District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

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Student Hearing Office
April 22, 2013

ADULT STUDENT[1], ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	Case No. 2013-0146 Impartial Hearing Officer: Charles M. Carron Date Issued: April 22, 2013 Representatives: Alana M. Hecht, Esq. for Petitioner William B. Jaffe, Esq. for Respondent

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed March 15, 2013, by the adult Student, who resides in the District of Columbia, Petitioner, against District of Columbia Public Schools ("DCPS"), Respondent.

On March 19, 2013, Virginia Deitrich was appointed as the Impartial Hearing Officer.

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

On March 21, 2013, Respondent timely filed its Response, stating that Respondent has not denied Petitioner a free appropriate public education ("FAPE").

On March 26, 2013, the undersigned was appointed as the Impartial Hearing Officer *vice* Hearing Officer Deitrich.

The Impartial Hearing Officer held a Prehearing Conference ("PHC") by telephone on April 3, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 10, 2013, and that the Due Process Hearing ("DPH") would be held on April 17, 2013, continuing on April 19, 2013 if needed.

A Resolution Meeting was held on April 8, 2013, but it failed to resolve the Complaint. The statutory 30-day resolution period ended on April 14, 2013. The 45-day timeline for the Hearing Officer's Determination ("HOD") started to run on April 15, 2013 and will conclude on May 29, 2013.

On April 12, 2013, Respondent filed a Motion for Summary Adjudication, which the undersigned denied by Order that same date.

The DPH was held on April 17, 2013, at the Student Hearing Office, 810 First Street, NE, Suite 2001, Washington, DC 20002. Petitioner elected for the hearing to be closed.

Petitioner attended the beginning of the hearing. Due to his anxiety disorder, Petitioner requested, through counsel, to be excused from the remainder of the hearing. On the record, Respondent's counsel objected but could not cite any legal authority for requiring Petitioner to remain throughout the hearing, despite the undersigned providing Respondent's counsel access to copies of the IDEA, its implementing regulations, District of Columbia laws and regulations, and as much time as Respondent's counsel needed to find such a provision. Accordingly, on the record, the undersigned excused Petitioner from the remainder of the hearing.

Respondent's counsel also asserted, without any basis, that Petitioner's counsel represented only the Parent, not the Petitioner (who, as of his 18th birthday on February 10, 2013, is an adult student), and that the instant case was brought improperly by the Parent. The undersigned rejected Respondent's assertions on the record.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-19

Respondent's Exhibits: R-1 through R-6

Impartial Hearing Officer's Exhibits: HO-1 through HO-8

The following witnesses testified on behalf of Petitioner at the DPH:

(a) The Parent

(b) [redacted] Petitioner's treating psychiatrist

(c) [redacted] and educational advocate, D.C. Disability Law Group[2]

(d) [redacted] educational advocate, D.C. Disability Law Group, who was qualified, after *voir dire*, as an expert in the development of educational programming for special education students

(e) Associate Head of School, Proposed School ("Associate Head")

The following witnesses testified on behalf of Respondent at the DPH:

(a) [redacted] Representative

(b) Individualized Education Program ("IEP") Coordinator, Private School

The parties gave oral closing arguments in lieu of written closing arguments or briefs.

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[2] [redacted]

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.*

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

Petitioner (also sometimes referred to herein as the "Student") is male, Current Age. Petitioner has been determined to be eligible for special education and related services as a child with a disability, autism, under the IDEA. Petitioner attended Private School since May, 2009. However, he attended only two days during the 2012-2013 school year and was absent the remaining days.

This case arose in February 2013 when Petitioner's placement at Private School was terminated due to his failure to attend. Petitioner filed a Due Process Complaint ("DPC") challenging Respondent's Prior Written Notice ("PWN") "unenrolling" him from Private School and advising him to "reenroll" in DCPS if he wanted Respondent to offer him a Free Appropriate Public Education ("FAPE"). The DPC also challenged Respondent's related instructions that Petitioner would be required to attend Public School #1 for a period of time in order to be reevaluated and to have an appropriate location of services determined.

IV. ISSUES

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at the DPH:

(a) Did Respondent deny Petitioner a FAPE by requiring him to enroll in a DCPS public school, and attend that school for at least 30 days, before receiving a placement and location of services consistent with his March 2012 IEP and his needs?

(b) Did Respondent deny Petitioner a FAPE by assigning him to attend Public School #1 for at least 30 days, because Public School #1 is unable to implement Petitioner's March 2012 IEP and meet his needs?

(c) Did Respondent deny Petitioner a FAPE by conditioning his reevaluation upon his attending and "reengaging" in school for at least 45 days?

V. RELIEF REQUESTED

Petitioner requests the following relief:[3]

(a) a finding in Petitioner's favor on all issues raised in the DPC;

(b) an Order placing Petitioner at a school and/or program to be identified by Petitioner no later than April 9, 2013;[4]

(c) an Order that within 10 days of the HOD, Respondent authorize an Independent Educational Evaluation ("IEE") to fund an independent comprehensive psychological evaluation including clinical, achievement, and

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[3] In the DPC, Petitioner also requested attorney's fees and costs, or a finding that Petitioner is the "prevailing party" and entitled to attorney's fees and costs, both of which are beyond the authority of the undersigned.

[4] Petitioner timely identified Proposed School.

cognitive components and including assessment tools designed to determine whether Petitioner is Intellectually Disabled or has Asperger's Syndrome;

(d) an Order that within 15 school days of receipt of the completed Comprehensive Psychological Evaluation, Respondent shall convene an IEP meeting to make any revisions to Petitioner's IEP that are warranted based upon the findings and recommendations of the evaluation, including but not limited to: disability classification, goals, needs, present levels of performance, and impact statements; and

(e) an Order that Respondent fund the compensatory education plan presented by Petitioner no later than April 9, 2013.[5]

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. Petitioner is a male, Current Age. P-1-1[6]

2. Petitioner resides in the District of Columbia. P-3-1.

3. Petitioner has been determined to be eligible for special education and related services under the IDEA as a child with autism. P-1-1.

[5] Petitioner timely filed the compensatory education plan, P-16.

[6] When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

Petitioner's March 30, 2012 IEP

4. On March 30, 2012, Petitioner's IEP Team ("IEPT")[7], including the Parent, met to conduct an annual review of Petitioner's IEP. P-1-1.

5. The notes of the March 30, 2012 IEPT meeting indicate that during the past year, Petitioner had not had any incidents of aggression, and seemed to have more engagement with his peers and staff; however, he "continues to struggle with his attendance at school." P-1-4.

6. During the year preceding the March 30, 2012 IEPT meeting, Petitioner had a 65% school attendance rate. P-1-5. A goal had been established for him to improve this to 85%. *Id.*

7. At the March 30, 2012 IEPT meeting, the IEPT determined that Petitioner "requires a private separate day school" and a "therapeutic environment which can provide seclusion, exclusion and physical restraint on an as needed basis." P-1-7.

8. Petitioner's March 30, 2012 IEP provides for him to receive 29 hours per week of specialized instruction outside general education (P-1-7), 60 minutes per week of behavioral support services (*Id.*), and the ability to earn a high school diploma (P-1-14).

9. At the March 30, 2012 IEPT meeting, the IEPT determined that Petitioner was appropriately placed at Private School. *Id.*

10. Petitioner's IEP does not require that he be educated with other students with autism or that he avoid contact with students with other disabilities. P-1.

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[7] On some documents, this team is referred to as a Multidisciplinary Team ("MDT"). The difference is not material to deciding the issues in this case.

11. Petitioner's March 30, 2012 IEP, which is his last IEP, is now outdated.

[redacted]

Petitioner's Assessments, Evaluations and Disabilities

12. An occupational therapy assessment of Petitioner was conducted in July 2003. P-10-1. In a report completed August 1, 2003, the evaluator recommended 30 minutes of direct occupational therapy per week and 30 minutes of indirect occupational therapy per month to remediate Petitioner's visual motor integration, bilateral hand skills, fine motor/motor coordination, visual form constancy, and visual figure ground. P-10-6.

13. An educational assessment of Petitioner was conducted on April 23, 2009. P-9-1. In a report completed May 6, 2009, the Special Education Evaluator concluded that Petitioner may require special education/support services in mathematics, reading and written language. P-9-4.

14. A psychological assessment to assess Petitioner's cognitive, emotional and behavioral functioning was conducted on November 2, 2009. P-11-1. The psychologist conducting the assessment diagnosed Petitioner as having a Mood Disorder Not Otherwise Specified ("NOS") and Autistic Disorder, and recommended regular psychiatric consultations, medication management, psychotherapy, an annual physical, specialized education, autism specific treatments, and extracurricular activities. P-11-10 and -11.

15. A psychiatric assessment of Petitioner, captioned "Psychiatric Evaluation (Update)" was conducted March 1, 2012. P-12-1. The psychiatrist conducting the assessment "provisionally" diagnosed Petitioner with Anxiety Disorder NOS and mild

mental retardation. P-12-3. The psychiatrist referred Petitioner for physical and laboratory examinations with emphasis on endocrine disease. *Id.* Petitioner's medications were to be tapered, and some discontinued. *Id.*

16. On November 16, 2012, Petitioner's counsel's paralegal [redacted], on behalf of the Parent, emailed DCPS Special Education Compliance [redacted] requesting that Respondent conduct a comprehensive psychological evaluation of Petitioner, including a clinical component. P-15-1. The email stated that the Parent doubted the accuracy of Petitioner's disability classification (autism) and suspected instead that he has Asperger's. *Id.* The email also stated the need to evaluate Petitioner's current level of cognitive functioning, achievement, and social-emotional functioning. *Id.*

17. On December 3, 2012, Private School IEP Coordinator emailed [redacted] offering three dates for a meeting to discuss the Parent's concerns as well as Petitioner's attendance. P-15-12.

18. On December 5, 2012, [redacted] replied to Private School IEP Coordinator stating that no meeting was necessary at that time, reiterating the request for reevaluation, and offering to obtain the Parent's signature on a consent form if required. *Id.*

19. On December 6, 2012, [redacted] emailed [redacted] stating that, with regard to the request for reevaluation, it was necessary to convene an IEP meeting, scheduled for December 18, 2012, for the psychologist to ask and answer questions regarding the request, and that Petitioner would need to attend school regularly so that

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[8] [redacted] title currently is DCPS LEA Representative.

data could be gathered via teacher/clinician observations, therapy sessions, etc. to assist any psychologist and/or clinician make an informed recommendation about Petitioner. P-15-14.

20. On December 10, 2012, [redacted] emailed [redacted] asking Respondent to postpone an IEP meeting that had been scheduled for December 18, 2012, until after the requested evaluation had been completed. P-15-17 and -18.

21. Later on December 10, 2012, [redacted] [redacted] stating that, for Respondent to move forward with the evaluation, "we must afford the psychologist an opportunity to come to the table to hear the parent's concerns and gather data on the student…. Understand we cannot move forward with the evaluation request until this meeting happens." P-15-21. [redacted] offered to reschedule the meeting if the December 18, 2012 date was not convenient. *Id.*

22. At the December 18, 2012 meeting, the participants discussed the request for a psychological evaluation. P-4-7.

23. At the December 18, 2012 meeting, DCPS psychologist [redacted] asked the Parent and educational advocate, [redacted] why they were requesting a psychological reevaluation. Testimony of [redacted]

24. [redacted] responded that they wanted to know the level of Petitioner's academic functioning and also have a psychologist explore why his absences had increased. *Id.*

25. Petitioner's other educational advocate, [redacted], stated that Petitioner might be found to have Asperger's. *Id.*

26. [redacted] that she did not want to do an evaluation just to determine whether Petitioner had autism or Asperger's because the disability classification is the same for both. *Id.*

27. Based upon the record evidence, the undersigned finds that [redacted] on behalf of Respondent, improperly disregarded the other asserted reasons for the requested reevaluation, *i.e.*, to determine Petitioner's levels of academic functioning and the reasons for his increased absences.[9]

28. At the December 18, 2012 meeting, Respondent's representatives stated that a psychological reevaluation could only be done if Petitioner were in school. Testimony of [redacted] P-4-7.

29. At the December 18, 2012 meeting, Respondent provided the Parent a Prior Written Notice ("PWN") stating, *inter alia,* that the psychologist would perform an evaluation once Petitioner reengaged in school "within" 45 days. P-5-1.

30. On February 19, 2013 another meeting was held, at which Respondent's representative announced that once Petitioner "reengaged" in school, a psychologist would observe and test him, and that after 30 days, a meeting would be held to review and amend his IEP. R-4-4, P-6-2.

31. [redacted] that Petitioner's request for reevaluation had "expired" upon his unenrollment from Private School, and that he would need to reenroll in a DCPS

[9] In any event, as discussed in Section IX, *infra*, IDEA does not require a parent to give a reason for requesting an evaluation or reevaluation.

school, reengage in that school, and request an IEP meeting at which he could "re-request" evaluation.[10] Testimony of [redacted]

32. Based upon the record evidence, the undersigned finds that Respondent conditioned Petitioner's reevaluation upon his attending and reengaging in school for at least 45 days, comprising the time to request an IEPT meeting and the time required for the psychologist to observe the student in the classroom and complete the reevaluation.

33. Petitioner currently has the following medical diagnoses: autistic disorder, anxiety disorder, and diabetes. Testimony of [redacted] testimony of [redacted]

34. Petitioner's anxiety disorder is quite prominent and severe, significantly limiting his ability to be in public and to tolerate crowds. Testimony of [redacted]

35. Petitioner would be unable to attend a school where he would have to tolerate crowds or noise, even briefly to enter the school. Testimony of [redacted]

36. Petitioner's anxiety disorder causes panic attacks, sometimes causing him to flee, as well as affecting his sleep, causing insomnia. Testimony of [redacted]

37. Petitioner's anxiety disorder causes shaking and trembling. *Id.*

38. Petitioner's anxiety disorder causes him to be chronically preoccupied and worried, feeling criticized and judged. *Id.*

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[10] As discussed in Section VII, *infra,* the undersigned gives no weight to [redacted] recantation of this testimony after he consulted with Respondent's counsel during a break off the record.

39. Petitioner has been prescribed many different sleep agents, with limited impact. *Id.*, testimony of [redacted]

40. Petitioner currently takes two medicines for anxiety, and one for sleep. Testimony of [redacted]

41. These medications have side-effects, including tiredness. *Id.*

42. Petitioner takes these medications regularly and willingly, and he knows why he takes them. Testimony of Parent.

43. Despite these medications, Petitioner has difficulty falling asleep and staying asleep, due to worry, feelings of social isolation, and being at home most of the time without physical activity. Testimony of [redacted]

44. As a result, Petitioner tends to fall asleep very late and his sleep is interrupted. *Id.*

45. Petitioner is difficult to arouse in the morning and often sleeps until mid-day. *Id.*

46. Petitioner is more tired and resistant in the morning than in the afternoon. *Id.*

[redacted] recommended to Petitioner and the Parent that Petitioner get up earlier in the day, become more active and get out of the house so that he will be more tired at earlier hours, which would increase the likelihood that he would fall asleep earlier. *Id.*

48. Petitioner's sleep patterns have not changed during the past six months. *Id.*

49. Petitioner's autistic disorder is mild, and manifests itself in difficulties with verbal expression (especially of feelings and emotions), making eye contact, and developing relationships. *Id.*

Petitioner's Academic Progress and Attendance Issue

50. On April 6, 2012, Petitioner's IEPT, including the Parent, conducted a Functional Behavioral Assessment ("FBA") of Petitioner, and developed a Behavior Intervention Plan ("BIP")[11] for him in an effort to improve his attendance. P-13.

51. The April 6, 2012 FBA notes that Petitioner was bothered by distracting behavior on the bus or in the classroom (P-13-2) and that his not attending school allowed him to avoid these situations (P-13-3).

52. The April 6, 2012 BIP called for (a) Petitioner to attend school on a consistent basis (at least 85% of the time); (b) Private School staff to encourage Petitioner to participate in all classroom and group activities on a daily and consistent basis by giving him rewards/reinforcements including verbal praise and participation in field trips and extracurricular activities; (c) Private School clinician to maintain communication with the Parent regarding Petitioner's attendance; and (d) Petitioner's therapist and Parent to monitor Petitioner's mood, anxiety, etc. as they occurred in order to assist in addressing somatic complaints. P-13-6.

53. On September 6, 2012, the Parent, Private School Social Worker, Petitioner's DCPS Progress Monitor, and Petitioner's DCPS Case Manager met to develop an Attendance Intervention Plan ("AIP") for Petitioner for the 2012-2013 school year. R-3-1. At that time, Petitioner had seven unexcused absences for the 2012-2013 school year. R-3-1 and -2, R-2-1.[12]

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[11] In the FBA, the BIP is referred to as a "Behavioral Support Plan." P-13-4. The difference is not material to deciding the issues in this case.

[12] Although this document bears the date June 6, 2012, [redacted] testified that this was an error, and that the document related to the September 6, 2012 meeting.

54. Petitioner's bus ride to Private School took an hour to an hour and fifteen minutes. Testimony of [redacted] testimony of Parent.

55. On the bus ride, Petitioner frequently was "hot," and the driver would not always open a window for him. Testimony of Parent.

56. Petitioner had issues with other students on the bus. *Id.*

57. At the September 6, 2012 meeting, the Parent stated that Petitioner's absences were due to mental health issues, that his severe anxiety symptoms inhibited his desire to attend school regularly. R-2-3.

58. At the September 6, 2012 meeting, the Parent stated that it was difficult for her to get Petitioner to school on a consistent basis, and that he did not make her aware of when he failed or refused to attend school. R-3-2.

59. At the September 6, 2012 meeting, the participants agreed that (a) the Parent would link Petitioner to a mental health service, and (b) Private School would follow up with DCPS regarding attendance during the period of the AIP. *Id.*

60. The expectations for Petitioner to attend school regularly were specified, but neither the Parent, nor Petitioner (who was not in attendance at the meeting) signed the form on the lines provided. R-2-3.

61. According to [redacted], it did not matter that the AIP was unsigned; it was the method Respondent utilized to inform students and their parents. Testimony of

[redacted]

[redacted] 6, 2012 meeting, the participants also agreed that (a) Petitioner's DCPS Case Manager would stay in contact with Private School and the Parent regarding Petitioner's attendance and keep the Parent informed of Petitioner's

completion or failure to satisfy the AIP, and (b) the Parent would send Petitioner back to school as soon as possible. R-2-3.

63. On September 26, 2012, [redacted] emailed Private School requesting an IEPT meeting. P-15-1.

64. On October 2, 2012, Respondent sent the Parent a Letter of Invitation to a meeting on October 5, 2012, to discuss Petitioner's truancy. P-15-5.

65. Later on October 2, 2012, [redacted] emailed Petitioner's DCPS Case Manager objecting to the meeting that had been scheduled for October 5, 2012, due to insufficient notice and also due to the fact that the location was not mutually convenient. *Id.* [redacted] noted that a meeting [apparently an IEPT meeting] had been scheduled for October 16, 2012 and requested that the two meetings be combined on that date. *Id.*

66. On October 8, 2012, [redacted] responded that the meeting would occur on October 16, 2012, as [redacted] had requested. P-15-7.

67. On October 10, 2012, Private School's Senior Clinician issued a 30-Day Review Progress Note. P-14-1. As of that date, Petitioner had attended school only one day for the 2012-2013 school year despite multiple phone calls to the Parent and home visits. *Id.*

68. On October 16, 2012, Petitioner's IEPT met to discuss Petitioner's attendance. P-2-4. As of that date, Petitioner had 29 unexcused absences for the 2012-2013 school year. R-1-1, P-2-1.

69. At the October 16, 2012 meeting, the Parent stated that Petitioner's absences were due to mental health issues, that his severe anxiety symptoms inhibited his desire to attend school regularly. R-1-3.

70. At the October 16, 2012 meeting, the Parent and [redacted] stated that Petitioner's absences were not his choice, rather, his medications interfered with his sleep and made him too tired to go to school; and Petitioner stated that he had been awake until 2:00 a.m. that morning. P-2-1, testimony of [redacted][13]

71. At the October 16, 2012 meeting, [redacted] stated that it was not possible to get doctor's notes for Petitioner's absences, because he did not have medical visits on most of the days he was absent from school and doctors would not issue attendance excuses for a range of dates. Testimony of [redacted]

72. At the October 16, 2012 meeting, the Parent stated that she would attempt to get doctor's notes for Petitioner's absences. *Id.*

73. No medical notes were provided at any time supporting Petitioner's absences during the 2012-2013 school year. *Id.*

74. At the October 16, 2012 meeting, Respondent prepared an AIP providing that (a) the Parent would unplug Petitioner's computer to stimulate more sleep and therefore, desire to attend school; and (b) Private School would provide an incentive for good attendance, *e.g.*, the ability for Petitioner to take guitar lessons. *Id.* The expectations for Petitioner to attend school regularly were specified. *Id.*

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[13] This testimony was accepted, over Respondent's counsel's hearsay objection, to show that Respondent was on notice of the reasons the Parent and educational advocated stated for Petitioner's absences, not to prove the truth of the cause of Petitioner's absences or that he had been awake until 2:00 a.m. that day.

75. The Parent and educational advocate disagreed with the October 16, 2012 AIP because it called for Petitioner to attend 80% of the time, which the educational advocate asserted was setting Petitioner up to fail. Testimony of [redacted]

76. Neither the Parent, nor Petitioner (who was not in attendance at the meeting) signed the AIP. *Id.*, R-1-4.

77. On November 14, 2012, Respondent issued a document entitled "IEP Progress Report – Annual Goals," indicating that Petitioner had made no progress. P-8.

78. On November 16, 2012, Ms. [redacted] emailed [redacted] stating, *inter alia,* that the Parent did not agree with a draft attendance contract because Petitioner's absences were medically related. P-15-1.

79. On December 6, 2012, Mr. [redacted] emailed Ms. [redacted] stating that Respondent needed to move ahead to discuss Petitioner's attendance, at a meeting scheduled for December 18, 2012. P-15-14.

80. On December 10, 2012, Ms. [redacted] emailed Mr. [redacted] stating that the Parent and Petitioner had made efforts to get Petitioner to school but his absences were medically related, and that it was not possible to get a doctor's note excusing each absence. P-15-17 and -18.

81. On December 12, 2012, Petitioner's IEPT, including the Parent, met to discuss, *inter alia,* Petitioner's attendance. As of that date, Petitioner had 66 unexcused absences for the 2012-2013 school year. *Id.*

82. At the December 12, 2012 meeting, a representative from Public School #2 stated that Public School #1 could not implement Petitioner's current IEP but Public School #2 could. *Id.*, testimony of [redacted]

83. At the December 12, 2012 meeting, the representative from Public School #2 described the two programs at that school for students with autism: (a) a self-contained classroom for low-functioning students taking a life-skills curriculum, earning a certificate rather than a high school diploma; and (b) an inclusion (general education) program for higher-functioning students earning a high school diploma. Testimony of [redacted].

84. At the December 12, 2012 meeting, the representative from Public School #2 stated that Public School #2 did not have a full-time outside general education degree program for Petitioner. Testimony of [redacted]

85. At the December 12, 2012 meeting, the Parent and Ms. [redacted] stated that they did not believe Public School #2 could implement Petitioner's IEP because he was not ready for inclusion, but his IEP called for him to earn a high school diploma. *Id.*, P-4-2, testimony of [redacted]

86. At the December 12, 2012 meeting, it was noted that a court referral had been submitted due to Petitioner's absences. P-4-4.

87. At the December 12, 2012 meeting, the psychologist stated that Petitioner could not be evaluated at home, but could be evaluated at school. *Id.*

88. On December 18, 2012, another meeting of the IEPT, including the Parent, was held. P-4-5.

89. As of December 18, 2012, Petitioner had attended school only two partial days during the 2012-2013 school year. P-4-5 and -9.

90. At the December 18, 2012 meeting, Respondent expressed that Petitioner was a truant, and that the Parent had failed to provide documentation about his absences

(P-4-10) to which the Parent responded that Petitioner only sleeps four hours per night (P-4-6).

91. At the December 18, 2012 meeting, the participants discussed the autism program at Public School #2 (P-4-6 and -11) as well as whether Petitioner would attend any school, or whether he should have home based services and instruction, which Respondent only provides in response to a doctor's request (P-4-6 and -7).

92. At the December 18, 2012 meeting, Respondent provided the Parent a Prior Written Notice ("PWN") stating, *inter alia,* that Respondent would research a school closer to Petitioner's home that could meet his needs. P-5-1.

93. The December 18, 2012 PWN stated that the psychologist would perform an evaluation "once the student re-engages into school within the 45 days." *Id.*

94. The PWN was written by Mr. [redacted] who clarified in his testimony that the DCPS psychologist was allowed up to 45 days to complete an evaluation of a student. Testimony of [redacted]

95. Respondent never researched a home closer to Petitioner's home. *Id.*

96. On February 19, 2013, another meeting of the IEPT was held to discuss Petitioner's progress, strengths, weaknesses, IEP, and Least Restrictive Environment ("LRE"), and to issue a PWN. R-4-3, P-6-1.

97. At the February 19, 2013 meeting, it was discussed that Petitioner had missed more than 80% of scheduled school days. R-4-4, P-6-2.

98. At the February 19, 2013 meeting, Respondent continued to maintain that Petitioner's absences constituted truancy even though he was then 18 years old and not subject to truancy laws. Testimony of [redacted].

99. At the February 19, 2012 meeting, Respondent continued to request medical documentation for Petitioner's absences even though such documentation would not improve Petitioner's attendance. *Id.*

100. At the February 19, 2013 meeting it was announced that Respondent was going to discharge Petitioner from Private School and assign him to Public School #1. Testimony of Parent.

101. At the February 19, 2013 meeting, the Parent expressed her disagreement with assigning Petitioner to Public School #1, particularly Petitioner's need to transit from bus to classroom in a noisy environment, as well as his safety at Public School #1 due to frequent fighting there. *Id.*

102. At the February 19, 2013 meeting, Private School social worker expressed her opinion that Petitioner needed to be encouraged consistently to return to school, and that a peer [mentor] at Public School #1 could help him get involved [in school] and with music. R-4-5, P-6-3.

103. Upon questioning by the undersigned, Mr. [redacted] acknowledged that Respondent did not believe Petitioner's absences were medically-related. Testimony of [redacted]

104. On cross-examination, [redacted] testified that he only learned of Petitioner's anxiety disorder at the DPH ("recently, like today") (*Id.*), despite the references to Petitioner's anxiety in the April 6, 2012 Functional Behavioral Assessment that [redacted] signed (P-13), and in the September 6, 2012 AIP prepared at the meeting Mr. [redacted] attended (R-2).

105. Based upon all of the record evidence, the undersigned finds that Respondent required Petitioner to enroll in a DCPS public school, and attend that school for at least 30 days, before receiving a placement and location of services consistent with his March 2012 IEP and his needs.

106. Based upon all of the record evidence, the undersigned finds (a) that Respondent assigned Petitioner to attend Public School #1 for at least 30 days in order to obtain an offer of FAPE, and (b) that Public School #1 is unable to implement Petitioner's March 2012 IEP and meet his needs because it is not a private school, it is not a separate special education school, and there is no record evidence that Public School #1 can provide Petitioner 29 hours per week of specialized instruction outside general education leading to a high school diploma.

107. Based upon all of the record evidence, the undersigned finds that Respondent did little, if anything, to improve Petitioner's attendance. Rather, Respondent pursued the same failed approach of characterizing Petitioner's absences as truancy and instructing Petitioner and the Parent that Petitioner must attend school. Respondent did not suggest, much less offer, changes that Private School might make other than the possibility of guitar lessons as a reward for better attendance. Respondent did not consider a different location of services that would be capable of implementing Petitioner's IEP that would encourage Petitioner's attendance, for example because of a quieter environment and/or a shorter bus ride (or no bus ride), allowing Petitioner to sleep longer in the morning. Respondent repeatedly delayed Petitioner's psychological reevaluation, which might have identified additional disabilities and/or needs, and might have informed the attendance intervention process. Respondent imposed extra-legal conditions on Petitioner

being reevaluated, effectively requiring him to attend an inappropriate school before he could be reevaluated, which Petitioner and the Parent justifiably rejected.[14]

108. Based upon all of the record evidence, the undersigned finds that Respondent's objective was to document, rather than remediate, Petitioner's absences. In particular, Respondent meticulously documented communications with the Parent expressing the need for Petitioner to attend school, without making any changes in Petitioner's placement, location of services, specialized education, or related services. In short, Respondent continued to insist that *Petitioner* change, without expressing any willingness to meet Petitioner's needs by making changes in placement, location of services, or special education or related services. This reflects Respondent's view of Petitioner as a truant, deliberately avoiding school, rather than as a student with a disability that adversely affected his willingness to attend school. In effect, Respondent disregarded the fact that Petitioner has a disability, punishing his absences as if he were a non-disabled child willfully absenting himself from school.

The February 19, 2013 Prior Written Notice

109. On February 19, 2013, Respondent issued a PWN stating, *inter alia*, that due to the inability of DCPS and Private School to "reengage" Petitioner, he was to be "unenrolled" from Private School due to excessive absences, but that he could "pursue re-

[14] Mr. [redacted] testimony that the delays and extra-legal conditions imposed upon Petitioner obtaining a FAPE are in accordance with DCPS policy is especially troubling. The undersigned encourages Respondent's higher management to review its policies for consistency with law, and then to ensure that its representatives at IEPT and MDT meetings, as well as counsel, understand the policies and controlling law.

enrollment and receive special education services from DCPS anytime in the future. He can return to DCPS in order to receive FAPE through age 22." R-4-1, P-7-1.

110.The PWN gave as the reason for the action that Petitioner had 90 unexcused absences despite the fact that Private School and DCPS Case Manager had made phone calls, and the DCPS Case Manager also had made home visits, mailed certified letters, and made a referral to the Office of Youth Engagement, all in an effort to "reengage" Petitioner. *Id.*

111. Although the PWN does not specifically mention reenrolling/reengaging at any specific DCPS school, Respondent orally identified Public School #1 as the location of services for Petitioner, as recorded by Respondent in its own meeting notes (R-4-4) and corroborated by Respondent's own witness (Testimony of IEP Coordinator, Private School) .

112. Mr. [redacted] that because Petitioner had been unenrolled from Private School, he was no longer a DCPS student and that Respondent's policy therefore required him to re-register at his home/zone school, *i.e.*, Public School #1. Testimony of [redacted]

<u>Proposed School</u>

113. Due to his sleep patterns, Petitioner requires a school with a schedule that is later in the day than a traditional school. Testimony of [redacted]

114. Petitioner requires a school that is relatively quiet. *Id.*

115. Proposed School is a new evening program of an established private special education school ("Day School"). *Id.*

116. All of the students at Proposed School have disabilities. Testimony of Associate Head.

117. All of the students at Proposed School have IEPs (if publicly funded) or Individual Learning Plans (if privately funded) requiring full-time specialized instruction outside general education. *Id.*

118. Proposed School has been approved by the District of Columbia Office of the State Superintendent of Education ("OSSE") and follows DCPS standards. *Id.*

119. Proposed School's classroom teacher, who is certified only in special education, consults with teachers who are certified in math, reading and other subject areas; however, those teachers do not co-teach in the classroom. *Id.*

120. OSSE has approved the credentials of Proposed School's classroom teacher even though she is certified only in special education because OSSE does not require special education teachers to be certified both in special education and in the subject areas they teach. *Id.*

121. OSSE does not require physical education teachers or other "specialty" teachers to be special-education certified. *Id.*

122. Proposed School's tuition has been approved by OSSE, and is prorated by the day. *Id.*

123. If a student funded by Respondent has more than five unexcused absences in a school year, Proposed School does not bill Respondent for those days of absence. *Id.*

124. A student who graduates from Proposed School earns diplomas from both Proposed School and DCPS. *Id.*

125. The instructional hours of Proposed School are 3:00 p.m. to 9:00 p.m., comprising 30 hours per week of specialized instruction leading to a high school diploma. *Id.*

126. Day School's program ends at 3:00 p.m., and students are grouped for dismissal between 2:50 p.m. and 3:10 p.m. according to the buses they ride. *Id.*

127. The only after-school activities at Day School are sports programs. *Id.*

128. Proposed School is in a quiet area on the second floor of the building shared with Day School. *Id.*

129. Proposed School has verbally accepted Petitioner based upon interviews and will follow up with a written acceptance. *Id.*

130. Proposed School did not know how Petitioner performed at Private School. *Id.*

131. Petitioner's path to his classroom at Proposed School would involve entering the building foyer, walking past the reception desk, climbing one flight of stairs, and taking two quick turns. *Id.*

132. Petitioner visited Day School once around 2:00 p.m., was greatly disturbed by the noise of the students in the day program, and insisted upon leaving immediately. Testimony of Parent.

133. If Petitioner attended Proposed School and the noise or proximity of Day School students around 3:00 p.m. disturbed him, Proposed School would adjust his arrival time as late as 3:30 and make up the lost instructional time. Testimony of Associate Head.

134. Proposed School currently has three students with varying disability classifications, two of whom are funded by Respondent. *Id.*[15]

135. Petitioner knows one of the students who would be a classmate and has a good relationship with that student. *Id.*, testimony of Parent, testimony of Associate Head. This "student level tie" would facilitate Petitioner's transition to Proposed School. Testimony of Associate Head.

136. Petitioner has met the individual who would be his teacher at Proposed School, including several visits that the teacher made to his home. *Id.*, testimony of [redacted]

137. Petitioner expressed excitement about attending Proposed School, including posting to his Facebook account that he was looking forward to that. Testimony of Parent, testimony of Associate Head.

138. Proposed School is one and a half blocks from Petitioner's home, allowing Petitioner to walk home if needed, and allowing the Parent to come to the school quickly if needed. Testimony of [redacted]

139. Petitioner routinely walks further than one and a half blocks in his neighborhood. Testimony of Parent.

140. Proposed School would develop a transition plan for Petitioner's entry, to acclimate him gradually to the new school. Testimony of Associate Head.

141. Based upon all of the record evidence, the undersigned finds that Proposed School can implement Petitioner's IEP.

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[15] Several other witnesses testified that there were fewer students; however, their information was dated. The difference is not material to deciding the issues in this case.

142. Based upon all of the record evidence, the undersigned finds that Petitioner is more likely to have satisfactory attendance at Proposed School than he did at Private School because (a) no bus ride is required, allowing Petitioner to sleep more hours, (b) Proposed School's schedule is more aligned with Petitioner's sleep patterns, (c) Petitioner will not be required to interact with a large number of other students at Proposed School, and (d) Petitioner has a positive attitude about attending Proposed School.

Compensatory Education

143. Petitioner's compensatory education plan seeks to remediate Petitioner's alleged denial of FAPE only for the period from February 19, 2013, when he was "unenrolled" from Private School, until the date of the DPH. P-16, as clarified by testimony of [redacted]

144. If Petitioner had been provided an appropriate location of services on February 19, 2013, then by the end of the 2012-2013 school year, he could have been expected to earn two and a half Carnegie unit credits toward his high school diploma. *Id.*

145. If Petitioner receives an appropriate location of services shortly after the DPH, then by the end of the 2012-2013 school year, he can be expected to earn one Carnegie credit. *Id.* Thus, Petitioner's educational deficit due to the period of not having an appropriate location of services is one and a half Carnegie credits.

146. Petitioner could earn one Carnegie unit by taking a one-credit course during summer school after being placed in an appropriate setting (P-16-2) and Petitioner could take that course by computer from his home (Testimony of [redacted]

147. Petitioner would require the assistance of a tutor for 20 hours while taking the credit class described in Paragraph 146, *supra.* P-16-2; testimony of [redacted].

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR § 5-E3030.3; *Schaffer v. Weast,* 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR § 5-E3022.16; *see also, N.G. v. District of Columbia,* 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their first hand knowledge or professional expertise, with the exception of [redacted] [redacted] testimony that he only learned of Petitioner's anxiety disorder at the DPH was contradicted by several documents prepared at meetings that he had attended, including one that he had signed. Moreover, in response to questions posed by the undersigned, Mr. [redacted] initially testified that Petitioner would have had to attend Public School #1 for a period of time before requesting an IEPT meeting, that he would have to "re-request" a psychological evaluation at that IEPT meeting, that the school psychologist would have up to 45 days to conduct that evaluation, and that an appropriate placement and location of services could not be determined by the IEPT until all of those events had occurred. However, at the conclusion of Mr. [redacted] testimony but before he had been excused on the record, the parties went off the record. During that time, Mr. [redacted]

conferred with Respondent's counsel. When the parties went back on the record, Respondent's counsel called Mr. [redacted] back to the stand, which the undersigned allowed over the objection of Petitioner's counsel. Mr. [redacted] hen testified that Petitioner could "re-request" evaluation without an IEPT meeting, that Petitioner's IEPT might convene promptly upon his "re-engagement" at Public School #1, and that Petitioner's IEPT might promptly determine an appropriate placement and location of services, without waiting for the psychological evaluation. The undersigned gives absolutely no weight to this testimony and discounts Mr. [redacted] remaining testimony because of his compromised credibility.

Respondent's counsel asserted that the educational advocates who testified on behalf of Petitioner should be disqualified as witnesses because they are employed by Petitioner's law firm. The undersigned rejected that assertion, noting that Respondent routinely presents expert witnesses who are employed by Respondent. In all litigation, it is common for expert witnesses to be paid by the party calling them. While compensation might go to credibility, the undersigned found all of Petitioner's witnesses to be credible. They all readily acknowledged when they lacked recollection of events, and showed no indication of dissembling to mold their testimony to Petitioner's theory of the case.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further

education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected…" 20 U.S.C. § 1400(d)(1). *Accord*, DCMR § 5-E3000.1.

Reevaluation

2. Unless the parent (or adult student) and the local educational agency agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted at least once every three years, or more frequently if conditions warrant reevaluation, if the child's parent or teacher (or the adult student) requests a reevaluation, or before determining that a child is no longer a child with a disability; but no more frequently than once a year unless the parent (or adult student) and the Local Educational Agency ("LEA") agree otherwise. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; DCMR § 5-E3005.7.

3. As part of a reevaluation, the IEPT and other qualified professionals, as appropriate, are required to:

> (A) review existing evaluation data on the child, including—
>
> (i) evaluations and information provided by the parents of the child;
>
> (ii) current classroom-based, local, or State assessments, and classroom-based observation; and
>
> (B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—
>
> (i) whether the child is a child with a disability …, and the educational needs of the child, or, in the case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
>
> (ii) the present levels of academic achievement and related developmental needs of the child;
>
> (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

> (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C. § 1414(c)(1); *accord*, 34 C.F.R. § 300.305. District of Columbia regulations paraphrase these federal provisions, while adding to the role of the IEPT the determination of whether the child has "a particular category of disability." DCMR § 5-E3005.4(b)(1).

4. The IEPT and other qualified professionals, as appropriate, may determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs. 20 U.S.C. § 1414(c)(4); 34 C.F.R. § 300.305(d). In that case, the LEA must notify the child's parents of that determination and the reasons for the determination, and of the parents' right to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs. 20 U.S.C. § 1414(c)(4); 34 C.F.R. § 300.305(d). [16]

5. The LEA is required to conduct or fund such an assessment if requested to do so by the child's parents, even if the other members of the IEPT disagree. *Id.*

6. As noted by the U.S. District Court for the District of Columbia in *District of Columbia v. West,* 54 IDELR 117 (D.D.C. 2010), quoting *James ex rel. James v. Upper Arlington City School Dist.*, 228 F.3d 764,768 (6th Cir. 2000):

> Under the IDEA, "the obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment." … The District's offer to convene an MDT meeting for A.C.

[16] No such determination was made in the instant case, and no such notification was provided.

> was always predicated upon her re-enrollment, a condition that was not required by the IDEA. As such, A.C. was neither required to re-enroll before requesting an MDT nor required to re-request an MDT after her re-enrollment.

7. In the instant case, the IEPT agreed with the Parent that an updated psychological assessment was appropriate but conditioned that assessment upon Petitioner re-enrolling in a DCPS school and "reengaging" for a period of time. Finding of Fact 29. However, those conditions are not contained in IDEA or its implementing regulations.

8. The undersigned concludes that, by imposing extra-legal conditions on Petitioner's reevaluation, Respondent violated IDEA's reevaluation provisions.

<u>FAPE</u>

9. The IDEA requires that all students be provided with a FAPE. FAPE means:

> special education and related services that –
>
> > (A) have been provided at public expense, under public supervision and direction, and without charge;
> >
> > (B) meet the standards of the State educational agency;
> >
> > (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> >
> > (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also,* 34 C.F.R. §300.17 and DCMR § 5-E3001.1.

IEP

10. The "primary vehicle" for implementing the goals of the IDEA is the IEP which the IDEA "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP in relevant part as follows:

> (i) In general The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—
>
> > (I) a statement of the child's present levels of academic achievement and functional performance, including—
> >
> > > (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
> >
> > * * *
> >
> > (II) a statement of measurable annual goals, including academic and functional goals, designed to—
> >
> > > (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
> > >
> > > (bb) meet each of the child's other educational needs that result from the child's disability;
> >
> > * * *
> >
> > (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
> >
> > > (aa) to advance appropriately toward attaining the annual goals;
> > >
> > > (bb) to be involved in and make progress in the general

> education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
>
> (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
>
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);
>
> (VI)
>
> (aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and
>
> * * *
>
> (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and
>
> (VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—
>
> (aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
>
> (bb) the transition services (including courses of study) needed to assist the child in reaching those goals ….

20 U.S.C. §1414(d)(1)(A).

11. If an appropriate IEP is developed, but the LEA fails to implement the IEP fully, the failure constitutes a denial of FAPE only if the failure is "material." *See, e.g.*, *Banks v. District of Columbia*, 54 IDELR 282, 110 LRP 39207 (D.D.C. 2010).

12. Changing the physical school where the student receives services constitutes a change in educational placement if there is a fundamental departure from the services provided in the IEP. *Savoy, Parent and Next Friend of T.W. v. District of Columbia*, 112 LRP 8777 (D.D.C. 2/21/12); *Johnson v. District of Columbia*, 112 LRP 13381 (D.D.C. 3/15/12) ("the District is free to change [the Student's] physical placement as long as the new placement does not amount to a fundamental departure from [the Student's] IEP").

13. A procedural violation of IDEA does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -
>
> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

14. There is no provision in IDEA or its implementing regulations allowing an LEA to assign or reassign a student, even on an interim basis, to a school or program that deviates materially from his IEP.

15. In the instant case, Petitioner's IEP required him to attend a private separate day school and to receive 29 hours per week of specialized instruction outside general education to earn a high school diploma (Finding of Fact 8), none of which Public School #1 can satisfy (Findings of Fact 82 and 106).

16. Removing Petitioner from Private School without placing him at another school capable of providing him with 29 hours per week of specialized instruction outside general education leading to a high school diploma constitutes a unilateral change in placement, a fundamental departure from Petitioner's IEP, a material failure to implement Petitioner's IEP, and therefore a denial of FAPE, despite repeated assertions by Respondent's counsel that only the location of services was changed.

17. The PWN removing Petitioner from Private School and conditioning his future receipt of FAPE upon his enrolling or re-enrolling in a DCPS school and attending (for any period of time) a public school that lacks the ability to provide him with 29 hours per week of specialized instruction outside general education leading to a high school diploma constituted (a) a unilateral change in placement, (b) a fundamental departure from Petitioner's IEP, (c) a material failure to implement Petitioner's IEP, and (d) imposition of an extra-legal condition upon Petitioner's receipt of FAPE—all of which are denials of FAPE. *District of Columbia v. West, supra.*

Authority of Hearing Officer to Order Prospective Placement in Private School

18. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) ("*Reid*"). That relief may include compensatory award of prospective services. *Id.* In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) ("*Branham*").

19. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

> If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if 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)(internal citations omitted); *see also, Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) ("Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent's desires.") and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) ("Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.").

20. Equitable considerations are relevant in fashioning relief. *See, School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 374 (1985).

<u>No Appropriate Public Placement is Available for Petitioner.</u>

21. In the instant case, there is no record evidence that there is an appropriate public school program available for Petitioner. The programs discussed or offered by Respondent are not appropriate. Findings of Fact 82-84, 95 and 106.

22. Based upon all of the record evidence, the undersigned finds that Respondent did not offer Petitioner an appropriate placement.

<u>Respondent Acted in Bad Faith.</u>

23. Based upon all of the record evidence, the undersigned finds that Respondent acted in bad faith by "unenrolling" Petitioner from Private School without placing him in

another school, as well as by conditioning his reevaluation and his future receipt of FAPE upon his taking actions not required by IDEA, its implementing regulations, or District of Columbia law or regulations. Findings of Fact 106-108.

24. The only argument put forward by Respondent for leaving Petitioner without an education was the repeated assertion on the record by Respondent's counsel that it was unfair for Respondent to be required to pay Private School's "exorbitant" tuition for an empty seat. However, Mr. [redacted] admitted upon questioning by the undersigned that Respondent was not paying for Petitioner on the days Petitioner was absent, and Associate Head testified that Private School would not be paid by Respondent for any days of Petitioner's unexcused absence exceeding five in a school year. In short, a student who has excessive absences at a non-public school placement is *not* costing Respondent any tuition, much less an "exorbitant" amount.[17]

Appropriateness of a Special Education Placement

25. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the Least Restrictive Environment (LRE) for the Student. *Branham.*

26. When DCPS makes a special education placement, the following order or priority applies among placements that are appropriate for the student:

[17] Respondent's counsel is reminded of his obligation of candor to the tribunal. D.C. Rule of Professional Conduct 3.3.

> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

DC ST §38-2561.02(c). Although this order of priority is not binding upon a Hearing Officer, a Hearing Officer is not precluded from taking these priorities into consideration in ordering a placement.

27. The IDEA requires that special education be provided in the "Least Restrictive Environment" (LRE):

> To the maximum extent appropriate, children with disabilities … are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). *Accord,* DCMR 5-E3011.1. *See also,* 34 C.F.R. § 300.114(a)(2).

28. District of Columbia law adds another element to LRE, that the placement must be "based upon consideration of the proximity of the placement to the student's place of residence." DC ST § 38-2561.01(6)(C). Implementing regulations in the District of Columbia require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement (DCMR § 5-E3013.1); and if a placement outside the LEA is required, the placement must be in the program that meets the requirements of the child's IEP that is closest to the child's residence (DMCR § 5-E3013.7).

Proposed School is an Appropriate Placement and Location of Services for Petitioner.

29. The parties agree that Petitioner's disability or disabilities are so severe that he requires a private separate day school. Finding of Fact 7.

30. The parties agree that Petitioner requires a "full time" special education program, *i.e.*, 29 hours per week of specialized instruction and one hour per week of behavioral support services. Finding of Fact 8.

31. Proposed School is a separate private day school that can meet all of the requirements of Petitioner's IEP and is his LRE. Finding of Fact 142.

32. Proposed School, its teacher, and its fees have been certified by OSSE. Findings of Fact 118-122.

33. Proposed School is the closest school to Petitioner's residence in the District of Columbia, only a block and a half away. Finding of Fact 138.

34. The undersigned therefore concludes that Proposed School is an appropriate placement and location of services for Petitioner, subject to reconsideration if Petitioner (a) fails to attend regularly after a transition period and (b) fails to seek medical attention on his days of absence from Proposed School,[18] as set forth in Section X, *infra.*

[18] While Respondent's requirement that Petitioner have medical visits and doctor's excuses for his absences was not appropriate when he was assigned to an inappropriate location of services, the undersigned finds such a requirement appropriate for Petitioner to remain enrolled at Proposed School (his school and program of choice) after a transition period.

Compensatory Education

35. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid.* That relief may include compensatory award of prospective services:

> When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

36. In all cases, an order of relief must be evidence-based. *Branham.* Compensatory education must be qualitative, fact-intensive, and "above all tailored to the unique needs of the disabled student." *Id.*

37. Mechanical calculation of the number of hours of compensatory education (a "cookie-cutter approach") is not permissible. *Reid.* Rather, compensatory awards "should aim to place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.* Awards compensating past violations must "rely on individual assessments." *Id.*

> Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment." *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) *(citing Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted)).

38. The Hearing Officer must base a compensatory education award on evidence regarding the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.*

39. Equity sometimes requires "consideration of the parties' conduct…. In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.*

40. Petitioner's compensatory education plan began with an assessment of the educational deficit suffered by Petitioner for the two-month period from February 19, 2013 to the date of the hearing, specifically, the loss of the opportunity to earn approximately 1.5 Carnegie unit credits required for a high school diploma. Finding of Fact 146. Petitioner's expert then recommended a summer course that would give Petitioner the opportunity to earn one Carnegie unit credit (Finding of Fact 147), remediation that the undersigned concludes is narrowly tailored to the educational deficit. Petitioner's expert, aware of Petitioner's educational needs from her review of the records and her knowledge of Petitioner, gave her expert opinion that Petitioner would require the assistance of a tutor to satisfactorily complete the summer course, requiring 20 hours of tutoring. Finding of Fact 148. The undersigned concurs.

41. The undersigned concludes that Petitioner's compensatory education plan meets all of the requirements of *Reid* and *Branham* because the plan is reasonably calculated to provide the educational benefits that likely would have accrued from special education services Respondent should have supplied to Petitioner in the first place.

X. ORDER

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

1. No later than Monday, April 29, 2013, without requiring Petitioner to enroll, reenroll, engage or reengage in or with DCPS, Respondent shall place and fund Petitioner's attendance at Proposed School for the remainder of the 2012-2013 school year and for the 2013-2014 school year, unless the location of services is changed pursuant to paragraphs 4 and 5 below.

2. No later than April 29, 2013, Respondent shall issue a written authorization for Petitioner to obtain an Independent Educational Evaluation (IEE) to fund an Independent Comprehensive Psychological Evaluation including clinical, achievement, and cognitive components and including assessment tools designed to determine whether Petitioner is Intellectually Disabled and to determine if Petitioner continues to have autism, and if so, at what point on the autism spectrum, and the educational consequences of his disability or disabilities. Included in or attached to the IEE authorization, Respondent shall identify the Compliance Case Manager to whom the IEE Report should be sent. Petitioner shall make reasonable efforts to have such evaluation completed and the IEE Report sent to the Compliance Case Manager no later than May 30, 2013. If Petitioner has been determined by a court of competent jurisdiction to be incompetent, the IEE authorization shall be provided to Petitioner’s Parent. If a court of competent jurisdiction has assigned a guardian to Petitioner for purposes of education, the IEE authorization shall be provided to Petitioner’s guardian.

3. Within 20 calendar days of receiving the IEE Report, Respondent shall convene a meeting of Petitioner's Multi-Disciplinary Team (MDT) or Individualized Education Program Team (IEPT) with all necessary members, including Petitioner (and the Parent or guardian if Petitioner has been determined to be incompetent or has assigned Petitioner a guardian for educational purposes, respectively), to (a) review the results of the IEE Report; (b) review any other updated information regarding Petitioner's performance, attendance, behavior, disability or disabilities, and side effects from medication; (c) review and revise, as appropriate, Petitioner's IEP, including implementing an attendance intervention plan if Petitioner has had any absences at Proposed School; and (d) discuss whether Petitioner requires Extended School Year ("ESY") services for the summer of 2013 and if so, determine those services and their location, which may, but need not, be at Proposed School.

4. Except for ESY, Petitioner's location of services shall remain the Proposed School during the remainder of the 2012-2013 school year and during the 2013-2014 school year, except as provided in paragraph 5 below or if a change in location of services is agreed to by Petitioner (or the Parent or guardian if Petitioner has been determined to be incompetent or has assigned Petitioner a guardian for educational purposes, respectively).

5. Between May 27, 2013 and the end of the 2013-2014 school year, if Petitioner is absent from school for more than five school days out of any 20 consecutive school days, Petitioner must submit to his school and to his Compliance Case Manager medical documentation that he received medical treatment on those days of absence. If Petitioner is absent for two or more consecutive school days, and obtains medical treatment on the

first of those days, medical documentation covering the consecutive days shall be sufficient. If Petitioner fails to submit such medical documentation, then, notwithstanding paragraph 4 above, Respondent may reassign Petitioner to a different non-public school or a DCPS public school that can provide the specialized education and related services in his then-current IEP. For purposes of this paragraph, absence from one or more classes will count as a full day's absence.

6. In the event Respondent reassigns Petitioner, pursuant to paragraph 5 above, to a DCPS public school, or to a non-public school that enrolls non-disabled students, Respondent shall revise Petitioner's IEP to delete references to a separate private school. Respondent shall not, however, require Petitioner to enroll, reenroll, engage, or reengage in any school as a condition of such reassignment.

7. In the event Respondent reassigns Petitioner pursuant to paragraph 5 above, nothing in this Order precludes Petitioner from appealing such a reassignment on the grounds that the new location of services is unable to provide the specialized education and related services in his IEP.

8. If Respondent determines that Petitioner should attend summer school at Proposed School at Respondent's expense, and if Petitioner can earn thereby at least one Carnegie unit credit toward his high school graduation requirements, that summer school will satisfy Respondent's compensatory education obligation for the denial of FAPE to Petitioner.

9. If Respondent determines that Petitioner should not attend summer school at Proposed School, or not at Respondent's expense, then as compensatory education for the denial of FAPE to Petitioner, Respondent shall provide or fund one course during the

summer of 2013 that will allow Petitioner to earn one Carnegie unit. Respondent may determine that Petitioner will take the course in a classroom, with transportation, as long as the course begins after noon, and the classroom setting is in a separate private special education school and does not expose him to loud noises or crowds. In the alternative, Respondent may determine that Petitioner will take the course at his home on his own computer, in which case Respondent will provide or fund the course, any associated fees for obtaining Carnegie credit, and 20 hours of one-on-one assistance by a special education teacher or a tutor to assist Petitioner complete the course successfully. Respondent must ensure that the course, setting and teacher or tutor provided or funded will enable Petitioner to qualify for Carnegie credit.

10. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

11. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

12. Petitioner's other requests for relief are DENIED.

Dated this 22nd day of April, 2013.

Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

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

APPENDIX A

[redacted] District of Columbia Public Schools
Case No: 2013-0146

Adult Student/Petitioner	[redacted]
Date of Birth	[redacted]
[redacted]	[redacted]
Current Grade	[redacted]
Student ID Number	[redacted]
[redacted]	[redacted]
Private School	[redacted]
Public School #1	[redacted]
Public School #2	[redacted]
IEP Coordinator, Private School	[redacted]
[redacted]	[redacted]
Associate Head of School, Proposed School	[redacted]

[redacted]

[redacted]etermination From <charles.carron@dc.gov>

Date: Monday, April 22, 2013 6:15:51 AM

Attachments: Hearing Officer Determination Madden S 04.22.2013.pdf

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[redacted]

Thank you,

Charles M. Carron
Impartial Hearing Officer
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Office of the State Superintendent of Education
Government of the District of Columbia
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