 IEP meeting, DCPS denied him a FAPE by offering him a placement only at City High School. Under the IDEA, DCPS is obligated to match a student with a school capable of fulfilling the student's goals and requirements in light of his disabilities. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir.1991). In this case, it is not disputed that City High School is capable of implementing the proposed December 12, 2014 IEP. *See Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (Placement is appropriate if the school is capable of "substantially implementing" the IEP.) However, the inquiry does not end there. The IDEA further requires that the educational placement made by a Local Education Agency (LEA) be "reasonably calculated to enable the child to receive educational benefits," that is, "sufficient to confer some educational benefit upon the handicapped child." *See Dawkins by Dawkins v. District of Columbia*, 1989 WL 40280, 3 (D.C.Cir. Apr. 24, 1989), quoting *Rowley, supra*, 458 U.S. at 200, 207. *See, also, Andersen v. District of Columbia*, 1988 WL 33506, 3 (D.D.C.1988), *aff'd* 877 F.2d 1018. (A FAPE "is 'educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" *Id.* (quoting *Rowley*, 458 U.S. at 188-89)).

Until Student started attending Nonpublic School in November 2013, he received no educational benefit from his high school IEPs because he was not going to school. An IEP, which fails to address in some fashion a student's persistent absence and tardiness, can not be considered "adequate and appropriate." *See, e.g., Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18, 34 (D.Me.2005). If the student's

disability makes it necessary, his IEP team must examine whether adaptations in content, methodology, or delivery of instruction to address the student's unique needs are necessary to ensure the student's access to the general curriculum. *See Letter to Anonymous*, 51 IDELR 194 (OSEP May 6, 2008).

The present case exemplifies the tension between the IDEA's mandate that a local education agency (LEA) address persistent truancy affecting a student's educational progress and the responsibility of the adult student for his own educational decisions. The dilemma for DCPS in this case is that while its educators believe that City High School is Student's least restrictive environment and that his IEP could be implemented there, the agency also knows that Student has an aversion to attending a large District public high school and past efforts by DCPS have not overcome that aversion. DCPS' Counsel argues, correctly, that Student should not be allowed to decide which school he is willing to attend and exercise a veto over any other school proposed by DCPS. *See, e.g., T.Y., supra*. However, the issue here is not whether Student may veto the choice of school location made by DCPS, but rather, in light of Student's personal history and disabilities, was the December 12, 2014 IEP specifically designed to meet his unique needs, supported by such services as are necessary to permit him to benefit from the instruction – including support to overcome Student's aversion to attending a regular public high school. *See Andersen, supra*.

Where a student's poor school attendance has a clear connection to his disability, this must be addressed in the IEP. *See, e.g., Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d at 34. *Compare S.J. ex rel. S.H.J. v. Issaquah School Dist. No. 411* 2007 WL 2703056, 7 (W.D.Wash. 2007) (Student's attendance problems not caused by his disability.) In the October 8, 2014 HOD, Hearing Officer Ruff reported that Student

earnestly stated that he feels unsafe in a large DCPS high school. In her November 2014 Comprehensive Psychological Evaluation, Clinical Psychologist wrote of Student's long history of neglect, physical abuse, parental abandonment and disrupted attachment/living situations. She attributed Student's extreme avoidance of school and adult authority and his fear of normative peer interactions to this traumatic history. DCPS did not conduct its own psychological evaluation of Student, but in the December 12, 2014 IEP, Student's IEP team reported that Student will need assistance in the area of social/emotional development to address his attendance concerns. I find that the hearing evidence establishes that Student's aversion to attending a regular DCPS high school does have a clear connection to his disability and must be appropriately addressed in his IEP.

The evidence also establishes that with the right interventions and services, Student can overcome his school aversion. He has been regularly attending school since he was admitted to Nonpublic School in November 2013. I find that it was DCPS duty to ensure that in the December 12, 2014 IEP, the IEP team addressed Student's aversion to the regular high school environment and included services and supports in the proposed IEP reasonably calculated to address those concerns.

The proposed December 12, 2014 IEP does contain an annual goal for Student to improve his school attendance and provides in-school counseling services for Student to utilize "to identify barriers to consistent school attendance." However, the IEP lacks a plan or services calculated to overcome Student's aversion to attending a public high school and to reintegrate him into the regular school environment. Rather, DCPS' position seems to be that if Student would only attend City High School, a FAPE awaits him there. *See, e.g.*, testimony of Special Education Teacher (The doors of City High

School are open. The best I can offer Student is “give us a try.”)

In *Presely v. Friendship Public Charter School*, 2013 WL 589181 (D.D.C. 2013), the Court credited the respondent charter school’s IEP provisions and other interventions to address the student’s school attendance:

Administrative record supports a finding that K.P.’s IEP was reasonably calculated to provide educational benefits by addressing her problems with attendance. Defendant implemented various measures, including daily check-ins with K.P.; a call from the school psychologist to Mother to confirm K.P.’s arrival at school; mentorship by the vice principal; Saturday school for tutoring; co-teachers in her core classes; classroom accommodations such as preferential seating and small group testing; verbal praise or recognition from teachers; classroom breaks as needed; Chipotle lunch rewards; and no morning detention for late arrival. Additional interventions were also subsequently implemented, including class escorts; progress reports; after school tutoring; selective class placement; hand-to-hand transportation; and morning wake-up calls.

*Id.* at 8. In contrast to the steps taken by the LEA in *Presely*, DCPS’ proposed December 12, 2014 IEP lacked appropriate measures that were reasonably calculated to address Student’s school avoidance issues. I conclude that the lack of a credible plan, services and accommodations, reasonably calculated to get this student through City High School’s front door and to reintegrate him into the regular school setting, made the IEP inadequate to permit Student to benefit from the specialized instruction and other services offered in the IEP. I find that Student has been denied a FAPE as a result.

B.

– Did DCPS deny Student his rights under the IDEA when it issued a Prior Written Notice in January 2015 that did not explain the District’s decision to deny Student’s request to be placed at Nonpublic School?

Petitioner contends that DCPS’ January 8, 2015 Prior Written Notice (PWN) does not adequately explain the agency’s reason for refusing to change Student’s placement to Nonpublic School. DCPS maintains that Student was informed of DCPS’ position and

that the PWN was adequate. The IDEA requires that an LEA must give prior written notice before the LEA proposes to, or refuses to, *inter alia*, initiate or change the identification, evaluation, or educational placement of child with a disability or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). The PWN must include, *inter alia*, an explanation of why the agency proposes to or refuses to take the action. *See* 34 CFR § 300.503(b)(2). At the December 12, 2014 IEP meeting, DCPS refused Student's request to change his placement to Nonpublic School. The January 8, 2015 PWN does not explain the reason for the refusal. I find that DCPS' failure to provide the required explanation in the PWN was a procedural violation of the IDEA. *See Honig v. Doe*, 484 U.S. 305, 312, 108 S.Ct. 592, 598 (1988) (Safeguards include prior written notice whenever the responsible educational agency refuses to change the child's placement or program.)

Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents (or an adult student) of their participation rights are actionable. *See, e.g., Lesesne, supra*, 447 F.3d at 834. The purpose of the prior written notice requirement "is to ensure that parents are aware of the decision so that they may pursue procedural remedies." *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7<sup>th</sup> Cir.2011). In this case, Student has been represented at all times by able counsel, who accompanied him to the December 12, 2014 IEP meeting, communicated on his behalf with DCPS and, seasonably, filed the present due process complaint. DCPS' failure in the January 8, 2015 PWN to provide an explanation for its refusal to place Student at Nonpublic School did not impair Student's ability to participate in the process or result in harm to him. I find that, on these facts, DCPS' issuance of the deficient PWN is not actionable.

## Remedy

In this decision, I have found that DCPS' December 12, 2014 IEP was inappropriate due to its lack of a plan, services or accommodations reasonably calculated to reintegrate Student into the public school setting and that Student was denied a FAPE as a result. For his remedy in this case, Student requests that DCPS be ordered to fund his continued placement at Nonpublic School for the remainder of the 2014-2015 school year. (Student does not seek reimbursement for his attendance, to-date, at Nonpublic School, for which he was not required to pay tuition.)

An award of private school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 11 (D.C.Cir.2005) (citations omitted). Placement awards, must be tailored to meet the child's specific needs. *Id.* at 11-12. To inform this individualized assessment, courts have identified a set of considerations “relevant” to determining whether a particular placement is appropriate for a particular student, including 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 private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

### a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student's primary IDEA disability classification is SLD. He has also been diagnosed with an Intellectual Disability and an Unspecified Trauma and Stressor-Related Disorder. DCPS' School Psychologist agrees that Student has borderline cognitive functioning and deficits in receptive and

expressive language. Although Student is nominally in GRADE in high school, his scores on academic achievement measures generally range from third to fourth grade level, with reading comprehension at the second grade level.

**b. Student's Specialized Educational Needs**

According to DCPS School Psychologist, Student requires close to full-time specialized instruction, the majority of which must be provided outside the general education setting. (In this decision, I have found that Student has not established that he requires full-time special education outside of general education.)

**c. Link between Student's Needs and the Services Offered by Nonpublic School**

Nonpublic School is a very small, alternative, full-time special education day program. It provides flexible programming for older students with disabilities, who have not been successful in a regular school setting, including students with SLD. Student has been attending Nonpublic School since November 2013 and has benefitted educationally from the program.

**d. Cost of Placement at Nonpublic School**

The cost of tuition at Nonpublic School is approximately \$40,000 per year. Nonpublic School has a current Certificate of Approval from OSSE. DCPS offered no evidence that the cost of placement at Nonpublic School is higher than at other local private schools serving students with disabilities.

**e. Least Restrictive Environment**

At Nonpublic School, Student is segregated from his non-disabled peers and in classrooms with only three students. In this decision, I have found that Petitioner did not establish that his least restrictive environment is a special school, where he has no

contact with nondisabled peers.

Considering all of the above factors, and that although Petitioner has not established that Nonpublic School is his least restrictive environment, the private school is otherwise capable of fulfilling his IEP needs, I conclude that Student's placement at Nonpublic School for the remainder of the 2014-2015 school year is appropriate. Further, I find that to change Student's school at this stage of the current school year would be inappropriate. *Cf. Holmes v. District of Columbia*, 1988 WL 21696, 1 (D.D.C.Feb. 26, 1988) (In light of student's complete adjustment to the environment of current school, to send him to different school to complete the last semester of his schooling would not only be inappropriate, but would also be insensitive and indefensible.) Consequently, I will order DCPS to fund Student's enrollment at Nonpublic School for the remainder of the current school year. I will also order DCPS to convene an IEP team to revise Student's IEP, as appropriate, for the 2015-2016 school year at which time DCPS will not be barred from proposing a less restrictive educational setting.

#### ORDER

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

#### ORDERED:

1. DCPS shall fund Student's enrollment at Nonpublic School, including covered charges for behavioral support and OT related services, from the date of this order through the end of the 2014-2015 regular school year;
2. Prior to the end of the 2014-2015 regular school year, DCPS shall convene Student's IEP team to review and revise his IEP in conformity with 34 CFR § 300.320, *et seq.* and with this decision. If DCPS determines that additional assessments of Student are needed, it shall arrange to conduct those assessments in time for the data to be considered by the IEP team. In the event that the IEP team determines that Student's appropriate placement is in a DCPS high school, the revised IEP shall include, *inter*

*alia*, services and accommodations reasonably calculated to assist Student to address his school aversion and to reintegrate him into the public school setting; and

3. All other relief requested by the Petitioner herein is denied.

Date: April 7, 2014

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).