OSSE
Student Hearing Office
October 2, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: October 1, 2013

Hearing Officer: Peter B. Vaden

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner, 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 ("D.C. Regs."). In her Due Process Complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by failing to develop and implement a full-time, therapeutic, Individualized Education Program ("IEP") for him.

Student, an AGE boy, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 22, 2013, named District of Columbia Public Schools ("DCPS") as respondent. The undersigned Hearing Officer was appointed on August 23, 2013. Concurrent with filing the Due Process Complaint, Petitioner's Counsel filed a request for an expedited hearing. After initially opposing the request, DCPS withdrew its opposition. The request to expedite was granted and the case was set for an expedited hearing. The IDEA requires that this decision be rendered within 10 school days after the hearing, by October 3, 2013. On August 29, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on September 18-19, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL and CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Petitioner's Counsel made an opening statement. DCPS' Counsel waived making an opening statement.

Petitioner called as witnesses, CFS SOCIAL WORKER, BEHAVIORAL CONSULTANT, CHILD PSYCHIATRIST, NONPUBLIC SCHOOL DIRECTOR, and DMH SOCIAL WORKER. DCPS called as witnesses LEA REPRESENTATIVE, SPECIAL EDUCATION TEACHER and SST COORDINATOR. Petitioner's Exhibits P-1 through P-20 and DCPS' Exhibits R-1 through R-25 were admitted into evidence without objection.

Counsel for both parties made oral closing arguments. At the request of Petitioner's Counsel, the parties were granted leave to file post-hearing briefs until September 23, 2013. Only Petitioner's Counsel elected to file a post-hearing brief.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- Whether DCPS has failed to develop and implement an appropriate IEP for Student, which provides for a full-time therapeutic special education placement, since Student was referred for services in October 2012; and

- Whether DCPS' April 18, 2013 IEP for Student, as amended in June 2013, is inappropriate because it fails to provide for Student's alleged requirement for full-time therapeutic special education services outside of the general education setting.

For relief, Petitioner seeks an order for DCPS to fund Student's private placement at Nonpublic School for the remainder of the 2013-2014 school year.[2]

FINDINGS OF FACT

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

1. Student, a AGE child, is a resident of the District of Columbia. He is eligible for special education and related services under the Primary Disability classification Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD"). Exhibit P-5.

2. Student and his younger brother were placed in foster care in March 2011, removing them from the care of biological mother following allegations of physical abuse. In September 2012, Student and his brother were removed from the first foster parent's home after that individual withdrew her application to adopt the children. On March 1, 2013, Student and his brother were placed in a new foster home. Exhibit P-9.

[2] Petitioner's request in her complaint for a compensatory education award was resolved in the resolution meeting before the due process hearing convened. *See* Exhibit R-25.

3. By order entered June 10, 2013, the Superior Court of the District of Columbia, Family Court, appointed Petitioner as the educational surrogate parent for Student with the rights, duties and responsibilities, *inter alia*, to aid Student in securing all rights provided under the IDEA and to challenge any matter relating to the evaluation, identification, placement, and the provision of a FAPE to Student. Exhibit R-17.

4. Since the beginning of the 2012-2013 school year, Student has been enrolled in City Elementary School, where he is now in the GRADE. Exhibit R-15.

5. In March 2013, Student was referred to DCPS DIAGNOSTIC CENTER for educational and psychological evaluations. The examiners concluded that Student's cognitive assessment results indicated that his overall cognitive abilities fall in the Borderline range of functioning (FSIQ=78). Student's verbal and non-verbal reasoning abilities fall in the Low Average range of functioning. Student fell in the Borderline range of functioning on the processing speed abilities scale. Student's executive function abilities were assessed using a Behavior Rating Inventory of Executive Functions (BRIEF-P) questionnaire completed by his classroom teacher. Based on the teacher's BRIEF-P ratings, Student fell in the Clinically Significant range on each domain that was assessed. Student's academic achievement was assessed with the Young Children's Achievement Test (YCAT). His scores on the YCAT indicated an overall performance in the below average range. Exhibits P-1, P-2.

6. The severe impact of Student's OHI disability on his learning is not in dispute. In a June 10, 2013 Functional Behavioral Assessment ("FBA") report, prepared by a DCPS social worker, it was reported that Student displays various maladjusted behaviors at school on a daily basis, primarily in the classroom and in the cafeteria. When Student gets upset he acts out in a physically aggressive manner – *i.e.*, rips up paper, overturns tables, throws pencils and crayons,

falls to the floor and thrashes his arms and legs, and kicks the desk, chairs, and bookshelves. Student will leave his seat and the classroom without permission and run down the hallway. At other times his behaviors are more dangerous and he threatens the safety of his peers. He is disrespectful and physically violent toward his classmates and teachers. He punches, hits and kicks them when he is mad. He will throw his body on the floor and will be oppositional, refusing to leave the classroom to calm down. When these behaviors occur they can last for 5 minutes to an hour. Any one of these problem behaviors may occur at least once a day. When Student is in crisis mode, he is not available to learn and disrupts the education for other students in his class. Exhibit R-15.

7. Student's initial IEP was developed on April 18, 2013 at City Elementary School. The IEP includes annual goals for Mathematics, Reading and Emotional, Social and Behavioral Development. For Special Education and Related Services, the IEP provides 1 hour per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all in the General Education Setting. (In a typographical error, the IEP states "240 hr per mon" for Behavioral Support Services.) Exhibit P-5. The IEP was amended on June 14, 2013 to add Extended School Year ("ESY") services. Exhibit P-4.

8. Student's birth mother participated in the April 18, 2013 IEP meeting by telephone. At that time, she still had educational decision making authority for her son. The birth mother disagreed with providing more special education and related services to Student than were agreed upon at the meeting. Testimony of CFS Social Worker.

9. On July 18, 2013, SST Coordinator at City Elementary School, completed a Least Restrictive Environment ("LRE") Justification for submission to the DCPS LRE review team. In the LRE Justification, SST Coordinator reported, with regard to Student's Social

Emotional/Behaviors:

On a daily basis, Student displays various maladjusted behaviors at school, primarily in the classroom and in the cafeteria. When he gets upset he acts out in a physically aggressive manner. These behaviors can last a minimum of 5 minutes to an hour. These incidents happen at least as many as 5 times a day with removal and/or his elopement from the classroom. Student has endured many changes in his short life. He has very limited coping skills. His current medical regimen has shown a decrease in hyperactivity. However, an increase in his awareness of how he lacks in academics when comparing himself to his peers, thereby increases his levels of frustration and the exhibition of inappropriate behaviors. The support specialists (DCPS & Department of Mental Health) have noted that the level of frustration that Student presents with is not typical for his age. For example, when he feels confident, he can reportedly write his name legibly and write a sentence with the initial sounds of most words and ending sounds of some words. However, if he is anxious, his writing is scribbled, frustration evolves and he escalates into physical aggression with peers and adults in the school and home settings. He receives ongoing support from the teacher, mental health staff member at the school, the school social workers and other staff members. Student's response to intervention is unpredictable. He engages in attention seeking and disruptive behaviors. It is important to note when Student attempts a task, he is engaging. However, his coping skills are very limited which causes him to responding inappropriately regardless of interventions.

Exhibit P-9, Testimony of SST Coordinator.

10. With regard to "Internalizes and externalizes emotions", the LRE Justification reports that Student:

- Becomes physical and verbally aggressive towards peers and adults;
- Openly rebels. Refuses to obey adult or adhere to redirection;
- Runs away from adult supervision;
- Has tantrums, oppositional defiance, hides his face;
- Displays unsafe behaviors, hits and pokes student (on occasion in the eyes);
- Destroys school property (rips paper, kick desks, chairs, book shelves, pours water on teacher's desk);
- Throws objects, hits teacher(s);
- On average, he is out of class 3 to 5 times a day, resulting from self initiating elopement or having to be removed from the class due to inappropriate behaviors;
- Shuts down emotionally and refuses to communicate his feelings;
- Has emotional outburst (pouts, crying, screams, will not talk, throws himself on the floor.

Exhibit P-9.

11. With regard to "classroom setting," the LRE Justification reports that in a "Larger

setting,"

- Student becomes frustrated and easily distracted;
- It is difficult to manage these behaviors due to the large number of students;
- He disrupts the class room by knocking over class room materials and/or furniture;
- In special classes, he demonstrates these same behaviors;
- With special accommodations, student may not comply;
- Academically Student functions below level;
- Student requires additional attention. When demands are placed on him, he is engages in the activity. But any demand placed on him becomes the trigger for his ability or inability;

In Smaller settings/groups:

- Even in small groups, he encounters difficulty;
- The classroom teacher predominately provides one on one instruction;
- Behavior - outcomes contingent on activity;
- Academics - minimum measurable growth;
- Even in small group setting, he is oppositional 95% of the time without any obvious external provocations.

Exhibit P-9.

12. On August 8, 2013, Petitioner's Counsel made a request to DCPS, by telephone and email, to schedule an IEP meeting for the purpose of placing Student in a full-time therapeutic special education day school before the beginning of the 2013-2014 school year. By email of August 12, 2013, DCPS' PROJECT COORDINATOR, RESOLUTION responded that she "suspected" this change could not be done without an official LRE review and a MDT meeting. She further stated it was DCPS' desire to exhaust all possible options within the DCPS programs and interventions before making such a "drastic change" to move Student from a full inclusion setting to a full-time out of general education setting at a non-public site. Project Coordinator, Resolution requested Petitioner's Counsel's thoughts on waiting to complete the process until late September or early October 2013 to review all of the data collected. By email of August 15, 2013, Petitioner's Counsel responded that if DCPS' final position was that Student must wait 30-40 days before a more restrictive placement could be discussed, Petitioner would

have no choice but to file immediately for a due process hearing. Exhibit R-24.

13. Petitioner filed her due process complaint in this case on August 22, 2013. Before that date, Resolution Specialist spoke with Petitioner's Counsel and informally offered to resolve the placement issue by amending Student's IEP to 27.5 hours per week and placing Student at a DCPS' Behavior and Educational Support ("B.E.S.") Program for students with behavior issues. Resolution Specialist explained that in the B.E.S. Program, Student would have no more than 11 students in the classroom, with a dually certified Special Education/General Education teacher, a classroom aide and a behavior tech specialist. Petitioner's Counsel responded that Petitioner would not take that offer because the B.E.S. Program did not have a full-time psychiatrist and a full-time psychologist on staff, at all times, to provide services to Student. Exhibit P-25.[3]

14. At the September 11, 2013 resolution session meeting for this case, Resolution Specialist stated that before the due process complaint was filed, he had offered to Petitioner's Counsel to amend Student's IEP to place Student in the B.E.S. Program. At the resolution meeting, he again made that offer, stating that DCPS could amend Student's IEP to provide 27.5 hours of Specialized Instruction and find a location of services within 10 business days. Petitioner's Counsel responded that Petitioner still wanted a full-time IEP for Student with 32 service hours and a setting outside the public school. She declined DCPS' offer. Exhibit R-25.

15. At the September 11, 2013 resolution session meeting, Student's 2012-2013 general education teacher reported that he had hit a limit with what he could do for Student in a general education setting and that a general education setting was not helping Student to learn

[3] Resolution Specialist did not testify at the due process hearing. This finding of fact is based upon the notes taken by Resolution Specialist at the September 11, 2013 resolution meeting for this case. *See* Exhibit R-25. The notes were admitted into evidence without objection and their accuracy was not refuted by Petitioner.

and be safe. That teacher remains Student's teacher for the current school year. Exhibit R-25.

16. Nonpublic School is a special education day school which offers comprehensive, tailor-made programming, for children in Kindergarten to 6th Grade. Most of the children at Nonpublic School have emotional disabilities as well as learning disorders. Classroom size is limited to 4 children with a maximum 4:1 student-to-teacher ratio. The school currently has 31 children enrolled. Besides the classroom teachers, Nonpublic School's staff includes, *inter alia*, a registered nurse, 6 full time social workers, 3 social worker interns, and related services therapists. Three psychiatrists and two psychologists in private practice are available to the school, as independent contractors, to provide services to students. Testimony of Director.

17. Nonpublic School has a current certificate of approval issued by the D.C. Office of the State Superintendent of Education ("OSSE"). The tuition cost is approximately $56,600 per year. Children as Nonpublic School have no in-school interaction with non-disabled peers. Testimony of Director.

18. Nonpublic School received a referral for Student. Student visited the private school where he met with one of the psychiatrists. The school's social worker obtained a social history on student. The Nonpublic School staff determined that Student is a child whom the school could help and that Nonpublic School would be appropriate for him. Student has been accepted for admission to Nonpublic School. Testimony of Director.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Legal Standard for Prospective Non-Public Placement

Petitioner asserts that Student is entitled to public funding by DCPS for his prospective private placement at Nonpublic School, because DCPS has failed to offer Student an appropriate IEP, which provides full-time therapeutic special education services outside of the general education setting. The IDEA ensures 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." 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). "The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010) (quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004)) A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24,

2012) (citing *Branham v. District of Columbia*, 427 F.3d 7, 11–12 (D.C.Cir.2005)).

Analysis

– *Has DCPS failed to develop and implement an appropriate IEP for Student, which provides for a full-time therapeutic special education placement, since Student was referred for services in October 2012?*[4]

– *Is DCPS' April 18, 2013 IEP for Student, as amended in June 2013, inappropriate because it fails to provide for Student's alleged requirement for full-time therapeutic special education services outside of the general education setting?*

Petitioner contends that DCPS' initial IEP for Student denies him a FAPE because it does not meet his alleged requirement for full-time, therapeutic, special education services. The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts 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. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The IEP issues asserted by Petitioner in this case concern only the second prong of the inquiry.

The IDEA's FAPE requirement is satisfied "by providing personalized instruction with

[4] This issue may be interpreted to include the claim that DCPS delayed excessively in completing Student's initial eligibility determination following alleged referrals in October 2012. Petitioner did not pursue that claim at the due process hearing. Moreover, it appears from the evidence that the birth mother did not consent to DCPS' conducting an evaluation of Student until January 31, 2013. *See* Exhibit R-1.

sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

With regard to DCPS' April 18, 2013 IEP, as amended on June 14, 2013 (collectively, the "June 14, 2013 IEP"), I find that the IEP, which provided Student only 1 hour per week of Specialized Instruction and 240 minutes per month of Behavior Support, in a general education setting, was inappropriate. Petitioner's expert, Behavioral Specialist, noted that Student was falling behind, academically, with only 1 hour per week of Specialized Instruction and that Student requires intensive social-emotional counseling and behavioral support throughout the school day. The inadequacy of the June 14, 2013 IEP was also established by DCPS' own evidence. For example, DCPS' June 10, 2013 FBA report, based on observations conducted in May 2013, described Student's daily disruptive behaviors as physically aggressive and

occasionally violent, often requiring that he be physically removed from the classroom for safety. Student's general education teacher reported that he had hit a limit with what he could do for Student in a general education setting and that a general education setting was not helping Student to learn and be safe. To the agency's credit, DCPS' Counsel, to did not attempt to argue that the June 14, 2013 IEP was appropriate. I find that Student was denied a FAPE by the June 14, 2013 IEP, because it was not reasonably calculated to enable Student to receive educational benefits.

Request for Award of Private School Placement

In this case, Student was first found eligible for special education services on April 18, 2013. His initial IEP provided scant services – 1 hour per week of Specialized Instruction and 240 minutes per month of Behavioral Support – in the general education setting. I have found that this IEP denied Student a FAPE. Petitioner seeks, as a remedy, an order for DCPS to fund Student's enrollment at Nonpublic School for the remainder of the 2013-2014 school year. DCPS argues that before removing Student to a nonpublic special education school, an attempt should be made to meet his education needs, in a more restrictive setting, in the public school system.

Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427

F.3d 7, 11 (D.C. Cir.2005). "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement. Although the [Local Education Agency ("LEA")] must pay for private school placement "'[i]f no suitable public school is available[,] . . . if there is an appropriate public school program available . . . the [LEA] need not consider private placement, even though a private school might be more appropriate or better able to serve the child.'" *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012), quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991).

The educators who testified at the due process hearing were generally in agreement on the scope of the specialized instruction and related services which Student needs. Petitioner's expert, Behavioral Consultant, observed that Student's "first and foremost" challenge is his behavior, which interferes with his learning He opined that Student requires full-time special education services, in a self-contained environment; that his services must include social-emotional counseling and behavior support throughout the school day; that the adults providing services to Student should be equipped to work with him on self-regulation, appropriate behaviors and social skills; and that the team should include a special education teacher, someone with a background in counseling and support staff trained in crisis intervention techniques. Behavioral Consultant has extensive experience working with children with behavioral disabilities and I found him to be a credible witness.

DMH Social Worker has provided individual therapy services to Student since October 2012. She opined that Student needs constant and ongoing support in learning emotional regulation and coping strategies and she emphasized the importance of assuring that all staff with whom Student interacts be highly trained and able to provide consistent and methodical interventions when needed. Of the witnesses at the due process hearing, DMH Social Worker

had the most extensive experience working with Student. I found her also to be a credible witness.

DCPS' witnesses, LEA Representative, Special Education Teacher and SST Coordinator, each of whom had also worked with Student, expressed views generally similar to that of Behavioral Consultant and Social Worker – that Student requires a smaller class size with more intensive behavioral support services. However, they also opined that Student would benefit from the opportunity to continue to interact with his nondisabled peers.

Child Psychiatrist proposed a more restrictive educational environment for Student than was recommended by the other experts. She opined that Student needs an educational setting where the whole school is based on therapy, and that Student would only be successful in a school that had a full-time psychiatrist on its staff to work hands-on with children in the classroom.[5] Child Psychiatrist is not an education expert and I accord less weight to her opinion.

In *N.T., supra,* U.S. District Judge Collyer held that reimbursement for private school tuition and cost was an inappropriate remedy in that case because (i) DCPS had been willing to modify Student's IEP to meet the child's need for small group instruction, (ii) the private school did not provide the least restrictive environment and (iii) although the private school offered smaller class sizes and unquestioned expertise, "[t]he question before the Court is not whether [the private school] could better educate N.T. than a public school but <u>whether N.T. could receive a FAPE at a public school</u>." *Id.* at 35 (emphasis supplied.)

Petitioner argues, on brief, that DCPS presented no specific evidence that Nonpublic School would not be appropriate for Student or that a particular more restrictive DCPS public school program would constitute the LRE for him. I find that Petitioner's argument falls short.

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[5] Nonpublic School, Petitioner's preferred placement for Student, is served by contract psychiatrists in private practice. The school does not have a full time psychiatrist on staff.

Analogizing to the *N.T.* case, the question before me is not whether Nonpublic School could help Student, but whether Student could receive a FAPE at a DCPS school. In that regard, DCPS has offered to change Student's placement from his current full-inclusion setting at City Elementary School to a DCPS B.E.S. self-contained program for students with behavioral issues. DCPS represents that the B.E.S. Program would provide small class size with no more than 11 children in the classroom, a teacher dually certified in Special Education and General Education, a classroom aide and a behavioral tech specialist. Petitioner, who bears the burden of proof, has not shown that Student could not receive, at DCPS' B.E.S. Program, the services identified by the education experts as necessary for the child to receive a FAPE, *e.g.*, full-time special education services in a self-contained environment and social-emotional counseling and behavior support throughout the school day.

Petitioner also argues against permitting DCPS "to have another chance at this late juncture" to identify an appropriate educational program placement for Student. *See Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (No authority permits a school system a second opportunity to conduct evaluations and propose an alternative placement where its failure to do so in the first instance violated the requirements of the IDEA.) With the Individuals with Disabilities Education Improvement Act of 2004, Congress recognized the need to provide additional opportunities for early dispute resolution. The resolution process was added as another way schools and parents can work out their differences whenever a parent has filed a due process complaint. The purpose of the resolution meeting "is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint." 34 CFR § 300.510(a)(2). To hold that DCPS could not offer Student a suitable public school

placement at the resolution meeting would vitiate the purpose of the resolution session to provide parents and the LEA with an opportunity to resolve the complaint and avoid a due process hearing. Moreover, Petitioner ignores that she rejected the B.E.S. placement for Student when informally offered by DCPS before Petitioner filed her due process complaint. In sum, I conclude that because Petitioner has not shown that DCPS is unable or unwilling to craft an appropriate IEP to provide a FAPE to Student, DCPS is not required to pay for Student's placement at Nonpublic School.

In lieu of ordering DCPS to fund Student's enrollment at Nonpublic School, I will order DCPS to convene Student's IEP team to revise his IEP. Special Education Hearing Officers have broad discretion in ordering relief for a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 8 (D.D.C. Feb. 20, 2013) (Once a court holds that the public placement violated the IDEA, the court enjoys broad discretion in granting such relief as it determines is appropriate.) I conclude that an appropriate, equitable, remedy in this case will be to order DCPS to ensure that Student's IEP is revised to address his required needs, as generally agreed by the expert educator witnesses in this case, and to match Student with a school capable of fulfilling those IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991).

ORDER

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

1. Within 10 school days of entry of this order DCPS shall convene Student's IEP team to revise his IEP in conformity with this decision. The revised IEP must provide Student full-time special education and related services, in a self-contained small class setting, designed for children with emotional disabilities;

2. Upon completion of the IEP, DCPS shall, without delay, identify a location of

services which is able to implement the revised IEP and to meet Student's specialized educational and behavioral support needs in accordance with this decision. The location identified by DCPS must be able to offer Student Specialized Instruction as well as social-emotional counseling and behavior support, throughout the school day. The services must be provided by qualified, experienced instructional and support staff, including the special education teacher, support staff, counselor and other related services providers, who have the requisite qualifications and training to be able to work with Student on self-regulation, appropriate behaviors and social skills, and crisis intervention. In the event that DCPS is not able to match Student with a public school capable of meeting these requirements, DCPS must provide funding for Student to attend an appropriate nonpublic special school; and

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

Date: October 1, 2013

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

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).