

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
January 31, 2014

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PETITIONERS,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: January 31, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Student Hearing Office,  
Washington, D.C.

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 Petitioners (the Petitioners or PARENTS), 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 their Due Process Complaint, Petitioners allege that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools' (DCPS) June 17, 2013 Individualized Education Program (IEP). They seek reimbursement and ongoing funding for Student's tuition at NONPUBLIC SCHOOL.

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

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on November 12, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 13, 2013. The parties met for a resolution session on November 26, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on December 13, 2013. On January 2, 2014, I granted the Petitioners' unopposed motion for a 10-day continuance making my Hearing Officer Determination due by February 5, 2014. On December 13, 2013, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 16 and 23, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person<sup>2</sup>, and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented SPECIAL EDUCATION COORDINATOR and DCPS COUNSEL.

Petitioners called as witnesses, CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, MOTHER, and MAP PROGRAM COORDINATOR. DCPS called as witnesses, MATH RESOURCES TEACHER, TECHNOLOGY TEACHER, SCHOOL SOCIAL WORKER, PRINCIPAL and Special Education Coordinator. Petitioners' Exhibits P-1 through P-25 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-21 were admitted without objection, with the exceptions of R-9 and R-10 which were not offered. Counsel for the respective parties made opening and closing statements. At the request Petitioners' counsel, the parties were granted leave to file post-hearing written argument by

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<sup>2</sup> Father did not attend the second day of the hearing.

January 27, 2014. Only Petitioners' Counsel filed a post-hearing memorandum of law. On January 28, 2014, DCPS' Counsel filed an objection to Paragraph I of the Petitioners' Memorandum to which Petitioners' Counsel replied on January 29, 2014.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

- Whether DCPS' June 17, 2013 IEP is inappropriate for Student because it fails to include goals requested by Parents for executive functioning, fails to include necessary supplementary aides as detailed in the school system's Autism observation and does not provide a full-time outside of general education setting for the 2013-2014 school year, which meets the needs of this Student arising from his Autism Spectrum Disorder (Aspergers) disability; and
- Whether DCPS denied Student a FAPE by failing to offer him a suitable full-time, outside of general education, placement for the 2013-2014 school year.

The Petitioners are requesting reimbursement by DCPS and ongoing placement and funding for Student to attend the MAP Program at Nonpublic School for the 2013-2014 school year, with all related services and costs.

### **FINDINGS OF FACT**

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

1. Student is an AGE resident of the District of Columbia, where he resides with Parents and his siblings. Testimony of Mother.
2. Student attended PRIVATE SCHOOL 1 for kindergarten and PRIVATE SCHOOL 2 for grades 1 through 3. Exhibit P-2. By Student's last year at Private School 2, Parents became concerned because Student lacked friends and began to feel like an outsider.

Testimony of Mother.

3. For the 2012-2013 school year, Parents enrolled student in CITY ELEMENTARY SCHOOL, a DCPS elementary school. Parents decided to enroll Student in City Elementary School because it is their neighborhood school, their other children went to public school and Parents thought there would be wider opportunities for Student there.

Testimony of Mother.

4. Prior to his enrollment at City Elementary School, Student had never been evaluated for special education eligibility. Testimony of Mother.

5. Parents met with Principal at City Elementary School in the summer of 2012 before the beginning of the school year. They were concerned about Student's moving to a bigger school from Private School 2. Principal alerted School Social Worker that Student was transferring in and asked her to look out for him. Testimony of Principal.

6. On September 10, 2012, Mother sent an email to Principal, Student's teacher and other staff at City Elementary School. She related the Parents' concern about signs that Student was heading in the wrong direction. Mother sought support with creating a "bridge" with other children. She informed the school staff that Student was taking Ritalin and had a neuropsychological examination scheduled for the following month. School Social Worker responded that she was planning to meet with Student in a "lunch bunch" and would try to provide some low key support on the playground during recess. She stated she hoped to speak with Student's therapist for suggestions on how to support Student. Principal responded separately that they were continuing to monitor Student and that Student had been enrolled in a small group fitness/math class which would provide him another opportunity to interact in a small group setting. Exhibit R-7.

7. On November 5, 2012, Mother wrote the school staff to report that Student's neuropsychological evaluation was completed and to request a meeting to share Student's diagnosis and the educational implications. In that email, Mother reported that Student had been doing well under his CLASSROOM TEACHER's care at City Elementary School. Principal responded the same day and requested that Parents provide the school with a copy of the neuropsychology evaluation report. He also stated that Special Education Coordinator would contact Parents in a few days to set up a meeting. Exhibit R-8.

8. On January 16, 2013, Mother sent the school staff an email advising the Parents had just received the neuropsychological evaluation report on Student, which she shared with the school staff. Exhibit R-11.

9. The neuropsychological evaluation was conducted by NEUROPSYCHOLOGIST on October 5, 10, 16 and 19, 2012. He administered to Student an extensive battery of cognitive tests, achievement tests and obtained emotional/behavioral questionnaire responses from Parents, Classroom Teacher and Student. Neuropsychologist reported, *inter alia*, that with regard to verbal comprehension, Student demonstrated remarkable, superior range (96th percentile), verbal intellectual functioning; that Student had a good understanding of language, an impressive capacity to remember what people say to him (narrative memory), and a strong capacity to deliberately commit verbal information to memory (*i.e.*, memorization capacity); that Student demonstrated excellent basic reading skills, including his sight-word recognition, phonetic decoding, and reading fluency and that his reading comprehension was at the 97th percentile for age; that Student had excellent writing skills, including very impressive spelling and sentence level written expression skills; that Student's performance was also quite impressive on measures of nonverbal and quantitative reasoning, with an overall estimate of his capacities at

the 96th percentile; and that Student's math calculation and quantitative reasoning skills were similarly impressive.

Neuropsychologist reported that Student came across as a generally well-regulated child, except for when he is stressed, confused, or overwhelmed, but, at the same time, testing revealed areas of cognitive weakness primarily in the domains of Social/emotional development, Attention and executive functioning.

Neuropsychologist reported that the findings from his evaluation were consistent with a diagnosis of an autism spectrum disorder (ASD), specifically Asperger's Syndrome. He reported that Student presented with a number of important social strengths which will serve him very well. However, Student also demonstrated significant weaknesses that impair his social functioning.

Neuropsychologist reported that in reference to attention and executive functioning, Student's test results were fully consistent with a diagnosis of Attention Deficit Hyperactivity Disorder, predominantly Combined Type. The test results also indicated significant weaknesses in executive functioning in the areas of organization, flexibility, working memory, and self monitoring.

Neuropsychologist diagnosed Student with Asperger Syndrome, Attention-Deficit Hyperactivity Disorder - Combined Type, and Executive dysfunction affecting organization, working memory, flexibility, and self-monitoring.

Exhibit P-2.

10. With regard to school placement, Neuropsychologist's report recommended, *inter alia*:

Regarding school placement, Student has a profile of remarkable intellectual strengths as well as weaknesses in social cognition, attention and executive functioning.

In addition to providing an educational curriculum that is appropriate for his exceptional verbal and nonverbal abilities, Student also requires a learning environment that appropriately addresses his neuropsychological weaknesses. Without addressing his weaknesses, he is vulnerable to increased frustration, escalating stress, and self-doubt. I am encouraged that Student has done so remarkably well academically. However, there are clear signs that he is increasingly stressed and anxious at school. Ideally, I would like to see improving social cognition be an explicit part of Student's educational curriculum. However, in the absence of such expertise at his school, I encourage Clinical Psychologist, Student's therapist who has excellent insight into his social emotional needs and social cognitive weaknesses, to work closely with the school to support his development and his deficits in this regard. Specific elements of an appropriate educational setting for Student are provided below:

- a. An appropriate educational setting for Student will provide classroom instruction that is highly stimulating and intellectually rigorous.
- b. Highly structured classroom environment with teachers who are consistent in their approach to classroom instruction. Ideally, the classroom should be staffed by teachers who are experienced and are able to accommodate the needs of children who have trouble with social cognition and are easily stressed (*e.g.*, anticipate that Student will misread social cues, will feel unsafe when placed in unfamiliar or ambiguous situations, and will be predisposed to misread the intentions of others [as a result of the combination of his social deficits and increasing level of social anxiety]).
- c. Teachers who are highly structured and consistent in their approach to classroom instruction, but who are also interpersonally flexible as necessary to accommodate Student. Moreover, Student's primary educators must be able to form a relationship with him so that he feels important, safe, understood, and socially included.
- d. A classroom setting that provides appropriate support for his inattention, impulsivity, and overactivity (fidgetiness), and his executive functioning weaknesses in the areas of flexibility, organization, and self-monitoring.
- e. A safe place to retreat when he is stressed and explicit permission to retreat if he feels stressed or overwhelmed.
- f. Additional social support around challenging peer interactions such as group projects, free play during recess, and field trips.

Neuropsychologist's report does not include a recommendation that Student be placed in a full-time special education program where he would be separated from his nondisabled peers.

Exhibit P-2.

11. Upon receipt of Neuropsychologist's report, Special Education Coordinator set up a Student Study Team (SST) meeting for January 29, 2013. At the meeting, Mother stated that she wanted an IEP, not a 504 Plan<sup>3</sup>, developed for Student. Special Education Coordinator set up a special education eligibility committee meeting for March 5, 2013. At that meeting Student was determined to be a child with a disability, eligible for special education and related services under the IDEA criteria for Autism Spectrum Disorder (ASD). Testimony of Special Education Coordinator, Exhibits P-4 and P-5.

12. Student's first IEP team meeting was set for March 26, 2013 to develop his initial IEP. That day, neither parent appeared for the IEP meeting due to a calendaring oversight by the Parents. Mother was out of state and not available. Father was reached by telephone and stated that the meeting should go forward with his participating by telephone. Testimony of Special Education Coordinator, Testimony of Mother. At the March 26, 2013 IEP meeting, the IEP team adopted an IEP, which included annual goals for Reading, Written Expression and Emotional, Social and Behavioral Development. The March 26, 2013 IEP provided Student one hour per week of Special Education Services in Reading in the General Education Setting and two hours per month of Behavioral Support Services. Exhibit P-6. Father did not offer any suggestions at the IEP meeting and he indicated he was very grateful for what the team had done. Testimony of Special Education Coordinator.

13. The following day, on March 27, 2013, Mother sent an email to Special Education Coordinator in which she apologized for missing the IEP meeting. The Special Education Coordinator responded that following the upcoming spring break, the IEP team could make changes to the IEP and add whatever Mother wanted. After spring break, neither Mother

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<sup>3</sup> A plan under Section 504 of the Rehabilitation Act of 1973. Often, a 504 Plan is used for a general education student who is not eligible for special education services.

nor Father requested any changes to the March 26, 2013 IEP. Testimony of Special Education Coordinator. Mother agreed to the March 26, 2013 IEP. Testimony of Mother.

14. On March 29, 2013, Mother went to see the MAP Program at Nonpublic School. Clinical Psychologist accompanied her. Testimony of Mother. Clinical Psychologist was familiar with the MAP Program because its director is a colleague. Testimony of Clinical Psychologist.

15. On April 9, 2013, Special Education Coordinator ran into Mother in the City Elementary School hallway. Mother approached him and stated how grateful the Parents were for all that City Elementary School had done, but that Student had been accepted for an expensive ASD program at Nonpublic School, and that the Parents intended to get lawyers involved because they wanted to obtain public funding for Student's enrollment in the private school. Testimony of Special Education Coordinator.

16. On April 22, 2013, Petitioners' Counsel wrote Principal to request an IEP team meeting to review Student's current educational program. Exhibit P-16. An IEP team meeting was scheduled for the end of May, 2013. In addition to the City Elementary School representatives, both Parents, two of their attorneys and Educational Advocate attended the May meeting. This was a contentious meeting. Father, for the first time, stated that Student had experienced a terrible year and had regressed. The meeting was continued to construct the final IEP. On June 3, 2013, Educational Advocate provided proposed IEP goals by email. Special Education Coordinator thought the goals were great. Testimony of Special Education Coordinator, Exhibit P-9.

17. By email of June 10, 2013, Petitioners' Counsel forwarded a letter dated June 7, 2013 from Clinical Psychologist. In that letter, Clinical Psychologist conveyed his opinion that

Student's program at City Elementary School relied primarily on pullout services which, in Clinical Psychologist's opinion, made Student self conscious, irritable and anxious, and reinforced his differences from his nondisabled peers. He recommended that Student would "benefit from a systemically oriented program that incorporate[d] a fully integrated social skills curriculum in a small class setting, with an emphasis on behavior management to facilitate [Student's] ability to self-monitor and self-regulate his mood, problem solving skills and social interactions." Exhibits P-11, P-10.

18. The IEP team reconvened on June 17, 2013. Both Parents, Educational Advocate, and the Parents' attorneys attended this meeting. The team incorporated Educational Advocate's proposed IEP goals into the IEP, except for a Goal Area for Executive Function because the City Elementary School team members did not believe that there should be a separate annual goal for Executive Function. Testimony of Special Education Coordinator, Exhibit P-12. There was discussion of Clinical Psychologist's June 7, 2013 report at the IEP meeting. Testimony of Educational Advocate, P-13. The June 17, 2013 IEP increased Student's Specialized Instruction services to five hours per week in the General Education setting and provided 240 minutes per month of Behavioral Support Services, one-half of which would be outside the General Education setting. Exhibit P-12.

19. On June 20, 2013, DCPS issued a Prior Written Notice, which stated, *inter alia*, that the IEP team rejected the proposal of Educational Consultant and the Parents' attorney to increase Student's IEP to 30 hours Specialized Instruction/Behavioral Support Services because that was not Student's Least Restrictive Environment. The Prior Written Notice explained that due to the nature of his disability, Student requires daily interaction with his non-disabled peers in order to apply the social skills he is continuing to acquire and that his removal from a general

education setting would negatively impact Student's social development and prevent him from practicing the social skills he is acquiring. Exhibit P-13.

20. Parents did not agree to the June 17, 2013 IEP. By letter of June 26, 2013, Petitioners' Counsel gave notice to Special Education Coordinator that the Parents disagreed with the level of services proposed in the IEP and they believed Student required full-time instruction in a self-contained setting, specifically designed to meet the unique needs of students with Asperger's Syndrome. Petitioners' Counsel gave notice that Parents intended to place Student at Nonpublic School for the 2013-2014 school year and to seek public funding for the placement. Exhibit P-15. Special Education Coordinator responded, by a letter dated July 22, 2013, that DCPS did not agree to bear the cost of a private location of services for Student because Student's neighborhood school could meet his special education needs and provide him educational benefit. Exhibit P-16.

21. For the four academic terms of the 2012-2013 school year, Student received grades of 4 (Exceeds the Standard/Advanced) or 3 (Meets the Standard/Proficient) in all of his courses. His Teachers' Comments were extremely positive:

First Advisory

Classroom Teacher: [Student] is new to [City Elementary School] this year and is settling in well. He is a stellar student; very accomplished. He is working on his writing and organizational skills. I look forward to seeing [Student's] continuing progress in the next several weeks.

Math: Student has quickly taken his place as a leader in math class. He is routinely on-task, focused, and eager to share his knowledge and understanding. I am impressed by his depth of knowledge and ability to conceptualize and make strong connections. I look forward to working with Student and exploring new challenges.

Second Advisory

Mathematics: [Student] is an outstanding math student with great promise and potential. He is proving himself to be an integral part of the class. Keep up the excellent

work!

Classroom Teacher: [Student] is advanced in math, advanced in reading and advanced in orally translating his thinking on complex subjects. [Student] is working on his organizational skills and social skills. He has friends in the classroom who are looking out for him. Let's continue to foster Student's comfort in our classroom community!

### Third Advisory

Math: [Student] is an outstanding mathematics student and an inspirational young man. He demonstrates superior accuracy, understanding and consistency in class. His insightful contributions and unassuming spirit are a vital part of the learning experience.

Classroom Teacher: In the general classroom [Student] has had a very smooth advisory. He continues to contribute during class discussions, seems to enjoy robotics and is working on his writing. Keep up the good work [Student]!

### Fourth Advisory

Mathematics: It has been both a pleasure and an honor to have worked with [Student] this year. He is a superlative math student with an outstanding depth of knowledge. I am confident that he will do well next year and beyond. Enjoy the summer!

Classroom Teacher: I was thrilled to have Student with me this year. His intellectual brilliance is such a joy, and I think he made a lot of social progress. Wishing you a fabulous summer break.

### Exhibit R-5.

22. Student took the DC CAS academic proficiency exam on April 22, 2013 for Composition, Reading and Mathematics. He scored at the highest level, Advanced, in all three content areas. Exhibit R-6.

23. School Social Worker initiated a social skills development group called the "lunch bunch" for the 2012-2013 school year. The group included both children who were considered "socially challenged" and their peers who were considered "high functioning." Student was a member of the group all year. When he started, he was quite reserved on "on the quiet side." As the year progressed, School Social Worker observed social progress. Student

appeared to make a connection with the group and would stay and play games with the other group members. He came to enjoy the game playing and had positive social interactions with the other students. At the June 17, 2013 IEP meeting, School Social Worker shared with the IEP team her sense that Student was progressing in terms of social-emotional skills. Testimony of School Social Worker.

24. At City Elementary School, Student was placed in an advanced math class. He was an outstanding math student. At the beginning of the school year Student did not have a lot of friends and he was partnered with another child in class. As the year wore on, other children requested to work with Student and he would work with them. Student's high abilities in math fed into improving relationships with his peers. Student enjoyed the collegial relationships with other high achieving students. Math Resource Teacher observed that in his general education classroom Student was "not the same child." He was never disruptive, but was always reserved. Testimony of Math Resource Teacher.

25. Technology Teacher taught Student in three different class situations. In her ER2 Robotics class, Student was a member of a three-student team. He was totally focused with his team, was very cooperative and volunteered to help problem-solve with other teams. In the "Stock Market" class, Student was a wonderful participant. He was focused, volunteered to help other students and gave wonderful presentations. Technology Teacher also taught math and keyboarding to Student in the computer lab, where Student was very cooperative, productive and collaborative. Student showed motivation in all three of Technology Teacher's classes. Testimony of Technology Teacher.

26. Special Education Coordinator observed Student in the classroom several times in spring 2013. He observed that Student's behavior in class was unremarkable. Special Education

Coordinator did note that Student was more engaged in Math Resource Teacher's class than in the general education classroom. Testimony of Special Education Coordinator.

27. Student was involved in a single "physical" incident at school during the 2012-2013 school year. On February 1, 2013, Student got into an altercation with another Student. This was a Friday. Both students were sent home for the day and Student returned to school the following Monday. Testimony of Principal, Exhibits R-12, R-13.

28. At home, Student had a bad year during the 2012-2013 school year. When Parents met with Neuropsychologist in October 2012, they related that Student was obsessed with a couple of Wii video games. Parents reported that since the start of the school year, Student essentially "shut down" from 3:30-6:30 p.m., during which time he played video games for an allowed 30 minutes and then would draw repetitively. They reported that Student had long-standing circumscribed interests and a history of repetitive play that included ordering objects, patterning after video games, and repetitively making lists. Exhibit P-2. In the 2012-2013 school year, Student needed much more "down time" than in the past and he got into fights with his siblings. Student would not tell Mother what was happening at school and began forgetting objects, such as his backpack, lunch box and coat. He engaged in excessive list writing both at school and at home. Making lists at school was new for Student. Mother felt Student was "shutting down." Testimony of Mother.

29. The Nonpublic School Model Asperger Program (MAP), located in suburban Maryland, serves exclusively children with Autism Spectrum Disorders. Its students are all on or above grade level for academics, but have deficits in the area of social cognition. MAP provides a highly structured, small group classroom setting and scaffolding instruction techniques. MAP incorporates a behavior management system in every class as part of its

comprehensive program. Testimony of MAP Coordinator. When Educational Advocate did an observation at MAP in October 2013, Student was in a classroom of eight student with roughly four adults. Testimony of Educational Advocate.

30. Nonpublic School has a current, full, Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE) for serving children with ASD and other disabilities. The school tuition is approximately \$47,000 per year. Testimony of MAP Coordinator.

31. At the MAP Program at Nonpublic School, Student is making significant progress. He is open to showing his teacher his math work. In reading, he has progressed to independently demonstrating an understanding of the perspective of characters and increasingly is showing an ability to think at a higher level. He is also showing strengthened executive functioning. Testimony of MAP Coordinator.

32. At the MAP Program, Student continues to have difficult moments with social interactions, sometimes involving physical contact with other children. Student is improving in this area. Testimony of MAP Coordinator, Exhibit P-21.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument and legal memoranda 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 Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *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

The issues for decision in this case are:

1. Is DCPS' June 17, 2013 IEP inappropriate for Student because it fails to include goals requested by Parents in executive functioning, fails to include necessary supplementary aides as detailed in the school system's Autism observation and does not provide a full-time outside of general education setting for the 2013-2014 school year, which meets the needs of this Student arising from his Autism Spectrum Disorder (Aspergers) disability?
2. Did DCPS deny Student a FAPE by failing to offer a suitable full-time, outside of general education, placement for the 2013-2014 school year?

### Reimbursement for Private School under the IDEA

In this case, the Petitioners are seeking reimbursement from DCPS to pay for sending Student to the MAP program at Nonpublic School. Under the IDEA, if necessary to provide a FAPE, “[i]f no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school.” *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005) (citation and alterations omitted). In his recent decision in *K.E. v. District of Columbia*, 2014 WL 242986 (D.D.C. Jan. 23, 2014), U.S. District Judge Walton explained the circumstances under which parents must be reimbursed for private school tuition:

Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (citation omitted). Parents in such situations may be reimbursed only if “the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate,” 34 C.F.R. § 300.148(c) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).

*K.E.*, 2014 WL 242986 at 5. “[I] there is an appropriate public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991). The Petitioners’ burden in this case in this case is, therefore, two-fold. They must show that DCPS did not make a FAPE available to Student and, if that is established, that their unilateral placement of Student at Nonpublic School was proper under the IDEA.

The Parents contend that DCPS has not made FAPE available to Student because DCPS’ June 17, 2013 IEP does not meet Student’s alleged requirement for a full-time, outside of general education placement. DCPS responds that the IEP is appropriate for Student because it was reasonably calculated to enable Student to receive educational benefits. *See Board of Education v. Rowley*, 458 U.S. 176, 202, 102 S.Ct. 3034. Since, in this case, the Parents are entitled to reimbursement for Student’s education at Nonpublic School only if the June 17, 2013 IEP did not offer Student a FAPE, I begin my analysis by considering the IEP. Whether this IEP provides a FAPE rests on (i) whether DCPS has complied with the procedural requirements of the IDEA, and (ii) whether the IEP developed through these procedures was “reasonably calculated to enable the child to receive educational benefits.” *See Spiegler v. District of Columbia*, 866 F.2d 461, 464-465 (D.C. Cir.1989), quoting *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3050-51. Because Petitioners have not alleged in their complaint that DCPS failed to comply with the IDEA’s procedural requirements<sup>4</sup>, I proceed directly to the second prong of the

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<sup>4</sup> In Petitioners’ post-hearing memorandum, counsel argued that the June 17, 2013 IEP team violated the IDEA’s procedural requirements by “literally disregard[ing] in its entirety” a June 7, 2013 letter from Clinical Psychologist. This alleged procedural violation was not identified as an issue in the Prehearing Order and DCPS filed a response objecting to my considering this claim. In any event, the Petitioners’ witness, Educational Advocate, who attended the June 17, 2013 IEP, testified that there was, in fact, a discussion of Clinical Psychologist’s letter and recommendations at the IEP meeting. This was supported by the June

inquiry – whether the June 17, 2013 IEP was reasonably calculated for Student to receive educational benefit.

In *K.S. v. District of Columbia*, 2013 WL 4506969 (D.D.C. Aug. 26, 2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. 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). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “ ‘cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.’ ”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report<sup>5</sup> at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C.2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’ ”) (quoting *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir.2003)); *Hunter v. Dist. of Columbia*, No. 07–695, 2008 WL 4307492, at \*9 (D.D.C. Sept. 17, 2008) (citing cases with same holding). . . .

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20, 2013 prior written notice, Exhibit P-13 (“Current independent reports provided by the parents were also referenced.”) I find counsel’s assertion that the IEP team disregarded Clinical Psychologist’s recommendations to be unfounded. I overrule DCPS’ objection as moot.

<sup>5</sup> U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (IDEA does not provide for an "education . . . designed according to the parent's desires") (citation omitted). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994, at \*32 (D.Hawai'i Oct. 31, 2011) (while "sympathetic" to parents' frustration that child had not progressed in public school "as much as they wanted her to," court noted that "the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available"); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060, at \*10 (D.Hawai'i Dec. 27, 2011) ("[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.").

K.S., 2013 WL 4506969 at 3-5.

Student has only a brief history with DCPS special education services. Prior to the 2012-2013 school year, he attended private schools. He entered City Elementary School as a GRADE student at the beginning of the 2012-2013 school year. Student was determined eligible for special education and related services on March 5, 2013 and received his initial IEP on March 26, 2013. The March 26, 2013 IEP, with which Mother agreed, provided that Student would receive one hour per week of Special Education Services for Reading in the General Education setting and two hours per month of Behavioral Support Services outside General Education. On April 9, 2013, Mother told Special Education Coordinator that the Parents had decided to enroll Student in the MAP Program at Nonpublic School and that they would seek public funding for his tuition. On April 16, 2013, Petitioners' Counsel requested an IEP team meeting to review Student's program. IEP meetings were held at the end of May and June 17, 2013.

The resulting June 17, 2013 IEP contained Annual Goals for Reading, Written Expression and Emotional, Social and Behavioral Development. The IEP increased Student's Specialized Instruction from one to five hours per week in the General Education setting and increased his Behavioral Support Services to 240 minutes per month, divided equally between

General Education and Outside General Education. In addition, the revised IEP provides that accommodations and strategies necessary to help Student access the general education curriculum include checklists, daily teacher check-ins, an adapted agenda book with checklists and faded prompting, a folder organization system to organize worksheets and papers completed during class and for papers to take home, use of graphic organizers, and teacher and peer modeling of writing tasks.

The June 17, 2013 IEP was not implemented because Parents proceeded with their intention to enroll Student in the MAP Program at Nonpublic School. Therefore, I shall consider Student's academic progress at City Elementary School, both under his initial March 26, 2013 IEP and before he had an IEP, in determining the appropriateness of the proposed June 17, 2013 IEP. *See K.S., supra.* (Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP.) The evidence provided by DCPS of Student's academic progress over the 2012-2013 school year was compelling. Math Resource Teacher testified that Student was an outstanding student in her advanced math class. At the beginning of the school year, he did not have a lot of friends. By the end of the year, he would work with other students and they requested to work with him. Student enjoyed the collegial relationships with other high achieving students. But Math Resource Teacher observed that in his general education classroom Student was "not the same child." He was never disruptive, but was always reserved. Technology Teacher taught Student in three different class situations. In her ER2 Robotics class and stock market project, Student was focused, helped other students and was very cooperative. She also taught math and keyboarding to Student in the computer lab, where Student was very cooperative, productive and collaborative. Technology Teacher testified that Student showed motivation in all three of her classes. School Social Worker testified that she definitely saw improvement in Student's social understanding over the 2012-2013 school year.

At the beginning of the school year, Student would misread social cues and shut down. As the year progressed, Student made connections with the other students in her group and developed positive interactions with his peers. Special Education Coordinator observed Student in the classroom several times in spring 2013. He testified that Student's behavior in class was unremarkable. Special Education Coordinator did observe that Student was more engaged in Math Resource Teacher's class than in the general education classroom.

Student's grades for the 2012-2013 school year and his DC CAS scores support his teachers' testimony. In all four advisory periods, Student received grades of 4 (Exceeds the Standard/Advanced) or 3 (Meets the Standard/Proficient) in all of his courses. His teachers' notations on the report cards provided qualitative backing for the quantitative data, with comments such as, Student has quickly taken his place as a leader in math class; [Student] is advanced in math, advanced in reading and advanced in orally translating his thinking on complex subjects. [Student] is working on his organizational skills and social skills. He has friends in the classroom who are looking out for him; [Student] has had a very smooth advisory. He continues to contribute during class discussions, seems to enjoy robotics and is working on his writing; It has been both a pleasure and an honor to have worked with [Student] this year. He is a superlative math student with an outstanding depth of knowledge; I [Classroom Teacher] was thrilled to have Student with me this year. His intellectual brilliance is such a joy, and I think he made a lot of social progress. Further, Student took the DC CAS academic proficiency exam on April 22, 2013 for Composition, Reading and Mathematics. He scored at the highest level, Advanced, in all three content areas.

In contrast to his experience at City Elementary School, Student, by his Mother's account, had a bad year at home and Mother felt he was "shutting down." Clinical Psychologist, who had worked with Student and his family since November 2010, observed that after January

2013, Student showed increased signs of stress, anxiety and poor social judgment. In his June 7, 2013 letter to City Elementary School, written at the Parents' behest, Clinical Psychologist criticized Student's present program as "rel[ying] primarily on pullout services to address his needs." He noted that "[w]e have observed an increasing tendency for pullouts to make Student self conscious, irritable and anxious. The pullout experiences reinforce his differences from his peers, which has served to increase his sense of isolation and lower his self-esteem. In a word, [Student] is regressing in his academic areas of need and his socialization." He opined that Student is not able to generalize gains (*i.e.*, incorporate new patterns of behavior and sustain behavioral goals) due to the insufficient direct instruction, prompting and scaffolding available in his current setting."

Educational Advocate opined that the four hours per month of behavioral support services in the June 17, 2013 IEP would not suffice to enable Student to generalize his learned behavioral skills and that, to make meaningful progress, Student needed full-time special education services in an environment where behavioral support components would be reinforced throughout the school day. She testified that the only such program she was aware of was the MAP Program at Nonpublic School. Petitioners' experts testified that the services and accommodations in the June 17, 2013 IEP are insufficient for Student.

I find the opinions of Parents' experts unpersuasive on the core issue in this case, that is, whether the June 17, 2013 IEP was reasonably calculated to enable Student to receive educational benefits. Clinical Psychologist did not observe Student at City Elementary School or speak with Student's teachers. In his June 7, 2013 letter, Clinical Psychologist's primary criticism of Student's IEP was that the program relied excessively on pullout services. However this expert was apparently unaware that, except for two hours per month of counseling, Student's IEPs did not provide any pullout services. Educational Advocate observed Student in May 2013

for 45 minutes in music class, but she did not observe him in his core academic classes.

The most problematical aspect of the testimony of Clinical Psychologist and Educational Advocate is that, instead of assessing Student's academic and social progress at City Elementary School over the 2012-2013 school year, both experts, focused on "generalizing" his gains beyond the academic setting. A number of courts that have considered this generalizing approach and found that it is not required by the IDEA. In *Gonzalez v. Puerto Rico Dept. of Educ.*, 254 F.3d 350 (1st Cir.2001), a family claimed that while their autistic son might have been making modest academic progress at school, placement in a private residential program was necessary because he was not generalizing skills learned at school and his tantrums at home made him a potential safety threat. The First Circuit held that IDEA was not designed "to remedy a poor home setting or to make up for some other deficit not covered by the Act." *Gonzalez*, 254 F.3d at 353 (internal citation omitted). In *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir.2001), the Eleventh Circuit rejected private placement for an autistic student, holding that "generalization across settings is not required to show an educational benefit," and that school districts must do no more than provide an IEP that enables the student to "mak[e] measurable and adequate gains in the classroom." 249 F.3d at 1293. In *Thompson R2-J School Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143 (10<sup>th</sup> Cir. 2008), the Tenth Circuit held that "generalization skills need not always be included in, and progress on such skills is not necessary to ensure, a compliant IEP." *Id.* at 1152; *See also* decisions cited in *Thompson*, 540 F.3d at 1150 n.7, for same holding. In the instant case, I find that Student did make academic and social-emotional progress in his 2012-2013 program at City Elementary School. Generalizing those gains beyond Student's academic setting was not a requirement for an appropriate IEP.

### Omission of Executive Functioning Goal in IEP

Besides the failure to provide Student full-time special education programming, Petitioners allege that two specific omissions in the June 17, 2013 IEP make the IEP inadequate, namely, omission of annual goals requested by Parents for executive functioning, and omission of “necessary supplementary aides as detailed in the school system’s Autism observation.” With regard to executive functioning goals, in a June 3, 2013 email, Educational Advocate sent Special Education Coordinator a list of six detailed “Goal Areas” which the Parents believed should be incorporated into Student’s revised IEP. These included three goal areas for Written Language, and additional goal areas for Executive Functioning, Area Organization and Behavioral/Social respectively. Educational Advocate testified that the IEP team incorporated all of her recommended goal areas in the annual goals section of the June 17, 2013 IEP, except for goals for Executive Functioning, which were addressed, instead, as an accommodation, in the Other Classroom Aids and Services section of the IEP. Explaining that decision, Special Education Coordinator testified that executive functioning deficits normally affect all aspects of school performance. However, for this Student, while there were academic areas of concern in Reading and Written Expression, Mathematics was not an area of concern. Hence, the IEP team decided to address Student’s executive function deficits with IEP accommodations rather than an annual goal encompassing all academic areas. I find that this decision did not violate the IDEA. Here, the information about Student’s executive functioning needs was contained in the IEP’s accommodations component and the IDEA regulations are clear that an IEP team need not include information under one component of a child’s IEP that is already contained under another component of IEP. *See* 34 CFR § 300.321(d)(2). Moreover, it is appropriate to defer to the expertise of DCPS’ special education personnel on the organization of the IEP’s content. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208

(4<sup>th</sup> Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators’ decisions as long as an IEP provided the child “the basic floor of opportunity that access to special education and related services provides.” (quoting, *Rowley, supra* 458 U.S. at 201)); *T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

#### Omission of Power Card Strategy

Petitioners also contend that the June 17, 2013 IEP is inadequate because it does not include “necessary supplementary aides as detailed in the school system’s Autism observation,” apparently referring to “The Power Card Strategy.” In a May 6, 2013 observation report, DCPS’ Autism Program Coordinator recommended that the school consider The Power Card Strategy to provide additional support to Student during the school day. *See* Exhibit P-7-2 (The power card strategy is a visually based strategy that incorporates the student’s special interest to teach social interactions.) However, there was no evidence at the due process hearing that Student requires the Power Card Strategy in order to benefit educationally. *See Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (FAPE requirement satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.) Moreover, parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *See W.H. v. Schuylkill Valley School Dist.*, 2013 WL 3153785, 6 (E.D.Pa. 2013). I conclude that Petitioners have not shown that the omissions of annual goals for executive functioning and of the Power Card Strategy in the June 17, 2013 IEP make the IEP inappropriate.

In sum, I find that the Petitioners have not shown that in June 2013, Student required a full-time, outside of general education, special education placement in order to receive a FAPE. While it may be that Student’s needs resulting from his Aspergers disability are being more

comprehensively served in the full-time MAP Program at Nonpublic School, the hearing evidence established that Student did make academic and social-emotional progress over the 2012-2013 school year at City Elementary School. DCPS' June 17, 2013 IEP would have increased and enhanced Student's Specialized Instruction, Behavioral Support Services and other accommodations. I find that, based upon the educational progress shown by Student at City Elementary School before the June 17, 2013 IEP was developed, the new IEP was reasonably calculated to enable Student to receive educational benefits. *See K.S., supra* (IDEA "does not require a school district to pay for a private school education simply because that opportunity would be ideal for the student. It requires only that a school board provide each student a FAPE, that is, a basic opportunity to receive an educational benefit. Because [the student] would have received that basic opportunity . . . , the Board is not required to reimburse the parents for the cost of what may have been an even better educational opportunity for [the student]." *Id.* at 5-6, quoting *A.E. ex rel. Mr. and Mrs. E. v. Westport Bd. of Educ.*, 463 F.Supp.2d 208, 221 (D.Conn.2006).

### Summary

In this case, Petitioners seek reimbursement for their enrollment expenses for Student in the MAP Program at Non-Public School. Parents who unilaterally place their child in a private school do so at their own risk and may be reimbursed only if they establish that the school system has not made FAPE available to the child prior to the enrollment and that the private placement is appropriate. I have found that Student was offered sufficient services and accommodations to benefit educationally in DCPS' June 17, 2013 IEP and that Petitioners have failed to establish that Student required a full-time, outside of general education, placement for the 2013-2014 school year. Student was, therefore, not denied a FAPE and Petitioners are not entitled to reimbursement from DCPS for Student's private-school placement at Nonpublic

School. The Parents' request for relief must be denied.

ORDER

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

- All relief requested by the Petitioners herein is denied.

Date: January 31, 2013

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).