

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

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

Petitioner,

v.

PUBLIC SCHOOLS,

Respondent.

Date Issued: December 4, 2012

Hearing Officer: Peter B. Vaden

Hearing Dates: November 1, 2 & 8, 2012

Advanced Technology Center, Room H-104  
Virginia

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**HEARING OFFICER DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Request for Due Process filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, Title 22.1 of the Code of Virginia and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81-10, *et seq.* (“Va. Regs.”). In her due process request, Petitioner alleges that Public Schools’ (“ ”) proposed September 12, 2012 Individualized Education Program

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

("IEP") denies Student a free appropriate public education ("FAPE") because the IEP continues Student's enrollment at ALTERNATIVE SECONDARY SCHOOL.

Student, an AGE adolescent, is a resident of \_\_\_\_\_, Virginia. Petitioner's Request for Due Process, filed on September 24, 2012, named \_\_\_\_\_ as respondent. After first being assigned to another impartial hearing officer, the case was reassigned to the undersigned Hearing Officer on October 5, 2012. The parties met for a resolution session on October 8, 2012 and did not reach an agreement. The 45-day deadline for issuance of this Hearing Officer Decision began on October 25, 2012. On October 17, 2012, the Hearing Officer convened a prehearing telephone conference with the Petitioner and counsel for \_\_\_\_\_ 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 November 1, 2 and 8, 2012 at the \_\_\_\_\_ Center in \_\_\_\_\_, Virginia. A stenographic record of the proceedings, which were opened to the public, was made by Adams - Harris Reporting, Inc. The Petitioner appeared in person and was not represented by counsel. GRANDMOTHER, who represented that she was Student's court-appointed guardian, assisted Petitioner. For the first two days of the hearing, Petitioner was also assisted by LAY ADVOCATE. Respondent \_\_\_\_\_ was represented by SPECIAL EDUCATION COORDINATOR 1 and \_\_\_\_\_ COUNSEL. Virginia Department of Education Evaluator Reginald Frazier, Esq. attended the first two days of the hearing. Upon motion of counsel for \_\_\_\_\_, witnesses were excluded from the hearing room.

The Petitioner testified and called as witnesses, GUARDIAN *AD LITEM*, PRINCIPAL of NON-PUBLIC SCHOOL, COUNSELOR from Non-Public School, GREAT GRANDMOTHER, TEACHING ASSISTANT 1, Alternative Secondary PRINCIPAL, Grandmother, Student,

SPECIAL EDUCATION COORDINATOR 2, and IN-HOME COUNSELOR. called as witnesses Alternative Secondary Principal, SCHOOL PSYCHOLOGIST, SPECIAL EDUCATION TEACHER, ASSISTANT DIRECTOR OF PROGRAMS and Special Education Coordinator 1. Petitioner's Exhibits P-A through P-K were admitted without objection, except for Exhibit P-E (5-page document), to which ' objection was sustained. Exhibits R-A through R-H378 were admitted without objection, with the exceptions of R-C59 and R-H346 through R-H378, which were not offered after Petitioner's initial objection. The Petitioner and Counsel made opening and closing statements. At the request of , the parties were granted leave to file post hearing memoranda by November 16, 2012. Both parties filed post-hearing briefs.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and 8 VAC 20-82-210.

### **ISSUES AND RELIEF SOUGHT**

- WHETHER ' SEPTEMBER 12, 2012 IEP, DEVELOPED FOR STUDENT, IS INAPPROPRIATE BECAUSE IT PROVIDES AN INAPPROPRIATE EDUCATIONAL PLACEMENT AT ALTERNATIVE SECONDARY; and
- WHETHER IS DENYING STUDENT A FAPE BECAUSE ALTERNATIVE SECONDARY SCHOOL IS NOT ABLE TO IMPLEMENT HIS IEP.

For relief, Petitioner seeks an order for to fund Student's nonpublic placement at Non-Public School for the remainder of the 2012-2013 school year.<sup>2</sup>

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<sup>2</sup> See Prehearing Order, October 17, 2012.

## FINDINGS OF FACT

After considering all of the evidence, as well as the arguments and legal memoranda of Petitioner and \_\_\_\_\_ Counsel, this Hearing Officer's Findings of Fact are as follows<sup>3</sup>:

1. Student is an AGE resident of \_\_\_\_\_, Virginia, where he resides with Mother and other family members. Testimony of Mother.

2. Student was last found eligible as a student with a disability, who continued to need special education and related services, on December 14, 2011 at ALTERNATIVE SECONDARY under the primary disability, Multiple Disabilities (MD), based upon Student's displaying both Attention Deficit Hyperactivity Disorder ("ADHD") and a Specific Learning Disability. Exhibit R-B98.

3. For the 2011-2012 school year, Student was enrolled in GRADE at Alternative Secondary. Testimony of Mother. After the 2011-2012 school year, Mother has refused to allow Student to return to Alternative Secondary. Exhibits R-G2, R-G3. At the request of Mother, Student has received temporary medical homebound services, provided by \_\_\_\_\_, since September 24, 2012. Exhibit R-B(i)(11), Testimony of Alternative Secondary Principal.

4. Before moving to \_\_\_\_\_ in 2009, Student and Mother lived in \_\_\_\_\_, \_\_\_\_\_. Following an August 2005 neurological evaluation, a \_\_\_\_\_ pediatric neurologist reported that Student appeared to have ADHD and that he would benefit with medication. She also recommended additional private behavior management if his behavior were a problem. Exhibit R-F55.

5. Following a September 15, 2005 Psychoeducational Evaluation, a \_\_\_\_\_ learning consultant and a school psychologist reported that Student had been referred for

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<sup>3</sup> For purposes of the relevant findings of fact, the testimony of the witnesses was not in significant conflict. Therefore, it was not necessary to make a finding as to the respective witnesses' credibility.

evaluation due to severe emotional and behavioral difficulties. He was unable to function in a mainstream setting, and had been placed on home instruction. These evaluators reported that Student's cognitive/language performance was comparable to that of the average child at his age level. His overall motor profile score was within the below-average range for children of his age level. Exhibit R-F47.

6. In a September 20, 2005 evaluation report, a \_\_\_\_\_ psychiatrist reported his impressions that he concurred with Student's ADHD diagnosis and that there were reasons to feel that Student experienced some trauma from a dog bite and this may have significantly exacerbated his behaviors. The psychiatrist recommended that Student was in need of treatment through a pediatric psycho-pharmacologist and stated that it was unlikely that Student could function in a regular classroom without medication. Exhibit R-F38.

7. On October 20, 2005, the \_\_\_\_\_, \_\_\_\_\_ Public Schools Child Study Team made an initial determination of Student's eligibility for special education and related services under the Classification Type, Multiple Disabilities ("MD"). The Child Study Team's reported rationale was:

Multiple disabilities means concomitant impairments, the combination of which causes such severe educational problems that programs designed for the separate disability conditions will not meet the student's educational needs. [Student] has an ADHD diagnosis and he presents with emotional weaknesses as well.

Exhibit R-H257.

8. In January 2007, the \_\_\_\_\_ Child Study Team placed Student at ALTERNATIVE SCHOOL due to his disruptive behaviors. Exhibit R-F13.

9. Following an October 2008 educational evaluation, when Student was in the Third Grade, a \_\_\_\_\_ Certified Learning Consultant reported that Student's levels of academic achievement ranged from significantly below grade expectancy in language arts and

literacy areas to low average in math; that graphomotor weakness may tend to make written work more tedious for Student and that his level of activity, inability to maintain focus on given tasks, and need for consistent and almost constant guidance and reinforcement continued to impact on his cumulative learning as well as on his day-to-day classroom performance. Exhibit R-F13.

10. In February 2009, a school psychologist conducted a psychological evaluation of Student. At that time, Student was attending Alternative School's self-contained program for children with behavioral disorders and was receiving speech and language services once a week and counseling services twice a week. The school psychologist reported, *inter alia*, that Student's overall intellectual function was within the low average range. His overall cognitive profile and presentation suggested that his impulsive response style and off-task behaviors continued to impact on his ability to concentrate and focus on task. The school psychologist reported that Student's then-current educational program at Alternative School provided him with a small classroom and individualized learning to maximize his potential. Exhibit R-F8.

11. On February 23, 2009, the Child Study Team determined that Student remained eligible for special education under the MD classification, because Student had a history of ADHD and also had a specific learning disability ("SLD"). Exhibit R-H1.

12. Student's May 23, 2009 IEP, developed by the Public Schools Child Study Team, continued Student's placement at Alternative School, which provided for a small group setting and individual attention and instruction. The IEP contained a behavioral intervention plan, which included teacher and staff support, modeling, role playing/behavioral rehearsal and "Verbal self-talk to exercise control." Exhibit R-H6.

13. In the summer of 2009, Student and Mother moved to . At a July 22, 2009 meeting, the IEP team recommended that an interim IEP be developed for Student pending the gathering of observational information. The team decided to place Student at REGULAR ELEMENTARY SCHOOL, with pull-out services for language arts and math. The IEP team felt that Student's needs could be met at Regular Elementary School with pull-out services, and wanted to give Student "this chance" before pursuing alternative placements. Mother gave consent to implement this interim IEP. Exhibit R-B207.

14. convened IEP meetings for Student in October 2009. At a meeting on October 13, 2009, the IEP team adopted an IEP, which maintained Student's placement at Regular Elementary School. Mother gave consent to implement this IEP. Exhibit R-B224.

15. At an IEP meeting on October 23, 2009, the IEP team decided to change Student's placement to ALTERNATIVE ELEMENTARY in , a more restrictive environment than Regular Elementary School. In the October 23, 2009 IEP, the team explained its rationale for the change:

Before transferring to [ ], [Student] attended a private separate school facility [in ] for students exhibiting challenging behaviors. When the IEP team first met with [Mother] in the summer of 2009, the IEP team reviewed the previous school's records and IEP and decided they wanted to give [Student] the chance to receive his services in his home school. At this time, [Student] has exhibited behavior challenges that require a more intense level of services than can be provided at [Regular Elementary School]. The IEP team feels [Student's] needs can be better met through the [Alternative Elementary] program that is in the public separate school facility that is located in a public school building . . . and is administered by Cooperative Education Program [sic].

Mother gave consent to implement this IEP. Exhibit R-B258,

16. In an October 30, 2009 Educational Programs (" ") Coversheet for Services packet, reported that Student had "demonstrated

behaviors that prevent him from learning including disruptive actions, verbal outbursts, inciting fights, hitting students and other physical altercations. [Student] transferred from where he was in an alternative setting. Attempts were made to accommodate public school placement but were not successful.” Exhibit R-C52.

17. Alternative Elementary and Alternative Secondary operate under the aegis of CEP. They offer educational programs that serve students, aged five to 21, who are identified as having an emotional disability and who have been unable to maintain appropriate behavioral control in previous placements. Exhibit R-B(i)006.

18. Alternative Elementary is housed in one hallway in a regular elementary school. It is divided off from the rest of school. Testimony of Teaching Assistant 1.

19. At Alternative Elementary Program, Student was placed for large amounts of time in the Student Quiet Area (“SQA”) for seclusion. The SQA is a small, windowless, room, approximately 7 feet square, with a lockable door, used as a holding facility to “de-escalate” out-of-control students. Student was placed in the SQA to extinguish his physical aggression behaviors toward other students. Testimony of Teaching Assistant 1.

20. Student was assigned a 1:1 teaching assistant at Alternative Elementary. For the second half of the 2010-2011 school year, Student’s teaching assistant was Teaching Assistant 1. Testimony of Teaching Assistant 1.

21. Student’s IEP team convened at Alternative Elementary on February 8, 2010 and decided to continue Student’s placement in the Alternative Elementary program. Mother gave consent to implement this IEP. Exhibit R-B167.

22. On May 26, 2010, Student’s IEP team convened again at Alternative Elementary and adopted an IEP addendum Behavior Intervention Plan, because Student had demonstrated



serious incidents of physical aggression on an on-going basis, which warranted a behavior intervention plan to address these behaviors. Exhibit R-B152. Student had been verbally aggressive toward some students and, at times, physically aggressive towards staff. Testimony of Teaching Assistant 1. Mother gave consent to implement this IEP addendum. Exhibit R-B152.

23. On February 4, 2011, at the next IEP meeting at Alternative Elementary, Student's behavior was reported to have worsened:

[Student] has difficulty interacting with peers in a positive manner . . . [Student] also engages in negative verbal and physical exchanges with peers in the classroom, initiating the exchanges with inappropriate gestures much of the time. If a student responds to his inappropriate behavior with a negative remark, [Student] takes it to another level, throwing objects, using profanity, or running around the room provoking. . . . Last year, [Student] enjoyed participating in group activities involving development of individual weekly goals and social skills, but has refused to attend groups during the second quarter of this school year. . . [Student] threatens staff and uses physical aggression toward them when re-directed. . . . Often when directed to leave the classroom to avoid conflict and end the disruption, [Student] will refuse to leave and attempt to get to his peers. He has become physically aggressive during these events throwing objects at staff and peers, hitting and kicking staff.

Exhibit R-B110.

24. At the February 4, 2011 IEP meeting, the IEP team decided to continue Student's placement at Alternative Elementary. The February 4, 2011 IEP provided for full-time special education instruction in the Alternative Elementary program and Extended School Year ("ESY") services, also at Alternative Elementary. No psychological services or other related services are specified in the IEP. Mother gave consent to implement this IEP. Exhibit R-B110.

25. In the fall of 2011, Student matriculated to Alternative Secondary. Alternative Secondary is housed in a separate wing of a alternative education facility for middle and high school students. All of the students in Alternative Secondary have identified IDEA disabilities. There are typically 8-10 students per classroom. Each classroom is staffed by a

minimum of two teachers, one of whom is certified in special education. Every classroom is assigned an education specialist, who typically will also be assigned to one or two other classrooms. In most classrooms there is a full time teaching assistant. Testimony of Alternative Secondary Principal.

26. Student's 2012 annual IEP review was conducted on February 17, 2012. The February 17, 2012 IEP provides for full time special education instruction in the Alternative Secondary program and ESY services. No psychological services or other related services are specified in the IEP. Mother gave consent to implement this IEP. Exhibit R-B50.

27. Like Alternative Elementary, Alternative Secondary has a School Quiet Area ("SQA"), comprised of six separate rooms, in which disruptive students may be isolated, so that there is no stimulus or attention given to that student. No instruction occurs in the SQA. If a student is sent to the SQA and secluded, staff members do not interact with the student during moments of escalation. Once a child has de-escalated, prior to going back to a classroom, there would be processing with the student to assure that he is ready to return to the classroom and be safe. When the SQA is used for seclusion, the student is placed in the room with the door secured and a staff member monitoring. A student would only be secluded for safety issues – where a student is harming himself or harming others. If a student is sent to the SQA because he is out of control, as evidenced by hitting, kicking, or screaming, staff would monitor the student for a cessation of the problem behavior. When the disruptive behavior stops, after a few minutes, staff would make a "compliance check," *i.e.*, give the student a simple direction, such as "step to the back wall," "tuck your shirt in," or "put your belt on correctly." If the student is able to comply with the simple directions, he may be sent back in his classroom to receive instruction. Testimony of Alternative Secondary Principal.

28. Teaching Assistant 1 continued to be Student's 1:1 teaching assistant for most of the 2011-2012 school year at Alternative Secondary. Whenever Teaching Assistant 1 was in Student's classroom, he stood directly next to Student – right on top of him – and was able to observe him. Teaching Assistant 1 observed a lot of aggression by Student against other students, mostly verbal. Student remained in his seat well, and except when he got out of his seat to engage in acts of physical aggression against other students, Student kept his hands and his feet to himself. Testimony of Teaching Assistant 1.

29. In addition to the support of the 1:1 teaching assistant, other behavior interventions used in Student's classroom included modeling of desired behavior by the staff, a token economy system to reinforce desired behaviors and a recognition system for the most-improved student and student of the week. Testimony of Alternative Secondary Principal.

30. When Student engaged in disruptive behaviors at Alternative Secondary, staff had a continuum of responses available. First, the teaching assistant would try closer physical proximity or sitting with Student in the classroom. If Student was still disruptive, then the teaching assistant would take Student to an area outside that classroom where Student could be in a location by himself, away from other students and disruptive stimuli. If Student was still disruptive, a staff member would try to redirect and refocus him. If that was not effective and Student's behavior became a safety issue, then Student would be conducted to the SQA. Testimony of Alternative Secondary Principal.

31. Over the course of the 2011-2012 school year at Alternative Secondary School, Student's behaviors worsened. At the beginning of the school year, he was doing better, and then, toward the end of the year, he had a declining time. For the first half of the year, Staff attempted placing Student in SQA for two minute spurts because of Student's resistance. Staff

could not get the door closed or get Student to remain in the SQA. Toward the middle of the year, staff sent Student to SQA for longer periods, because there were too many trips and too much disruption to class. Testimony of Teaching Assistant 1.

32. As of December 2011, Student's IEP team reported that he had made only marginal educational progress for the school year. He continued to have significant issues with physical aggression toward staff and peers as well as [making] verbal threats. He had difficulties remaining in class due to his constant disruptive behaviors. He was able to complete most assignments with one-on-one assistance and when separated from class distractions. Exhibit R-B98.

33. Following April 9-13, 2012 spring break, Alternative Secondary replaced Student's teaching assistant and adopted a new individualized behavior plan for Student. The new assistant, TEACHING ASSISTANT 2, would meet Student at the school backdoor in the mornings, and hold a 1:1 pre-class session with Student in a designated office to go over behavior rules and expectations and to complete his morning work. Student would then move on to his classroom, where he would have to recite the behavior rules. Student knew that if he did not follow the rules, he would have to leave the classroom. If he followed the rules, he would be rewarded with stickers which would allow him to earn rewards at the end of the day. Following the assignment of Teaching Assistant 2 and the implementation of the new behavior plan, there was a marked improvement in Student's behavior. He would stay on task and in class more. Before the new plan was implemented, Student remained in class at best for ten minutes at a time. By the end of the year, he was, a times, staying in class for the entire subject period. Testimony of Special Education Teacher.

34. After the new behavior plan was adopted, there was a reduction in the frequency

and duration of Student's seclusions in the SQA. From September through November 2011, Student had 42 critical incidents resulting in seclusion in the SQA for a total of over 1,530 minutes. From December 2011 through February 2012, Student had 32 incidents resulting in seclusion in the SQA for a total of 1,550 minutes. From March 2012 through May 2012, Student had 17 incidents resulting in seclusion in the SQA for a total of 1,087 minutes. After the 2012 spring break, Student was secluded in SQA on April 18, 2012 (60 minutes), April 26, 2012 ( two incidents - 35 minutes and 22 minutes), April 27, 2012 (153 minutes), May 3, 2012 (15 minutes), May 4, 2012 (three incidents - more than 30 minutes), May 14, 2012 (several minutes) and May 31, 2012 (100 minutes). Testimony of Assistant Director of Programs, Exhibit R-D001, Exhibit R-D1.

35. At an April 27, 2012 IEP meeting at Alternative Secondary, convened at Mother's request, Mother requested that Student's placement be moved from Alternative Secondary to a regular public middle school. She expressed her concern that Student's behavior, particularly his aggression, had worsened over the 2011-2012 school year. In a prior written notice dated April 27, 2012, gave notice to Mother that, "The placement was rejected due to minimal progress on behavioral goals." Exhibit R-B37.

36. Student made some educational progress in reading and writing over the 2011-2012 school year. His ability to participate at a higher reading level progressed throughout the year. At the beginning of the year it was very difficult to get Student to write at all. As the year progressed, he was able to write complete sentences and keep them in the logical differential order, so that the sentences followed through in a manner that was easy to understand. Testimony of Special Education Teacher.

37. On May 31, 2012, Student was involved in a serious incident of physical

aggression after the school day ended. Following a confrontation between Student and Mother and Teaching Assistant 2 in the Alternative Secondary school parking lot, Teaching Assistant 2 restrained Student and forced him back to the school building into the SQA. During this incident, Alternative Secondary Principal received a serious injury. The school resource officer transported Student to the Juvenile Intake Unit where he was charged with assault and battery. Exhibit R-D129, Testimony of Guardian *ad litem*. Student served 14 days in the Juvenile Detention Center. Testimony of Mother. Since the May 31, 2012 incident and subsequent judicial proceedings, Mother has refused to allow Student to return to Alternative Secondary. Exhibit R-G2 (Recording of Sept. 12, 2012 IEP Meeting).

38. Beginning approximately June 2012, upon the application of Mother, the Community Services Board instituted intensive in-home counseling services for Student, by a counselor (“In-Home Counselor”) from a private organization that assists at-risk youths in the Virginia community. In-Home Counselor works with Student two times per week. The purpose of the counseling is to stabilize Student within his home and prevent him from returning to detention. Testimony of In-Home Counselor.

39. In-Home Counselor has a bachelor's degree in social work, and intensive experience in working with juvenile offenders in juvenile detention. He has been working for nine years as a part-time in-home counselor. Testimony of In-Home Counselor.

40. In-Home Counselor has observed that Student does not accept responsibility for his negative actions; that Student tries to control how much counseling or redirection he should receive; that Student's tolerance and patience seem to be low, which causes a lot of the frustration that he displays; that when Student has to take responsibility for his actions, he does not have the tolerance and patience to deal with it entirely, which causes him to display negative

behavior, negative outbursts, negative comments, and negative physical behaviors. Testimony of In-Home Counselor.

41. From July 24 through July 30, 2012, Student was admitted to BEHAVIORAL HEALTH CENTER due to his out-of-control behaviors at home and threats and aggression toward family members. Student informed the admitting physician that he had a great deal of difficulty at school and was just escalating with his level of irritability and progressive explosive violence. His July 30, 2012 discharge diagnoses were Mood Disorder Not Otherwise Specified, Attention Deficit Hyperactivity Disorder (severe) and Disruptive Behavior Disorder. Exhibit P-I.

42. The examining psychologist at Behavioral Health Center conducted a psychological evaluation of Student on July 27, 2012. He reported, *inter alia*, that barring complicating factors, Student should be capable of average academic performance; that it appeared that impulsivity associated with ADHD played a significant part in Student's behavioral problems, particularly his aggression; that data suggested that Student was a very angry and anxious child who struggled to control his affect; that Student's moods tended to change quite rapidly although he appeared to have some understanding of his emotional triggers; and that Student acted aggressively due to a combination of mood disorder, ADHD and significant insecurities about himself. Exhibit P-I.

43. The examining psychologist recommended pharmacological treatment for Student's mood disorder and ADHD, and that Student will likely need a therapeutic milieu in which he can develop a consistent and regular relationship with a therapist to begin to address his anger and sadness. The psychologist reported that Student presents as being very treatable and that his prognosis is relatively good with adequate treatment. Exhibit P-I.

44. At an IEP meeting on September 12, 2012, considered a request by Mother to place Student at Non-Public School. rejected this option because Student's needs were allegedly being met at Alternative Secondary. During this meeting, Special Education Coordinator 2 offered, for the first time, to add to Student's IEP 60 minutes per week of mental health services, by a school psychologist, as a related service. Mother and Guardian *ad litem*, who also attended the meeting, did not agree with the IEP and Mother refused consent to implement the IEP revision. Exhibit R-B(i), Exhibit R-G2.

45. The September 12, 2012 IEP team did not include a psychologist or other mental health professional with special expertise to address the mental health component of Student's educational needs. Exhibit R-B15.

46. psychological services has one full-time and one part-time school psychologist to provide therapeutic services as IEP related services at Alternative Secondary. These school psychologists do not intervene in student crisis situations because of safety concerns. Testimony of School Psychologist.

47. At an IEP meeting on September 21, 2012, at Mother's request, Student's IEP team decided that Student would receive temporary homebound services for six hours per week, beginning September 24, 2012. Mother consented to implement homebound services. Exhibit R-B11.

48. Non-Public School is a private day facility in , which services students with emotional disabilities and also operates an autism program. Its current enrollment is just over 30 students in Grades K-12. Student has not yet been accepted at Non-Public School. Non-Public School staff have not interviewed Student or reviewed his educational or mental health records. Except for giving Mother and Student a tour of the school, Non-Public



School staff have had no interaction with Student. Testimony of Non-Public School Principal,  
Testimony of Non-Public School Counselor.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument and legal memoranda of Petitioner and 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 the responsibility of the party seeking relief – the Petitioner in this case. *See, e.g., Sch. Bd. of The City of Norfolk v. Brown*, 769 F.Supp.2d 928, 938 (E.D. Va. 2010) (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005)).

#### **Legal Standard for Prospective Non-Public Placement**

In this case, Petitioner asserts that under the IDEA, Student is entitled to placement at Non-Public School, at public expense, because denied Student a FAPE by maintaining his placement at Alternative Secondary for the 2012-2013 school year. The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” *Hogan v. Fairfax County School Bd.*, 645 F.Supp.2d 554, 562 (E.D. Va. 2009) (quoting 20 U.S.C. § 1400(d)(1)(A).) To achieve this purpose, the IDEA extends federal funding to the states to provide disabled schoolchildren with a FAPE. 20 U.S.C. § 1412(a)(1)(A). A FAPE requires a school district to provide educational services in the so-called “least restrictive environment,” *i.e.*, the educational environment suitable for the disabled student that is most similar to the public school

environment in which non-disabled children are educated. 20 U.S.C. § 1412(a)(5); *Sch. Bd. of Prince William County v. Malone*, 762 F.2d 1210, 1213 (4th Cir.1985). Where the public school district is unable to provide a FAPE in the public schools, the IDEA requires the school district to assume the cost of educating the child in a private school that meets the child's educational and social services needs. 20 U.S.C. § 1412(a)(10)(B). *Hogan, supra*.

To provide a FAPE, the school district is obligated to devise an IEP 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* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991). The IDEA establishes detailed procedures for the development and review of the IEP, a plan designed by a team consisting of school district educators and administrators, education experts, and, of vital importance, the child's parents. The FAPE requirement is satisfied when a school district provides the disabled child with "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 106 (4th Cir.1991) (citing *Rowley, supra*, 458 U.S. at 203, 102 S.Ct. 3034). To provide an "appropriate" education within the meaning of the IDEA, the school district does not have to provide the child with the best possible education. *MM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir.2002). Once a FAPE is offered, the school district need not offer additional educational services. *Id.* That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the disabled child, the IDEA does not require the furnishing of every special service necessary to maximize each disabled child's potential. *Id.*

at 526-27. 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).

The question of whether a public school placement is appropriate rests on (1) whether the school system has complied with IDEA’s administrative procedures and (2) whether or not the IEP “developed through the Act’s procedures [is] reasonably calculated to enable the child to receive educational benefits.” See *Hudson By and Through Tyree v. Wilson*, 828 F.2d 1059, 1063 (4<sup>th</sup> Cir.1987) (quoting *Rowley, supra*, 458 U.S. at 206-207). Serious procedural noncompliance can by itself support a finding that the child has not been provided with a FAPE. *Hudson, supra*. In making this determination, a hearing officer must defer to educators’ decisions so long as the IEP at issue provides the child “the basic floor of opportunity that access to special education and related services provides.” See *Tice ex rel. Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir.1990) (quoting *Rowley, supra*, 458 U.S. at 201, 102 S.Ct. 3034).

### ANALYSIS

The issues raised by Petitioner in this case are (i) whether [redacted] February 17, 2012 IEP, with the mental health services proposed by [redacted] on September 12, 2012 (collectively the “September 12, 2012 IEP”) is inappropriate for Student because the IEP provides an inappropriate educational placement at Alternative Secondary; and (ii) whether [redacted] has denied Student a FAPE because Alternative Secondary is not able to implement his IEP.<sup>4</sup>

#### I. IS STUDENT’S PLACEMENT UNDER THE SEPTEMBER 12, 2012 IEP INAPPROPRIATE?

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<sup>4</sup> See October 17, 2012 Prehearing Order. As provided in the Prehearing Order, at the due process hearing, I limited the issues to those set forth in the order.

The issue of whether [redacted] ' September 12, 2012 IEP placing Student at Alternative Secondary is inappropriate rests on (i) whether [redacted] has complied with IDEA's administrative procedures in developing the IEP and (ii) whether the September 12, 2012 IEP is reasonably calculated to enable Student to receive educational benefits. *See Hudson, supra*, 828 F.2d at 1063. Because Petitioner has not alleged that [redacted] failed to comply with the IDEA's procedural requirements, I proceed directly to the second prong of the inquiry.

The first purpose of the IDEA, identified by the Congress in the Act, is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)-(4); 34 CFR § 300.1(a). To that end, every IEP must contain annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability as well as a statement of the special education and related services and supplementary aids and services, to be provided to the child, to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. 34 CFR §§ 300.320(a)(2), 300.320(a)(4). The child's IEP team must review and revise the IEP, as appropriate, to address, *inter alia*, information about the child provided to, or by, the parents, and the child's anticipated needs. 34 CFR § 300.324(b).

“Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on the child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits.” *S.H. v. Fairfax Cnty. Bd. of Educ.*, Civil Action No.: 1:11-cv-128 (E.D.Va. Jun. 19, 2012) (Internal quotations and citations omitted.) Before focusing on Student's needs for the 2012-2013 school year, it is appropriate to review Student's history of behavioral challenges associated with his mental

health disabilities.

Student was placed in \_\_\_\_\_' alternative education program in 2009, when he was nine years old, because of his behaviors that prevented him from learning, including disruptive actions, verbal outbursts, inciting fights, hitting students and other physical altercations, and because attempts made to accommodate him in a regular \_\_\_\_\_ public school were not successful. Despite this profile, \_\_\_\_\_' IEPs for 2009-2010 and subsequent school years provided no mental health related services to assist Student to benefit from special education. *See* 34 CFR § 300.34(a). Student's in-school behaviors worsened in the 2011-2012 school year at Alternative Secondary to the extent that, for safety reasons, Student had to be confined in the School Quiet Area for a total of over 70 hours. Although \_\_\_\_\_ now maintains that Student was making progress on his behavior goals toward the end of the 2011-2012 school year, Student still had to be confined in the SQA for a total of 1,087 minutes during his last three months of school, including several seclusions of one hour or more. In December 2011, Student's IEP team reported that he had made only marginal educational progress thus-far for the school year. He continued to have significant issues with physical aggression toward staff and peers as well as [making] verbal threats. Near the end of the school year, Student's IEP team concluded that Student had made "minimal progress" on his behavioral goals.

Student's last day at Alternative Secondary was May 31, 2012. Following a violent incident that day, which resulted in serious injury to Alternative Secondary Principal, Student was incarcerated for 14 days in \_\_\_\_\_ juvenile detention. Over the summer, Student's severe behaviors continued. Six weeks before the September 12, 2012 IEP meeting, Student was admitted to the acute unit at Behavioral Health Center, due to his out-of-control behaviors at home and threats and aggression toward family members. The Behavioral Health Center

psychologist reported that Student's impulsivity associated with ADHD played a significant part in his behavioral problems, particularly his aggression; that data suggested that Student was a very angry and anxious child who struggled to control his affect; that his moods tended to change quite rapidly, and that Student acted aggressively due to a combination of mood disorder, ADHD and significant insecurities about himself. The psychologist added diagnoses of mood disorder and disruptive behavior disorder to Student's mental health axis, in addition to the previously diagnosed severe ADHD. Clearly, when the IEP team met in September 2012, Student was presenting as a child with a serious mental health disability that interfered with his benefitting from special education.

Prior to the September 12, 2012 IEP meeting, had refused to change Student's February 17, 2012 IEP, which continued his placement at Alternative Secondary and provided no related services. In the middle of the September 12, 2012 IEP meeting, offered, for the first time, to add 60 minutes per week of mental health services to Student's IEP. Under this proposal, a licensed school psychologist would provide scheduled counseling services to Student, but would not be permitted to intervene directly, when there was a recurrence of Student's extreme behaviors and aggressions, which had resulted in his being secluded in the SQA for more than 70 hours in the prior school year. The September 12, 2012 IEP team did not include a psychologist, or other mental health professional, who could address the mental health component of Student's educational needs,<sup>5</sup> or address how the provision of 60 minutes per week of counseling would suffice to enable Student to advance, appropriately, toward attaining his IEP annual goals and to be involved in and make progress in the general education curriculum. *See*

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<sup>5</sup> *See* 34 CFR § 300.321(a)(6). "The public agency must ensure that the IEP Team for each child with a disability includes [*inter alia*]. . . [a]t the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate."

34 CFR § 300.320(a)(4). Neither was testimony offered at the due process hearing to show how the addition of this service to Student's IEP would assist Student to benefit from special education. Considering Student's minimal progress on his behavior goals during the 2011-2012 school year, his hospitalization in July 2012 for out-of-control behaviors and aggression, the new diagnoses of Student's mental health disorders by the Behavioral Health Center psychologist, and the insights of In-Home Counselor informed by many hours' work with Student, I find that, notwithstanding ' offer to provide 60 minutes per week of mental health services, the September 12, 2012 IEP did not appropriately address Student's ADHD and emotional disturbance disorders and was not reasonably calculated to enable Student to receive educational benefits.

II. IS ALTERNATIVE SECONDARY UNABLE TO IMPLEMENT THE SEPTEMBER 12, 2102 IEP?

' proposed September 12, 2012 IEP provides for full-time special education instruction and ESY services in the Alternative Secondary classroom, 60 minutes per week of mental health services and school transportation. Petitioner, who has the burden of proof in these proceedings, offered no evidence, that is not willing and able to implement these services, if Parent sends Student back to Alternative Secondary. Instruction in the full-time special education classroom and school transportation are services which has provided to Student in prior school years. Mental health services would be an addition to Student's IEP. At the due process hearing, it was established that employs school psychologists at Alternative Secondary, who are able to provide mental health services, if identified as a related services requirement by a child's IEP Team. I find, therefore, that Petitioner has not shown that Alternative Secondary is unable to implement the September 12, 2012 IEP.

## REMEDY

A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2496 (2009) (“In determining the scope of the relief authorized, we noted that ‘the ordinary meaning of these words confers broad discretion on the court’ and that, absent any indication to the contrary, what relief is ‘appropriate’ must be determined in light of the Act’s broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary.” *Id.*, 557 U.S. at 237-238 (quoting *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U. S. 359, 369 (1985).)

I have found, in this decision, that [redacted]’ September 12, 2012 IEP was not reasonably calculated to provide Student a FAPE. Petitioner’s requested remedy is that [redacted] be ordered to fund Student’s prospective enrollment at Non-Public School for the remainder of the 2012-2013 school year. 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 the private school is reasonably calculated to enable the child to receive educational benefits. *See School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U. S. 359, 370 (1985). Petitioner has the burden of proving that the proposed private placement is proper. *Cf. J.P. v. County School Bd. of Hanover County*, 447 F.Supp.2d 553, 587 (E.D.Va. 2006) (Once parents have proved that an IEP offered to their child by an LEA is inappropriate, to obtain reimbursement for their unilateral private placement, the parents have the burden of proving the private placement they selected is proper under the IDEA.)

Petitioner offered no competent evidence, at the due process hearing, that Student’s



placement at Non-Public School would be proper under the IDEA. Prior to the hearing, the Non-Public School administrators' only interaction with Student was to give a tour of the school to Student and Mother. He had not been accepted by the school. No one from the Non-Public School had interviewed Student or reviewed his records. Therefore, whether Student would be able to receive educational benefits at Non-Public School, or even whether the private school would admit Student, with his history of physical aggression and out-of-control behaviors, is a matter of pure speculation. *Cf., e.g., Guererro v. Deane*, Civil Action No. 1:09cv1313 (E.D.Va. Sept. 10, 2012) (Court will disregard opinion on such matters if they constitute mere speculation, not supported by facts.) I find, therefore, that Petitioner has not met her burden of proving that placement of Student at Non-Public School would be proper under the IDEA.

I find that the appropriate equitable remedy in this case is to order \_\_\_\_\_ to conduct an IDEA reevaluation of Student, pursuant to 34 CFR § 300.303(a)(1), to determine his current IDEA disabilities and his needs for special education and related services. The IDEA requires that an LEA must ensure that a reevaluation of each child with a disability is conducted if the LEA determines that the educational or related services needs of the child warrant a reevaluation. *See* 34 CFR § 300.303(a). In view of the changes in Student's social-emotional and behavioral functioning since Student's last special education reevaluation in December 2011 and his changed mental health diagnoses, a special education reevaluation is warranted. Further, pursuant to 34 CFR 300.502(d), as part of the reevaluation, I will order the LEA to provide an independent comprehensive psychoeducational evaluation of Student, at public expense. The independent evaluator shall be a psychologist, or other professional, qualified to evaluate Student's emotional and behavioral disorders and to recommend appropriate special education and related behavioral support and therapeutic services, calculated to permit Student to benefit

educationally from future instruction. *See Doyle v. Arlington County Sch. Bd., supra.* Upon receipt of the IEE evaluation report, Student's IEP team shall promptly convene to update his IEP, determine his special education and related services needs, and identify an appropriate placement that is capable of fulfilling those requirements. Whether that placement should be Alternative Secondary, or another public or non-public school, will be a decision for the IEP team, guided by the requirements of the IDEA and the Va. Regs., and informed by the new evaluations and assessments.

### **ORDER**

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

1. Subject to obtaining parental consent,<sup>6</sup> shall, within 10 business days of entry this order, initiate a special education reevaluation of Student, pursuant to 34 CFR §§ 300.303 through 300.306. As part of that reevaluation, shall fund an IEE comprehensive psychoeducational evaluation by a psychologist, or other professional, qualified to evaluate Student's emotional and behavioral disorders and to recommend appropriate special education and related behavioral support and therapeutic services. Upon receipt of the reevaluation assessments and other data, shall promptly convene Student's IEP team to revise his IEP as appropriate, to determine his special education and related services needs, and to match Student with a school capable of fulfilling those needs.
2. If requested by Mother, shall continue to provide homebound services to Student for the period of time reasonably required to complete the reevaluation and to revise, as appropriate, Student's IEP; and
3. All other relief requested by the parties herein is denied.
4. shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing and the Virginia Department of Education.
5. Petitioner is the prevailing party in this due process hearing.

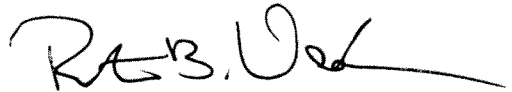
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<sup>6</sup> See 34 CFR § 300.300(c). This order shall be without prejudice to the rights of provided in the IDEA, if Mother does not provide consent for the reevaluation.

Right of Appeal Notice

A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a federal district court within 90 days of the date of this decision, or in a state circuit court, within 180 calendar days of the date of this decision.

Date: December 4, 2012



Peter B. Vaden, Hearing Officer