

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

Date Issued: March 8, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Office of Dispute Resolution,  
Washington, D.C.

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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 FATHER), 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 his due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a Free Appropriate Public Education (FAPE) by failing to propose an appropriate Individualized Education Plan (IEP) or educational placement for her for the 2013-2014 and 2014-2015 school years.

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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. Petitioner's due process complaint, filed on November 13, 2014, named DCPS as respondent. The parties met for a resolution session on November 24, 2014 and did not reach an agreement. The 45-day period for issuance of this decision began on December 14, 2014. On December 2, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing date was originally scheduled for January 5-6, 2015. On December 14, 2014, the Chief Hearing Officer granted Petitioner's unopposed continuance request, due to the unavailability of a witness, which resulted in the extension of the due date for this decision to February 13, 2015. On January 10, 2015, the Chief Hearing Officer granted DCPS' unopposed continuance request, due to the unavailability of DCPS' counsel on the rescheduled hearing date, and the due date for this decision was further extended to March 13, 2015.

The due process hearing was held before this Impartial Hearing Officer on February 12 and 18, 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 SPECIAL EDUCATION COORDINATOR (SEC) and by DCPS' COUNSEL.

Petitioner testified and called as witnesses LICENSED PSYCHOLOGIST, EDUCATIONAL CONSULTANT, NONPUBLIC SCHOOL DIRECTOR, and TREATING PSYCHOLOGIST. DCPS called as witnesses SPECIAL EDUCATION TEACHER, SCHOOL PSYCHOLOGIST and SEC. Petitioner's Exhibits P-1 through P-38, with the exceptions of Exhibits P-25 and P-33, were admitted into evidence, including Exhibits

P-14, P-15, P-20 through P-23, P-26 and P-31, which were admitted over DCPS' objections. DCPS' objection to Exhibit P-33 was sustained. Exhibit P-25 was not offered. DCPS' Exhibits R-1 through R-8 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. At the completion of Petitioner's case-in-chief, counsel for DCPS made an oral motion for a directed finding against the Petitioner, which I denied. Counsel for both parties made closing arguments. At the request of Petitioner's Counsel, the parties were granted leave until February 26, 2015 to file post hearing argument. Petitioner's Counsel submitted a Table of Additional Authorities on February 26, 2015.

### **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 December 2, 2014

Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to propose an appropriate program for the 2013-2014 and 2014-2015 school years including by proposing an IEP that lacks appropriate goals, social skills support and training, and a sufficient amount of specialized instruction; and
- Whether DCPS denied Student a FAPE by failing to propose an appropriate placement for the 2013-2014 and 2014-2015 school years.

For relief, Petitioner requests that DCPS be ordered to reimburse the parent for Student's enrollment at Nonpublic School for the 2013-2014 and 2014-2015 school years with all related services and costs. The parent also requests prospective placement at Nonpublic School.

## **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. Since the 2011-2012 school year, Student has resided with Father in the District of Columbia. Testimony of Treating Psychologist. Student is eligible for special education and related services under the disability classification Multiple Disabilities (MD). Exhibit R-5.

2. Student has been a client of Treating Psychologist since she was four years old. Treating Psychologist diagnosed Student with Bipolar Disorder, Anxiety Disorder, high functioning autism and a learning disability (LD). As part of her autism disorder, Student has a severe social skills problem, difficulty interacting with other children and intense sensitivity to sound. Testimony of Treating Psychologist.

3. Student has been hospitalized two times in the past for mental health concerns. She was hospitalized at age 6 so that her psychiatric medications could be adjusted. In 2011, Student received hospital inpatient treatment for two weeks. This hospitalization was precipitated by increased rage, anger and noncompliance. Exhibit P-4.

4. In the fall of 2012, Student was referred by her parents to Licensed Psychologist for a comprehensive psychological evaluation to understand Student's then-current intellectual, emotional, academic and attentional functioning, and to inform and determine any educational and treatment considerations. Licensed Psychologist administered an extensive battery of cognitive, educational, and behavioral assessments and rating scales, conducted interviews of the Student and both parents

and consulted with Treating Psychologist. Licensed Psychologist issued a psychological evaluation report on November 30, 2012. Exhibit P-4, Testimony of Licensed Psychologist.

5. Licensed Psychologist diagnosed Student with Bipolar Disorder, Not Otherwise Specified; Pediatric Bipolar Disorder; Pervasive Developmental Disorder, Not Otherwise Specified; Generalized Anxiety Disorder (secondary to Bipolar Disorder); Attention-Deficit Hyperactivity Disorder, Combined Type (with significant executive functioning deficits; secondary to Bipolar Disorder); and Learning Disorder, Not Otherwise Specified (with deficits in oral reading, written expression, math problem solving, visual-motor integration, visual-scanning, executive functioning, and language).

Exhibit P-4. Under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM IV) criteria, Student's Pervasive Developmental Disorder diagnosis would be coded as High Functioning Autism Spectrum Disorder, which resulted in Student's missing cues, misunderstanding questions and reading matter, difficulty interpreting language and nonverbal communication, difficulty in changing focus, rigidity and inflexibility. Her executive functioning deficits affected her organization, planning, focus, critical thinking and interaction with peers. Student's ADHD disorder resulted in extreme inattention and an inability to sit still and focus on her teacher and learning. Testimony of Licensed Psychologist.

6. Student attended CITY ELEMENTARY SCHOOL for the 2011-2012 and 2012-2013 school years. Her City Elementary School March 30, 2012 IEP provided annual goals for Mathematics, Written Expression, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development. The IEP provided four hours and 40 minutes per week of Special

Education Services, including two hours outside the general education setting. As related services, the IEP provided 30 minutes per week of Speech-Language Pathology, 120 minutes per month of Behavioral Support Services and 30 minutes per week of Speech-Language Pathology. In addition, the IEP provided 30 minutes per month of Behavioral Support consultation services. Exhibit P-2.

7. An IEP annual review meeting for Student was convened at City Elementary School on March 21, 2013. Father and Petitioner's Counsel attended the meeting. The March 21, 2013 IEP team continued Student's Special Education and Related Services from her March 30, 2012 IEP and added 120 minutes per month of Occupational Therapy (OT) services to support her in the areas of sensory motor, fine motor dexterity and visual motor integration. Exhibit R-1. The March 21, 2013 IEP was amended on June 11, 2013 to add additional accommodations. Exhibit R-2. (Hereinafter in this decision, the term "March 21, 2013 IEP", refers to the March 21, 2013 IEP, as amended on June 11, 2013.)

8. By the end of the 2012-2013 school year, Student was reported to be "Progressing" on most of her IEP goals. Exhibit R-4. Father believed that Student had been successful at City Elementary School where she had received "good, nurturing support." Exhibit P-23. In the opinion of Petitioner's expert, Educational Consultant, from the social-emotional standpoint, Student had a "pretty good" year at City Elementary School, although the Educational Consultant would have liked to have seen that she "mastered" more of her IEP goals. Based on Student's progress at City Elementary School, Educational Consultant recommended that Student attend City Middle School for the 2013-2014 school year. Testimony of Educational Consultant.

9. The consensus recommendation to the parents was to give City Middle

School a try for Student. The parents had reservations, but after visiting the school, meeting with the principal and SEC and receiving Educational Consultant's recommendation, they decided to give City Middle School a try. Testimony of Father.

10. At City Middle School, Student continued to make progress toward her IEP goals. Special Education Teacher and the occupation therapist worked with Student on organization because she required moderate to high levels of assistance with organizing her notebook. Student improved over time. In math and language arts, Student was making progress. Writing was a little hard for her and she was given accommodations. There were times when Student was overwhelmed and needed breaks. She would remove herself from the classroom and was able to calm down. These overwhelmed episodes were more frequent in the beginning of the school year and became less frequent as the fall term progressed. Student expressed being overwhelmed less and less. Testimony of Special Education Teacher.

11. At the beginning of the school year, Student was nervous about going outside for gym class. As the year went on, she was okay. When recess was held indoors because of bad weather, Student did not like to be in the indoor gym because of the noise and too many children in the space. On those days, Student would go instead to Special Education Teacher's room or the library. Testimony of Special Education Teacher.

12. School Psychologist provided behavioral support services to Student at City Middle School. He was working with her on socialization and on her anxiety attending the new school. At the beginning of the school year, Student would go to see School Psychologist in his office every day during lunch period. As the school quarter progressed, School Psychologist did not see so much anxiety. Student appeared to be

more comfortable at school and eventually reached the point where she sought less and less help from School Psychologist. School Psychologist observed that Student was establishing relationships with adults and some peers in the school. Testimony of School Psychologist.

13. SEC met Student when she visited the school with her parents prior to enrolling. SEC oversaw implementation of Student's IEP and discussed Student's progress with her teachers and related services providers. She saw Student in and outside of her classroom. When Student started at City Middle School, she was a little nervous and anxious. As the term progressed, Student started to relax at school.

Testimony of SEC.

14. Student's grades at City Middle School for the first quarter were all A's, B's and C's. She received C's in math and science and a C- in art. Her grades declined for the second quarter. She received F's in science and band and a D in math. For the fall term, Student's grades were all A's, B's and C's except for an F in science. Exhibit P-17.

15. Student's IEP Progress Report - Annual Goals, for the period August 26, 2013 through November 1, 2013 at City Middle School, reported that for Mathematics, Student had mastered or was progressing in three of four goals. One goal had not yet been introduced. For Written Expression, Student was reported to be progressing in three of four goals. One goal had not yet been introduced. For Communications/Speech and Language, Student was reported to be progressing in three of five goals. The other two goals were just introduced or not yet introduced. For Motor Skills/Physical Development, Student was reported to have mastered two goals and to be progressing in two goals. All five Emotional, Social and Behavioral Development annual goals were reported as not introduced or just introduced. Exhibit R-4. School Psychologist

explained that the Emotional, Social and Behavioral Development goals were not introduced because he was using the first quarter of the school year to establish a relationship with Student and to ease her transition to City Middle School. He was working on getting Student to feel comfortable enough to open up him and to build trust. Testimony of School Psychologist.

16. From Father's vantage point, City Middle School was not meeting Student's needs. He observed that it took all of Student's strength to get through the school day and she began to fall behind. He would pick Student up after school and she would "erupt." At home, Student could be angry, explosive, morose and withdrawn. She became distressed about her school work because it was difficult for her to keep up. Testimony of Father.

17. Treating Psychologist observed that in the fall of 2013, Student was at first excited about going to City Middle School, but her attitude changed. Her mood began to break down. Student refused to enter Treating Psychologist's office. This escalated to the point what it seemed Student might have to be hospitalized. Student told Treating Psychologist that it was too loud at City Middle School and she was being bullied. She begged Treating Psychologist to get her out of the school. Testimony of Treating Psychologist. At City Middle School, the staff did not see any major mood symptoms. Testimony of SEC.

18. An IEP team meeting for Student was scheduled at City Middle School for December 11, 2013. Prior to the meeting, Petitioner's Counsel wrote SEC that Student was overwhelmed in the large middle school classroom settings and not engaged in learning; that her parents were very concerned about her social emotional well-being; that Student did not have friends at school and she had been subjected to serious teasing

and bullying; and that all this was having a negative effect on Student's self-esteem and she did not want to attend school. Petitioner's Counsel wrote that it was "our belief that [Student] requires significantly more special education support that she is currently receiving and possibly a different program and placement to meet her special education needs." Exhibit P-14.

19. The IEP team meeting convened as scheduled on December 11, 2013. Father, Petitioner's Counsel, Treating Psychologist and Educational Advocate attended the meeting. Testimony of SEC. Educational Advocate shared the Father's concern that Student was not making meaningful progress and that the City Middle School program was not working for her. Student's teachers at the meeting reported Student's progress and they thought she was doing fine with the services she was receiving. Testimony of Educational Advocate. Treating Psychologist told the IEP team that Student needed a quieter environment with less people, social skills training and to be protected from bullying. SEC responded that she disagreed with the need for a change and that City Middle School was able to meet Student's needs. At the meeting, Treating Psychologist did not relate her concern that she was worried that Student was getting to the point where she might require hospitalization. Testimony of Treating Psychologist.

20. At the December 11, 2013 meeting, Father and his representatives made suggestions for the draft IEP tabled at the meeting, including additional goals and increased services hours. The school team agreed to revise the draft and another IEP meeting was scheduled for January 8, 2014. Testimony of SEC, Special Education Teacher.

21. By the time of the December 11, 2013 IEP team meeting, the parents and Educational Advocate were already "pretty convinced" that Student would be moved to

Nonpublic School. Testimony of Educational Advocate. On December 13, 2013, Petitioner's Counsel wrote SEC to serve notice that Student would be placed by her parents at Nonpublic School as of January 2, 2014 and that they intended to seek public funding for the private placement. Petitioner's Counsel wrote that the parents planned to attend the January 8, 2014 IEP meeting and to work with the IEP team in good faith to update the IEP. She wrote that should the team propose significantly more special education services, the parents would consider the proposal. Exhibit P-15.

22. The IEP team reconvened on January 8, 2014 IEP to review the revised IEP draft. Father, Petitioner's Counsel and Educational Consultant attended the meeting. Exhibit R-5, Testimony of Educational Consultant. The January 8, 2014 IEP provided annual goals for Mathematics, Written Expression, Speech and Language, Emotional Social and Behavioral Development and Motor Skill/Physical Development. For Special Education and Related Services, the proposed IEP would have provided six hours per week of special education services in the general education setting for Written Expression and Mathematics and four hours per week of Specialized Instruction outside general education. This would have been an increase over the March 21, 2013 IEP of over three hours per week of services in general education and of two hours per week outside general education. For related services, the January 8, 2014 IEP would have provided 240 minutes per month of Speech-Language Pathology, 180 minutes per month of Behavioral Support Services and 120 minutes per month of Occupational Therapy. This would have been an increase over the prior IEP of 60 minutes per month of Behavioral Support Services. The proposed IEP would have provided 30 minutes per month, each, of Behavioral Support and Occupational Therapy Consultation Services. Exhibit R-5.

23. At the January 8, 2014 IEP meeting, Father shared with DCPS that he did not think the revised IEP was appropriate. Testimony of Father. By letter of February 26, 2014, Petitioner's Counsel wrote SEC that "we do not believe that the proposed [January 8, 2014] IEP provides [Student] the intensity of special education support that she requires in order to make meaningful progress." Petitioner's Counsel repeated the parents' request for DCPS to place and fund Student at Nonpublic School for the 2013-2014 school year. Exhibit P-22.

24. By letter sent on or about August 11, 2014, Father wrote DCPS to give notice that Student would continue to attend Nonpublic School for the 2014-2015 school year, because he did not believe that an appropriate special education program had been identified or offered by DCPS for the school year. He requested that DCPS place and fund Student at Nonpublic School. Exhibit P-27. DCPS responded by letter of August 21, 2014 that DCPS had made FAPE available to Student with an appropriate IEP and placement in Student's least restrictive environment (LRE) and that DCPS would not agree to fund Student's placement at Nonpublic School. Exhibit P-28. By a separate letter of August 21, 2014, DCPS informed Father that the new [*sic*] location of special education services for Student for the 2014-2015 school year would be City Middle School and that City Middle School had the programming in place to meet Student's IEP needs. Exhibit P-29.

25. Since January 2, 2014, Student has been enrolled in Nonpublic School. Nonpublic School is a private school in suburban Maryland, serving students with special needs, from pre-Kindergarten through 12<sup>th</sup> Grade. Nonpublic School serves students with disabilities, including learning disorder, Attention Deficit-Hyperactivity Disorder (ADHD), Other Health Impairment (OHI), and moderate to high functioning

Autism Spectrum Disorder. Classroom size is 8-10 students, taught by a teacher certified in special education and a teaching assistant. Nonpublic School holds a current certificate of approval from the D.C. Office of the State Superintendent of Education (OSSE). The tuition cost at Nonpublic School is approximately \$29,000 per year, plus additional hourly charges for Occupational Therapy, Counseling and Speech-Language services. Students at Nonpublic School have no interaction with nondisabled peers. Testimony of Director.

26. After at first experiencing significant transition difficulties, Student has done well at Nonpublic School and she is currently flourishing there. Testimony of Director, Educational Consultant. Student is a happier child now. She is “definitely a different kid.” Testimony of Treating Psychologist.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and 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

– Did DCPS deny Student a FAPE by failing to propose an appropriate program for the 2013-2014 and 2014-2015 school years including by proposing an IEP that lacked appropriate goals, social skills support and training, and a sufficient amount of specialized instruction?

– Did DCPS deny Student a FAPE by failing to propose an appropriate placement for the 2013-2014 and 2014-2015 school years?

In this case, Petitioner contends that DCPS denied Student a FAPE by failing to offer her an appropriate IEP in January 2014 and seeks reimbursement from DCPS for Student's expenses to attend Nonpublic School since January 2, 2014.<sup>2</sup> In his decision in *K.E. v. District of Columbia*, 19 F.Supp.3d 140 (D.D.C.2014), U.S. District Judge Walton reviewed the circumstances under which parents may be reimbursed for private school expenses:

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]

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<sup>2</sup> Although the issues identified in this case appear to encompass the provision of FAPE to Student and the appropriateness of DCPS' IEPs for the entire 2013-2014 and 2014-2015 school years, Petitioner's claims are in fact more limited temporally. From the beginning of the 2013-2014 school year to the winter vacation, Student was provided special education and related services at City Middle School under an IEP adopted on March 21, 2013 as amended on June 11, 2013, when Student attended City Elementary School. Petitioner does not contend, and there was no evidence, that the March 21, 2013 IEP or Student's initial placement at City Middle School for the 2013-2014 school year was not appropriate. *See, e.g. S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008) (measure and adequacy of an IEP can only be determined as of the time it is offered to the student.)

and the parents made an appropriate placement”).

*K.E.*, 19 F.Supp.3d at 146-147.

Petitioner’s claim for tuition reimbursement in this case is based on the alleged failure of Student’s IEP team at City Middle School to make appropriate revisions to the March 21, 2013 IEP at IEP review meetings on December 11, 2013 and January 8, 2014. Petitioner contends that by not offering Student significantly more special education services in a self-contained setting, DCPS failed to make a FAPE available to her.<sup>3</sup>

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg restated, at length, the applicable legal standards to be used by a hearing officer to determine the appropriateness of an IEP and parents’ entitlement to reimbursement for unilateral private school enrollment:

1. Role of IEPs . . .

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.” *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). 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).

The role of courts is to inquire:

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<sup>3</sup> Following the December 11, 2013 IEP meeting, the parents withdrew Student from City Middle School and enrolled her in Nonpublic School. In oral argument, DCPS’ Counsel made much of the fact that the parents unilaterally enrolled Student at Nonpublic School between the December 11, 2013 and January 8, 2014 IEP meetings – before the January 8, 2014 IEP was completed. While the parents’ timing may be considered in determining the amount of any tuition reimbursement ultimately awarded, the IDEA does not require, as a condition to reimbursement, that parents wait for the IEP to be completed before withdrawing their child from public school. *Cf. K.E. v. District of Columbia*, 19 F.Supp.3d 140, 149, n.6 (D.D.C.2014) (court considered the unilateral withdrawal of a student prior to the IEP deadline as a factor to consider when deciding the ramifications of a procedural violation.)

First, has the State complied with the procedures set forth in the Act? 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. *Rowley* at 206–07, 102 S.Ct. 3034 (footnotes omitted). 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 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).

When assessing a student’s progress, courts should defer to the administrative agency’s expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir.2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir.2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP

is appropriate. . . . The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

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. v. District of Columbia*, 962 F.Supp.2d at 220-222.

As explained by Judge Boasberg, under the Supreme Court’s *Rowley* decision, to determine whether a FAPE has been provided, a hearing officer must determine whether: (1) the school complied with the IDEA’s procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *K.S.* at 220. Petitioner has not raised an IDEA procedural issue in this case. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the January 8, 2014 IEP, developed by the City Middle School IEP team, reasonably calculated to enable Student to receive educational benefits? Petitioner contends that the proposed IEP was inadequate because Student required a full-time placement outside of general education.<sup>4</sup> DCPS maintains that Student was making progress at City Middle School

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<sup>4</sup> Petitioner also alleged in the due process complaint that the January 8, 2014 IEP was inadequate because it lacked appropriate goals, social skills support and training. Special Education Teacher’s testimony was un rebutted that Petitioner’s

under her prior IEP and that in January 2014, she remained able to be educated with her nondisabled peers.

The starting point in my analysis is the March 21, 2013 IEP that Student brought to City Middle School. That IEP provided for Student's education in the general education setting except for two hours per week of special education outside general education and for pull-out sessions for related services. It is undisputed that at City Elementary School, Student was successful in this setting and there was a consensus at the March 21, 2013 IEP meeting that Student did not require a more restrictive placement when she advanced to middle school.

Both the IDEA and the District's regulations require that students with disabilities be educated in the least restrictive environment (LRE). *See, e.g., Smith v. Dist. of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C.2012) ("The IDEA requires that children with disabilities be placed in the 'least restrictive environment' so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate." (Citation omitted.)) It follows that, under the IDEA's LRE requirement, in order for Student's IEP team to have removed her from the regular education setting at the January 8, 2014 IEP meeting, the IEP team would have had to determine that after Student enrolled at City Middle School, "the nature or severity of [Student's] disability [became] such that education in regular classes [could no longer]

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representatives requested additional annual goals at the December 11, 2013 IEP meeting and the added goals were incorporated in the January 8, 2014 IEP. Student's need for support to improve peer relations was described in the annual goals section of the proposed IEP. At the December 11, 2013 IEP meeting Treating Psychologist recommended social skills training for Student. However, there was no evidence that Student required formal social skills training, as opposed to the counseling services provided in the IEP, to receive educational benefit from the program. To the extent that the adequacy of the annual goals and the omission of social skills support and training in the January 8, 2014 IEP remain at issue, I find that Petitioner did not meet his burden of proof that the IEP was inappropriate on those grounds.

be achieved satisfactorily.” *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34-35 (D.D.C.2012) (citations omitted).

The primary dispute between Petitioner and DCPS in this case is whether by the end of the 2013-2014 fall term, Student’s education could still be achieved satisfactorily primarily in regular classes. Father, supported by his three expert witnesses, maintains that after matriculating from elementary school to City Middle School in the fall of 2013, Student, whose disabilities include Bipolar Disorder, Anxiety Disorder and high functioning Autism Spectrum Disorder, was overwhelmed by the large public middle school environment and became anxious and distressed. Father testified that Student would “erupt” when he picked her up at the end of the school day and at home could be angry, explosive and withdrawn. Treating Psychologist, who has been Student’s therapist for years, testified that after first being excited about going to City Middle School, Student suffered a mood broke down and she “decomposed.” In therapy sessions, Student was angry, physical, and even violent, and at times would refuse to speak to Treating Psychologist or to go into her office. Treating Psychologist was concerned that Student might have to be hospitalized.

The facts in this case are unusual in that, after Student began attending City Middle School there was a divide between Student’s performance at school and her social-emotional state outside of school. Student’s out-of-control emotions and behaviors, as reported by Father and Treating Psychologist, were not observed at school. For example, Special Education Teacher testified that toward the beginning of the school year, Student expressed feelings of being overwhelmed and that she and School Psychologist worked with Student on that issue. Over the term, Student expressed being overwhelmed less and less. Notwithstanding, Student’s emotional and behavioral issues

outside of school are still relevant to the FAPE analysis, if because of those problems, Student was no longer able to receive education benefits in the primarily general education setting proposed in the January 8, 2014 IEP. *Cf., e.g., G.H. v. Great Valley School Dist.*, 2013 WL 2156011, 6 (E.D.Pa.) (E.D.Pa. May 20, 2013) (“Courts have been clear that emotional issues which occur at home are still relevant to IDEA analysis so long as those problems had a significant effect on her ability to learn. Put another way, the fact that outbursts occurred at home does not in and of itself deprive those outbursts of relevance; the question is whether the outbursts adversely affected her educational performance.” *Id.* at 6 (discussing special education eligibility under the Emotional Disturbance classification) (citation and internal quotations omitted.))

Petitioner’s experts, Treating Psychologist, Licensed Psychologist and Educational Consultant, all opined that as of December 2013, Student could no longer be educated in the large public school setting. Treating Psychologist told the IEP team in December 2013 that Student needed a small environment with less people around. Licensed Psychologist affirmed her March 2014 recommendation that Student should be in a small, self-contained, school setting. *See Exhibit P-23.* Educational Consultant, who testified as an expert in IEP development and special education programming, had observed Student at City Middle School in November 2013 and had spoken with SEC about Student. Although Educational Consultant had initially supported sending Student to City Middle School, he opined that as of December 2013, Student required a full-time out of general education placement because she could not tolerate being with general education peers. Educational Consultant attended Student’s IEP meetings in December 2013 and January 2014. He shared with the IEP team that the sensory and emotional environment at the large, comprehensive public middle school, with loud

noises and lots of students, was not consistent with what Student needed. Educational Consultant also opined that Student needed more intensive reading, writing and math services in her IEP.

The opinions of Petitioner's experts were countered by the testimony of DCPS' witnesses from City Middle School, Special Education Teacher, SEC and School Psychologist. Special Education Teacher, who was Student's case worker, worked with Student in two to three classes every day. She testified that in the fall 2013 term at City Middle School, Student was making progress on her March 21, 2013 IEP academic goals and that she was satisfied globally with Student's work. Special Education Teacher felt that Student was making progress with the support she was being provided at City Middle School and agreed with the special education services in the proposed January 8, 2014 IEP, because the IEP continued what staff and Student had been working on in the fall term.

SEC, who was qualified as an expert in special education programming and placement, opined that the January 8, 2014 IEP was appropriate because Student had been making progress and working toward her goals under the IEP she brought to City Middle School and the revised IEP provided additional annual goals requested by the parents' representatives and significantly increased service hours. SEC testified that the revised IEP provided extra help in Student's areas of need, including math, written language and the social-emotional domain.

School Psychologist, who was qualified as an expert in programing and placement as relates to social-emotional needs, provided behavioral support services to Student at City Middle School. For much of the 2013 fall term, Student would go to his office every day during the lunch period. School Psychologist testified that from the

social-emotional standpoint, Student had made progress at City Middle School. As the fall 2013 school term progressed, Student became more comfortable in the middle school setting and he did not see so much anxiety. At the December 11, 2013 IEP meeting, the parents' representatives had raised concerns about Student's "shutting down." Although School Psychologist had not seen Student's shutting down at school, he agreed that the parents' concerns ought to be addressed in the revised IEP. The January 8, 2014 IEP would have increased Student's Behavioral Support Services by 60 minutes to a total of 210 minutes per month. School Psychologist opined that these services were appropriate for Student's behavioral needs. School Psychologist did not believe that the severity of Student's behaviors warranted a full-time special education placement.

Where, as in this case, there are conflicting opinions offered by the respective parties' witnesses, a hearing officer must determine which testimony is entitled to more weight. *See, e.g., McAllister v. District of Columbia*, 2014 WL 2115467, 4 (D.D.C. May 21, 2014) (hearing officer entitled to make reasonable credibility determinations.) I found both parties' witnesses to be professional, knowledgeable and invested in Student's succeeding in school. In the context of the IDEA placement requirements, I discount Licensed Psychologist's recommendation, first made in November 2012, that Student be placed in a small self-contained school, because it is undisputed that Student was successful in her mostly general education setting at City Elementary School for the 2011-2012 and 2012-2013 school years. Also, Licensed Psychologist never observed Student at a DCPS school, did not speak with Student's DCPS teachers and did not attend any of Student's IEP meetings.

Treating Psychologist certainly was knowledgeable about Student's mental health

needs. But her expertise is child psychology and her opinion on Student's educational placement is entitled to less weight than those of the school experts who worked with Student in the school environment.

As Judge Boasberg explained in *K.S., supra*, academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. Educational Consultant had originally supported Student's attending City Middle School and his opinion that Student was not making meaningful progress there is entitled to weight. However, Educational Consultant only observed Student in one or two classes at the school. DCPS' witnesses, who provided IEP services to Student at City Middle School, testified to the contrary that Student was making progress, both academically and behaviorally, at City Middle School and that the January 8, 2014 IEP was appropriate. I found DCPS' witnesses also to be credible. The testimony of Special Education Teacher, who worked with Student in two to three classes every day, was particularly important.

When assessing a student's progress, a hearing officer should defer to the administrative agency's expertise, at least where, as in this case, the agency's witnesses are informed and credible. *See K.S., supra*, 962 F.Supp.2d at 220. Accepting the testimony and opinions of the City Middle School witnesses, and considering also Student's IEP progress reports and grade reports from the period, I find that, even though Student was experiencing serious emotional and behavioral issues outside of school, she did make progress in the fall 2013 term at City Middle School both in academics and in the Emotional, Social and Behavioral Development area of concern. DCPS' proposed January 8, 2014 IEP would have continued and increased Student's special education and related services over her prior March 21, 2013 IEP. I find,

therefore, that DCPS' proposed IEP offered Student the "basic floor of opportunity" required by the IDEA and was reasonably calculated to provide her educational benefits. *See Rowley, supra*, 458 U.S. at 201, 206-207.<sup>5</sup>

Petitioner's claim for reimbursement of Student's tuition at Nonpublic School is predicated upon his contention that the January 8, 2014 IEP was inappropriate. Having concluded that DCPS did not deny Student a FAPE by failing to develop an appropriate IEP on January 8, 2014 or by failing to offer her an appropriate placement, I find that the parents are not entitled to reimbursement for Student's attendance at Nonpublic School for the 2013-2014 or 2014-2015 school years or to public funding for Student to attend the private school for the remainder of the current school year.

#### ORDER

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

All relief requested by Petitioner herein is denied.

Date: March 8, 2015

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

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<sup>5</sup> Having concluded that Petitioner has not established that the proposed January 8, 2014 IEP denied Student a FAPE, I do not reach the second prong of the test for reimbursement of private school tuition – whether Nonpublic School was a "proper" placement. *See, e.g., R.H. v. Fayette County School Dist.*, 2009 WL 2848302, 3 (N.D.Ga.2009), citing *School Comm. of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

## **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).