

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

OSSE
Student Hearing Office
March 13, 2013

STUDENT, a minor, by and through
his Parent¹

Petitioner,
v

SHO Case No: 2012-0846
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On December 28, 2012 Parent (“Petitioner”), on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Parent’s Administrative Due Process Complaint Notice (HO 5) on January 11, 2013. This was 3 days beyond the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held on January 16, 2013.³

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

³ The Resolution Period Disposition Form (“Form”) (HO 6) filed in this matter indicates the meeting was held January 17, 2013. However, the two signatures on this form are dated January 16, 2013. It is likely that the date on

The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on January 16, 2013 so indicating. HO 6. The 45 day timeline began to run on January 28, 2013, the day after the 30 day resolution period ended. Following the Prehearing Conference held on January 30, 2013, I issued a Prehearing Conference Order on January 31, 2013. HO 8. My Hearing Officer Determination is due on March 13, 2013.

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq. of the D.C. Disability Law Group, P.C., and Justin Douds, Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was scheduled for February 27 and 28, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office on February 27, 2013 and in Room 2007 on February 28, 2013.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

ISSUES

The issues are:

- 1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by changing his placement and location of services in May 2011 to one not able to implement Student’s individualized education program (“IEP”). Specifically Student’s placement was changed from a full – time separate school (Prospect Learning Center) to a full – time, separate program within a general education school (Woodson SHS). However, there is no full- time, separate out of general education program at Woodson SHS;
- 2) Whether DCPS denied Student a FAPE by pre-determining Student’s placement and location of services without parental in-put in May 2011;

the Form is a typographical error. As the date of execution is January 16, 2013 I am identifying this date as the date of the resolution meeting.

- 3) Whether DCPS denied Student a FAPE by moving Student to a lesser restrictive environment without considering the potential harm to Student when moving him from a full time, separate special education school to a separate special education program within a general education school under the May 2011 IEP;
- 4) Whether DCPS has denied Student a FAPE by providing Student an inappropriate IEP in May 2012. The IEP is not calculated to provide Student educational benefit. The hours of special instruction were reduced from 26.5 in the previous IEP to 21 hours per week. Instructional services were moved from outside general education to inside general education. Behavioral services were reduced from 60 minutes each week to 30 minutes each week. There is no Behavior Intervention Plan based on a Functional Behavioral Assessment, and the transition plan is inadequate. At an October 2012 meeting, Petitioner and her advocate raised these concerns about the May 2012 IEP. DCPS did not amend the May 2012 IEP to address these concerns. In addition, the May 2012 IEP was developed without parental in-put;⁴
- 5) Whether DCPS has denied Student a FAPE by failing to implement the May 2011 and May 2012 IEPs. Student was not placed in a full- time, separate special education program at Woodson SHS and did not receive 60 minutes of behavior support as required by the May 2011 IEP. The May 2012 IEP which called for 21 hours of special instruction in a general education setting also has not been implemented at Woodson SHS. Student has been placed in self-contained settings for some of his classes. He has not received the 30 minutes of behavior support required by this IEP; and
- 6) Whether DCPS has denied Student a FAPE by failing to conduct an appropriate re-evaluation of Student. DCPS failed to provide the parent written notice that DCPS did not need new assessments to re-evaluate Student. DCPS did not include the parent in the re-evaluation meeting. DCPS did not complete a vocational assessment on which to base the transition plan. DCPS did not complete a comprehensive psychological assessment following its own determination of the need for such an assessment nor after the parent's written and verbal requests for such an assessment. DCPS did not complete a functional behavioral assessment following the Student's escalating behavioral issues demonstrating the need for such an assessment nor following parental requests for such an assessment.

⁴ Petitioner's complaint originally referenced an October 2012 IEP as well as the May 2012 IEP under this allegation. During the conference, Respondent's counsel indicated there had been no IEP developed after May 2012. Petitioner's counsel agreed to review her records and subsequently notified Respondent and me that there was no IEP following the May 2012 IEP. Counsel agreed, during the conference that this issue would address the May 2012 IEP only, if no October IEP existed. Counsel further agreed that this issue also would address Petitioner's concerns, raised at an October 2012 meeting, and this issue (#4) has been amended to reflect these agreements.

RELIEF REQUESTED

Petitioner requested:

- 1) Immediate revision of the student's IEP to include 26.5 hours of special instruction and 60 minutes of behavior support outside the general education environment each week;⁵
- 2) Placement in a nonpublic school, including tuition and transportation costs;
- 3) Three independent educational evaluations: Functional Behavioral Assessment, Comprehensive Psychological Assessment; and Vocational Assessment; and
- 4) Within 15 days of receipt of the independent educational evaluations, the IEP team is to meet and review the evaluations and revise the IEP, if appropriate.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1	Compensatory Education Plan by [REDACTED]	February 20, 2013
P-2	Student Class Schedule at Woodson SHS	2012-2013 SY
P-3	Student Report Cards/ Progress Reports	June 2011- Sept 2012
P-4	Student Transcripts from Woodson SHS	Sept 2012- Jan 2012
P-5	No Child Left Behind Report on Teacher Qualifications	January 14, 2013
P-6	Email Correspondence Between DCPS & Parent Representatives	Jan. 2012 – Jan. 2013
P-7	IEP Progress Reports	Apr. 2010 – July 2011
P-8	Service Tracker Logs for Behavioral Support Services	Jan. 2011 – Apr. 2012
P-9	Paralegal Notes from October 2012 MDT Meeting	October 9, 2012
P-10	DCPS Notes from October 2012 MDT Meeting	October 9, 2012
P-14	Final Eligibility Determination Report	February 1, 2012
P-15	DCPS Notes from January 2012 Re-Evaluation MDT Meeting	January 31, 2012
P-17	Parent's request for Functional Behavior Assessment (FBA)	December 27, 2011
P-19	Student Work Samples from 2011-2012 SY	2011-2012 SY
P-22	Individual Education Program (IEP) dated December 2010	December 15, 2010
P-23	DCPS Notes from December 2010 IEP Meeting	December 15, 2010

⁵ At the beginning of the hearing on February 27, 2013, I asked whether Petitioner was withdrawing this particular request for relief as the IEP developed on February 7, 2013 (R 19) includes the full time hours specified in this request for relief. Petitioner's counsel stated they had learned through the 5- day disclosures that an IEP meeting was held on February 20, 2013. Petitioner, her counsel and her educational advocate had not attended that meeting. Petitioner's counsel asked that this February 7, 2013 IEP be deemed an admission on the part of DCPS that the previous IEPs had not provided Student a FAPE. I declined to do so, stating that IEPs are developed at a point in time, and that the determination as to the appropriateness of an IEP must be determined as of the date it is developed. Further, under IDEA, a school district is to hold an IEP meeting to revise an IEP if it determines there is a need to do so. A revised IEP is not a document demonstrating, per se, that the prior IEP was not appropriate. Rather it is document memorializing the programs and services necessary to provide a student FAPE as of the date of its development.

P-25	Individual Education Program (IEP) dated February 2010	February 1, 2010
P-26	Educational Evaluation (WJ-III)	June 3, 2011
P-27	Educational Evaluation (WJ-III)	September 15, 2010
P-28	DCPS Psycho-Educational Evaluation	May 21, 2008
P-29	Star Reading Diagnostic Report	January 23, 2012
P-30	Excerpts from DCPS Manuals/ Guidebooks	Various
P-31	Resume of [REDACTED]	Updated Summer 2013

Exhibits admitted on behalf of Respondent are:

R 02:	Prior Written Notice	05/19/2011
R 05:	Woodcock Johnson III	06/03/2011
R 07:	Behavioral Service Trackers	2011-12 SY
R 09:	Final Eligibility Report	01/31/2012
R 11:	Letter of Invitation	03/22/2012
R 12:	SEDS Communication Regarding IEP Meeting	05/08/2012
R 15:	Behavioral Service Trackers	2012-13 SY
R 16:	Student Progress Report	11/15/2012
R 17:	Letter of Invitation	12/11/2012
R 18:	SEDS Communication Regarding IEP Meeting	02/05/2013
R 19:	IEP	02/20/2013
R 20:	Academic Schedule	02/19/2013
R 21:	Attendance Record 2012-13 SY	01/29/2013
R 22:	Archived Attendance History	02/19/2013

Joint exhibits⁶ admitted on behalf of the parties are:

J 1 ⁷	DCPS Notes from December 2010 MDT Meeting	December 18, 2010
J 2 ⁸	Individual Education Program (IEP) dated May 2011	May 19, 2011
J 3 ⁹	DCPS Notes from May 2011 IEP Meeting	May 19, 2011
J 4 ¹⁰	Letter from DCPS to Parent re: Placement at Woodson SHS	August 20, 2011
J 5 ¹¹	Disability Worksheet & Prior Written Notice of Identification	January 31, 2012
J 6 ¹²	DCPS Notes from February 2012 MDT Meeting	February 6, 2012
J 7 ¹³	Individualized Education Program (IEP) dated May 2012	May 14, 2012
J 8 ¹⁴	DCPS Notes from May 2012 IEP Meeting	May 14, 2012

⁶ Before the hearing began on February 27, 2013, I asked the parties to review their 5-day disclosures and identify those documents that could be introduced as Joint exhibits. They identified the 8 exhibits identified herein as Joint exhibits. These exhibits are so identified in the record. I have marked each joint exhibit with a tab indicating its Joint Exhibit number.

⁷ Provided in 5-day disclosures as P 24 and R 1

⁸ Provided in 5-day disclosures as P 20 and R 3

⁹ Provided in 5-day disclosures as P 21 and R 4

¹⁰ Provided in 5-day disclosures as P 18 and R 6

¹¹ Provided in 5-day disclosures as P 16 and R 8

¹² Provided in 5-day disclosures as P 13 and R 10

¹³ Provided in 5-day disclosures as P 11 and R 13

Exhibits admitted by the Hearing Officer are:¹⁵

- HO 1 Administrative Due Process Complaint Notice of December 28, 2012
- HO 2 Notice of Hearing Officer Appointment sent January 2, 2013
- HO 3 Prehearing Conference Scheduling letter (with attachment) of January 2, 2013
- HO 4 Prehearing Notice (with attachment) of January 4, 2013
- HO 5 District of Columbia Public Schools' Response of January 11, 2013 to Parent's Administrative Due Process Complaint
- HO 6 Resolution Period Disposition Form executed January 16, 2013
- HO 7 Miscellaneous emails
 - chain re October 2012 meeting
- HO 8 Prehearing Order dated January 31, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

- [REDACTED], Paralegal and Advocate, D.C. Disability Law Group, P.C.
- [REDACTED] Admissions Director,
- [REDACTED] Ph.D., admitted, by stipulation, as an expert in the administration and interpretation of educational evaluations for students with disabilities

DCPS presented the following witnesses:

- [REDACTED] Social Worker,
- [REDACTED], Special Education Coordinator,
- [REDACTED] Special Education Teacher/ Case Manager,¹⁶

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

¹⁴ Provided in 5-day disclosures as P 12 and R 14

¹⁵ Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

¹⁶ [REDACTED] stated he has been Student's case manager since the beginning of the 2001-2012 school year and will be referred to as Student's case manager throughout this HOD.

1. Student is [REDACTED]. He is repeating the 9th grade at (“Woodson”). Student is eligible for special education and is classified as a student with a specific learning disability. Student has been diagnosed as having Attention Deficit Hyperactivity Disorder. Testimony of Petitioner; Testimony of [REDACTED] Testimony of [REDACTED] Testimony of [REDACTED]; Testimony of [REDACTED] HO 1; P 11.

2. Prior to attending [REDACTED] Student attended [REDACTED] a DCPS, separate, special education school for students in grades P-K through the 8th grade level. Prospect provides instruction in small, self-contained classes with individualized and/or small group instruction. Student’s February 2010 and December 2010 IEPs implemented at Prospect during the 2009 -2010 and 2010-2011 school years required he receive 25.5 hours of specialized instruction and 60 minutes of behavior support services outside the general education environment each week. Testimony of [REDACTED]; P 22; P 25.

3. During the 2010- 2011 school year, Student received two educational assessments. These assessments indicate Student made approximately one year’s academic growth in the course of the school year. On September 15, 2010, the date of the first administration of the Woodcock Johnson III Tests of Achievement, at the beginning of his 8th grade year when Student was [REDACTED] Student received, among others, the following scores:

Broad Reading:	Age equivalent 10 – 9; Grade equivalent 5 – 3
Broad Math:	Age equivalent 11 – 6; Grade equivalent 6 - 0
Broad Written Language	Age equivalent 9 - 4; Grade equivalent 4 – 2

His lowest score (Age equivalent 7 - 11; Grade equivalent 2 – 4) was in Word Attack, and his highest score (Age equivalent 12 – 8; Grade equivalent 7 – 7) was in Passage Comprehension.

On June 3, 2011, the date of the second administration of the Woodcock-Johnson III Tests of Achievement, at the end of his 8th grade year when Student was 13 years 7 months old, Student received, among others, the following scores:

Broad Reading: Age equivalent 11 – 10; Grade equivalent 6 – 4

Broad Math: Age equivalent 11 – 7; Grade equivalent 6 - 0

Broad Written Language Age equivalent 11 - 10; Grade equivalent 6 – 3

His lowest score (Age equivalent 9 - 6; Grade equivalent 4 – 3) was in Spelling, and his highest score (Age equivalent 13 – 10; Grade equivalent 8 – 9) was in Passage

Comprehension. Testimony of ██████ P 27; R 5.¹⁷

4. Previous psycho-educational testing on the WISC-IV revealed Student has strengths in verbal comprehension and weaknesses in working memory and in processing speed. While Student showed growth in cognitive functioning between 2004 and 2008, the pattern of relative strengths and weaknesses was similar across the two test administrations. Student has average cognitive functioning. Student's highest skills were in the verbal area and lowest were in processing speed. Slow processing speed means Student requires more time to understand and integrate information than his non-disabled peers. Student also will have difficulty keeping up with the class in a fast paced learning environment. Student is aware of his learning struggles which impacts his self-esteem and creates insecurity. Testimony of Holman; P 28.

¹⁷ Petitioner also introduced this second set of test scores. However, the scores attached to the cover page of Petitioner's exhibit are the scores from the September administration rather than the June administration of the assessment. I therefore refer to the Respondent's exhibit herein.

5. An IEP meeting was held on May 19, 2011, at the end of Student's 8th grade year. At the May 19, 2011 meeting Petitioner was provided a Prior Written Notice for Student to attend _____, ¹⁸ his neighborhood school, for his 9th grade year, the 2011-2012 school year. The IEP developed at that meeting required Student receive 26.5 hours of specialized instruction and 60 minutes of behavior support outside the general education environment each week. The IEP was changed at the meeting to provide Student a full time, out of general education program because Petitioner disagreed with the original IEP provided at this meeting which proposed Student receive inclusive education proposed by _____ at Woodson.¹⁹ Petitioner also expressed disagreement with the proposed placement at Woodson. The school based members of the IEP team indicated Student was assigned to Woodson because it was his neighborhood school. She was given a booklet with Charter School options to consider as alternatives to Woodson. Petitioner was not able to find a DC public school or a charter school to provide the full time, out of general education program required by Student's May 19, 2011 IEP. Petitioner was not aware Student's placement at Woodson was finalized until she received a letter dated August 19, 2011 responding to her inquiry about Student's placement for the 2011-2012 school year. J 2; J 3; J 4; Testimony of Petitioner; Testimony of _____.

6. Student's initial adjustment to _____ went well. However, within a few weeks of his enrollment at the school Student began to cut classes and eventually stopped attending for prolonged periods of time. At least some of the days Student was not in class he was in the school building. The staff at _____ made efforts to address Student's attendance using behavioral measures, including attendance monitoring sheets. These efforts were

¹⁸ Student could not continue to attend _____ as it has does not provide classes beyond the 8th grade level.

¹⁹ The school based members of the team told petitioner they thought Student might do better with his nondisabled peers.

not successful. Student had not had attendance issues when he attended R 21; R 22; Testimony of Petitioner; Testimony [REDACTED]; Testimony of [REDACTED] Testimony of [REDACTED] Testimony of [REDACTED]

7. Student's grades at Woodson have been poor. At [REDACTED] he earned As, Bs, and Cs. His teachers reported he was doing well. At [REDACTED] Student has failed the majority of his classes, resulting in his repeating 9th grade during the 2012 -2013 school year. He currently has failed and is failing most of his classes at [REDACTED] It is likely he will not matriculate to 10th grade at the end of this school year. P 3; P 4; P 7; Testimony of Petitioner; Testimony [REDACTED] Testimony of [REDACTED]; Testimony of [REDACTED] [REDACTED]
8. As of January 31, 2012, Student has earned a total of 3 Carnegie units ("CUs") of the total 24 CUs required for graduation. Of the 4 CUs in English required for graduation, he has earned 1; of the 1.5 CUs required in physical education/health, he has earned 1; Student also has earned 1 CU in the Other category in which 3.5 CUs can be earned and considered a graduation requirement. Student's schedule for the 2012-2013 school year has included 6 classes that fall in the Other category. If Student passes these classes he will receive a credit for so doing but once the total of such credits exceeds 3.5 they will not count toward the 24 CUs needed for graduation. Student will not be able to graduate from high school with a diploma in four years if his schedule continues to provide this large number of classes in the Other category that do not lead to CUs.

Woodson is not able to provide all classes required for graduation in a separate special education setting each year. The classes that can be provided in a separate special

education setting depend on the staff available at the school at a particular time. P 3; P 4; Testimony of [REDACTED]; Testimony of [REDACTED]; Testimony of [REDACTED]

9. On December 17, 2011, Petitioner's attorney made a written request that a Functional Behavior Assessment be performed. P 17.
10. On January 23, 2012 Student's academic skill levels were assessed with the STAR Reading and Math tests. Student earned a grade equivalent level of 6.6 in reading and 4.8 in math. The math score is 1.2 years below that he earned on the Woodcock Johnson 7 months earlier, and the reading score is similar to that earned on the Woodcock Johnson. While the Woodcock Johnson and the STAR assessments are not exactly comparable, the scores should fall within the same range. P 27; P 29; R 5; Testimony of [REDACTED].
11. A triennial evaluation meeting was held at [REDACTED] on January 31, 2012. Petitioner was not present. Prior to this meeting, Petitioner's educational advocate sent emails on January 26, 2012 and January 30, 2012 to the special education coordinator ("SEC") and Student's case manager asking whether a multidisciplinary team ("MDT") meeting proposed for January 24, 2012 had occurred and further asking that all documents reviewed and/or prepared for that meeting be provided to her. Petitioner's educational advocate also offered two possible dates for the meeting if it had not occurred. The SEC replied by email on January 30, 2012 at approximately 3:04 PM. The SEC stated the meeting had not occurred and could not be delayed beyond that week. She offered two different meeting dates, either the following day at 10:00 AM or the day after that at 2:15 PM.

Student, who was [REDACTED] at the time, attended the meeting on January 31, 2012.

Petitioner did not attend. Student's eligibility for special education and related services as

a student with a specific learning disability was continued. P 6; P 14; P 15; J 5;

Testimony of [REDACTED].

12. A meeting was held with Petitioner on February 6, 2012 to review the results of the January 31, 2012 meeting. At this meeting Petitioner and her advocate raised the need for an FBA and for a psychological assessment. Testimony of [REDACTED]; J 6.
13. On March 22, 2012 DCPS sent an invitation to an IEP meeting scheduled for May 10, 2012 at 9:00 AM to Petitioner. No invitation was sent to Petitioner's educational advocate despite the educational advocate's email in January 2012 requesting such notification. On May 8, 2012 the Student's case manager reminded Petitioner of the scheduled IEP meeting when he saw Petitioner at [REDACTED] Petitioner, who was a [REDACTED] to discuss her concerns regarding her son's safety informed the Student's case manager that she would only attend the meeting if her attorney and/or advocate were able to attend. P 6; R 11; R 12; Testimony of Petitioner; Testimony of [REDACTED]
14. An IEP meeting was held on May 14, 2012. Neither Petitioner nor her representative(s) were in attendance. The IEP developed at this meeting changed Student's services. The 25.5 hours of special education instruction per week outside of the general education setting were reduced to 21 hours of specialized instruction inside the general education setting, and the 60 minutes of behavior support services outside the general education setting each week were reduced to 30 minutes outside the general education setting each week. Petitioner did not sign this IEP. The reduction in hours and change in setting was based, at least in part, on Student's performance during the first semester of the school year. The changes were made because Student's English teacher and his case manager stated Student was capable of accessing some instruction in the general education setting.

The IEP identified many concerns under the present Level of Academic Performance in the Social/Emotional/Behavioral Development Area. The IEP states Student was not performing up to his potential, and his grades had fallen from Cs to Fs. As of the date of the development of the IEP Student was cutting classes and had been suspended on several different occasions. The IEP stated Student's lack of impulse control and inability to follow school rules would continue to have an impact on Student's academic performance. This IEP also includes a transition plan that states Student's functional skills were assessed. The tool used is not identified. The plan indicates Student would like to attend college and earn a degree in business entrepreneurship. It further states Student would like to open his own business and live independently. J 7; J 8.

15. Following this meeting, Petitioner's educational advocate and Student's case manager exchanged emails regarding the meeting. The case manager agreed to provide a copy of the IEP and meeting notes. P 6.
16. On September 14, 2012, the paralegal²⁰ for Petitioner's counsel sent an email requesting a 30 day review meeting. A meeting was confirmed for October 9, 2012. At this meeting, Petitioner again requested an FBA. She also requested a comprehensive psychological be conducted. Petitioner rejected Respondent's offer to perform the FBA and requested an independent educational evaluation, noting the long delay in providing the FBA. The meeting participants discussed Student's deteriorating behavior including increased absences and running away from home. They also discussed safety concerns and agreed that bus transportation would probably be provided. The psychological was not scheduled because a psychologist was not present at the meeting. The meeting participants also discussed concerns that Student's Microsoft class was deemed an 11th/12th grade class,

²⁰ The person who had been Petitioner's educational advocate, [REDACTED]

the teacher told Student he should not be in that class and on multiple occasions directed Student to leave the class. P 6; P 9; P 10.

17. DCPS notified Petitioner it would not fund an independent functional behavioral assessment nor an independent psychological assessment. DCPS did not send Petitioner a consent form for either assessment. P 6; Testimony of [REDACTED]
18. A new IEP requiring Student receive a full time special education program outside the general education setting was written on February 7, 2013. Student's schedule was changed after the February 2013 IEP was developed. R 19.
19. Accotink Academy is a full-time, non-public, therapeutic day school for students with disabilities. It provides services for students with learning disabilities and emotional disabilities. The school has a certificate of approval from the Office of the State Superintendent of Schools for the District of Columbia. Student has completed the admissions process and has been accepted at the school. [REDACTED] can provide Student the program and services he requires. He would be assigned to a classroom with no more than 9 students and a student staff ratio of 3 to 1. In addition to academic classes the school closely monitors students' attendance in their assigned classes and has a clinical team including trained behavior counselors and psychologists. All students in the Accotink therapeutic day program, to which Student would be assigned should he attend there, receive group therapy in addition to their IEP based services. Crisis intervention services are available. Testimony of [REDACTED]
20. The Compensatory Service Plan provided by Petitioner includes 50 hours of academic support and 150 hours of mentoring. Student does not need the tutoring if he is receiving support classes such as those provided at [REDACTED]. The mentoring is to provide Student a

strong male role model who can assist Student in learning to access programs and services in the District of Columbia. The mentoring is intended to compensate Student for the lack of counseling. P 1; Testimony of [REDACTED]

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. The testimony provided by the DCPS witnesses was particularly troublesome in this matter. While I understand that witness' testimony reflects the witness' general view of the issues in a case, in the instant matter, the DCPS witnesses tended to fail to recollect items from particular meetings or conversations that might, if recollected, weigh against DCPS. Yet, these same witnesses were able to recall items from the same meetings or conversations that were neutral or weighed in DCPS' favor. This pattern of recall and lack of recall, in my view, raises questions regarding whether the DCPS testimony reflected intentional evasiveness. I do not imply by these comments regarding the DCPS witnesses that Petitioner's witnesses were totally objective in their testimony. They too provided testimony reflecting their view of the issues. The difference was, in my opinion, a matter of degree – with at least some of the DCPS witness testimony being less than candid. As a result, I find some witnesses were more persuasive than others. When possible I rely on documentary evidence in reaching my determinations and tend to look to witness testimony to supplement the documentary evidence. In the discussion that follows, I identify those situations where the testimony raises particular credibility or persuasiveness concerns.

1) Whether DCPS denied Student a FAPE by changing Student's placement and location of services in May 2011 to one not able to implement Student's IEP. Specifically Student's placement was changed from a full – time separate school (Prospect Learning Center) to a full – time, separate program within a general education school (Woodson SHS). However, there is no full- time, separate out of general education program at Woodson SHS

2) *Whether DCPS denied Student a FAPE by pre-determining Student's placement and location of services without parental in-put in May 2011*

3) *Whether DCPS denied Student a FAPE by moving Student to a lesser restrictive environment without considering the potential harm to Student when moving him from a full time, separate special education school to a separate special education program within a general education school under the May 2011 IEP*²¹

Under the IDEA each local education agency ("LEA") is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. See also, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*,

²¹ The three issues regarding the May 2011 IEP and placement are discussed together as they involve overlapping areas of law and related facts. The issues do not address the content of the IEP, that is the goals. Rather they focus on location and placement.

D.C. Code § 30.3007. An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). Each local education agency must have a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c). Moreover, the placement decision must conform with the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2). Reviewing these regulations it is clear that placement involves more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services, as identified under IDEA, a student's program will be implemented. See 34 C.F.R. § 300.115.

In the instant matter, Student has been classified as a student with Specific Learning Disability. He has disabilities in reading, math, and written language. In the academic arena his test scores show he is functioning more than two years behind age level peers in many areas. This is a decrease in his relative performance as compared to earlier evaluations. Student also has

start of the school year. It was not until she received a letter dated August 19, 2011 that she understood the proposed placement was, in fact, Student's actual placement.

Student entered Woodson at the beginning of the 2011-2012 school year, and his initial adjustment appeared to go well. However, Student was never provided the full time out of general educational education program required by the May 19, 2011 IEP. During the first semester of the 2011-2012 school year Student was enrolled in four classes. Two of these classes, Algebra I and English I, were special education classes, two of these classes, Accounting and Physical Education were not. The SEC initially testified that this schedule provided "close to" the 26.5 hours of special education instruction outside the general education setting required by the May 2011 IEP. She also testified that she did not know whether the Accounting class was a special education class, despite having been the SEC at _____ for 4 years. Eventually she stated that to the best of her knowledge the accounting class was not a special education class. The witnesses willingness to obfuscate her knowledge of the accounting class and to state that a schedule involving only 50% special education classes is close to the 26.5 hours of special instruction outside the general education setting raises serious questions about her credibility in this matter. It is unlikely that she did not know whether the accounting class was a special education class,²² and simple math is able to establish that this schedule could not meet the 24.5 hours of special instruction outside the general education setting each week.

Student's second semester schedule in the 2011- 2012 school year also did not meet the 26.5 hours outside of general education required by the May 2011 IEP. During second semester Student was enrolled in three special education classes, English II, Developmental Reading and

²² The case manager knew it was not a special education class and so testified. I note the special education coordinator's obvious lack of candor continued when she testified regarding Student's enrollment in an MS Office class in the first semester of the 12-13 school year. The teacher in that class told Student it was an 11th/12th grade class and the SEC indicated she did not know that it was an upper level course stating she had not spoken to the teacher. Again, the Student's case manger subsequently testified that the class was an upper level class.

World History. He also was enrolled in a general education Business/Marketing class. Thus, in the 2011-2012 school year Student was enrolled in 8 classes only 5 of which complied with the requirements of his IEP. Student earned only 3 credits for the entire 2011-2012 school year, earning one credit in English, one credit in Algebra and one credit in physical education. All of these credits were earned in the first semester. Student failed all of his second semester classes.

Petitioner also contends Student did not receive the behavior support services required by his May 2011 IEP. Student was to receive 60 minutes of such services each week. Service Tracker reports from October and March of the 2011 – 2012 school year show that out of 10 scheduled sessions, Student was absent or unavailable for an unspecified reason four times and school was closed once. Of the five sessions in which the social worker met with Student, two were held on the same day. While a related service provider is not required to provide services when a session is missed due to school closure or student absence, services missed due to student's unavailability must be made up if school was in session and the student missed the related service due to a school activity such as an assembly or testing. *See, for example*, OSEP letter dated March 11, 2008 to ██████████ Mountain Plains Regional Resource Center, Logan Utah. Here it is not possible to tell whether the missed service for unavailability should have been made up. More importantly, however, the social worker who was assigned to work with Student since the fall of the 2011- 2012 school year appeared to have little knowledge or awareness of Student and his needs. Her testimony was that she did not know how many times she met with Student, nor did she remember the goals she was to address when working with Student. The social worker was aware that Student had attendance issues and that the efforts to address his nonattendance had not worked. She testified that she was unaware that an FBA and BIP could be used for attendance. Although, when pushed on cross examination she

acknowledged that an FBA might have helped determine the basis for Student's chronic absenteeism. The social worker also could not remember the triennial review. More importantly, the social worker who was and is responsible for working with Student regarding his behavioral problems seemed naïve and ill-informed about human behavior. For example, she asked Student why he was not attending school and accepted his answer that he was lazy and did not want to get up at face value. Rather than attempting to understand whether this was Student's effort to rationalize his behavior. She reported that Student did not have problems making friends or getting along with his peers as if this demonstrated the placement was appropriate. However, nothing in the IEPs suggests that peer interactions were an area of concern. Instead Student's social emotional goals are focused on developing impulse control and increasing his sense of competency. The social worker was unaware of Student's disability classification and did not know what school he attended before entering . Her testimony was of limited value because she appeared to have little knowledge of Student and because she was unable to follow my direction to inform us if she wanted to refer to a document.²³

The question before me is whether Petitioners' have shown Student needs a full time special education program outside the general education environment, and, if so, is an appropriate placement. DCPS argument is that Student's placement at was a location determination that is at LEA discretion. In DCPS' view placement is the hours of service and whether the hours are provided inside or outside general education. If this were all there is to placement the continuum of alternative placements each school district is required to

²³ The social worker testified by telephone. I instructed her to inform us should she refer to a document during her testimony. I explained it was important that we understand whether she was testifying from memory or by reference to a document. I asked whether she understood this direction and she stated he did. In the middle of her testimony I heard sounds that suggested she might be looking at a document and interrupted her testimony to ask whether she was doing so. She replied she was. I reminded her that she need to inform us if she was looking at a document. She apologized and said she would do so. Later in her testimony I again heard sounds that suggested she was looking at a document and again, when asked, she responded she was. In one of these instances she was referring to documentation that was not in evidence.

have available under the IDEA would be vastly abbreviated. Once a student was determined to need full time hours outside of general education, there would be no distinction, for example, among placements that were full time in a separate class in a general education school and full time in a private separate day school. Both have the same number of hours outside of general education. DCPS' position does not address the continuum of services that the LEA is required to have available. A separate special education school and a separate special education program within a general education school are not the same placement on the continuum of alternative placements which includes both special classes and special schools 34 C.F.R. § 300.115. Thus the placement at Prospect and the proposed full time separate special education classes at

are, by definition, different placements. Moreover, never provided Student the 26.5 hours of instruction outside the general education setting required by the May 2011 IEP.

DCPS witnesses' assertions that such a program could be provided and allow Student to graduate with a high school diploma simply is not supported by the record. The witnesses were clear that some courses could be provided and some could not be provided in separate special education classes. Their testimony that staff could be hired who were dually certified in the subject areas in which separate special education classes are not available does not ring true. It also asks that I make a decision as to the appropriateness of Student's current placement at

, based on a future possibility. Just as I would not find there is a current failure to provide a FAPE based on a possible future problem, I cannot find there is not denial of FAPE because it may be corrected in the future. Even the SEC finally testified that a number of courses need for graduation with a high school diploma were not currently available as special education classes. These include, among others, United States history, United States government, District of Columbia history and French (although Spanish is available as a special education class to

meet the graduation requirement for a foreign language). In this regard it is important to note that DCPS in May 2012 changed Student's IEP to an inclusion based IEP, that is instruction in the general education setting with special education support, rather than instruction in the special education setting for the 2012-2013 school year. It is through these inclusive classes that the IEP team was attempting to provide Student the courses he needs to receive a diploma.

Student has not attended school this school year (with only a few exceptions). DCPS argues that it is this failure to attend that is causing his poor grades, and of course this is true. However, DCPS has not attempted to determine the basis for this poor attendance. Student has moved from being a good student with acceptable attendance while in a full time separate special education school to being a failing student who rarely attends school since enrolling at in August 2011. DCPS essentially argues this is Student's responsibility rather than assessing Student's needs and attempting to provide him a program that will allow him to have some educational benefit.²⁴

I conclude, for the reasons stated above, that _____ could not and did not provide Student the 26.5 hours of separate special education instruction required by his May 2011 IEP. I therefore find by a preponderance of the evidence that Woodson was not an appropriate placement in that it could not implement Student's IEP.

Petitioner also contends this change in placement was made without parental input and with this I disagree. Parental participation is a key element of IDEA. Parents are to be full and active members of teams making placement decisions. 34 C.F.R. § 300. 327. In the instant

²⁴ I do not address here DCPS decision to return Student to a full time special education program outside the general education setting in February 2013 because this occurred following the filing of this Complaint. I note, however, that in doing so, Student was placed in two classes that would lead to credit toward high school graduation. The remaining three classes would fall in the Other category, an area in which he is able to earn only 2.5 credits to count toward graduation for the remainder of his high school experience. At this rate, student, assuming _____ were able to hire the necessary teachers, would earn 4 credits toward high school graduation per school year, meaning he would require approximately 4 additional years of education, if he passed all courses to graduate with a diploma.

matter, there is no doubt that Petitioner participated in the meeting in May 2011 in which placement at _____ was discussed. Petitioner, herself, testified regarding the discussion of the proposed placement at Woodson during the meeting. Her argument, that she had no input into the placement decision is based, it appears, on two factors: First, that she was provided a Prior Written Notice for placement at _____ at the 5/19/11 MDT meeting; and Second, that the team did not change the placement when she objected to it. Neither of these arguments indicate Petitioner had no input into the _____ placement decision.

The Prior Written Notice states on its face that the notice is provided to comply with the IDEA requirement that an LEA must provide prior written notice when it proposes, among other actions, to change the placement of a student. 34 C.F.R. § 300.503. The notice is intended to provide an opportunity for the parent to have input into the proposed action. In the instant matter, this notice was provided because Student was aging out of his then current placement and required a placement for the 2011-2012 school year. _____ was that proposed placement. Petitioner argues the decision had been made, and she had no input because the Prior Written Notice was given to her at the beginning of the 5/19/11 meeting. Yet her own testimony contradicts this position. After she received the notice there was a discussion of the proposed placement at _____. Petitioner expressed her disagreement, and she was given a document containing a list of charter schools she could explore as alternatives to placement at Woodson. The notes from the meeting clearly state the hours of instruction on the IEP will remain until the parent has selected a placement option. Petitioner testified she was unable to identify a DCPS or charter school that was able to provide Student both a full time pull-out special education program and a high school diploma. Petitioner indicated she expected there to be another meeting regarding placement, and this meeting did not occur. She ultimately contacted DCPS in

August 2011 regarding where Student was assigned for the 2011-2012 school year. She received a response dated August 19, 2011 identifying [redacted] Petitioner would not have expected there to be a second meeting regarding placement nor would she have had reason to contact DCPS regarding Student's school assignment if she thought the school assignment had been finalized, without her input, prior to the 5/19/11 MDT meeting, or even at the meeting. Thus, the evidence is clear that Student's placement was not finalized without Petitioner's input and opportunity for further input if she had chosen to provide it.

Petitioner's second argument that the placement at [redacted] was made despite her opposition confuses the opportunity for input and the team's agreement with that input. Petitioner testified to the discussion of the placement at [redacted] that occurred during the May 2011 meeting. She was told the school team members proposed [redacted] because it was Student's neighborhood school, and she was told the school team members thought Student might do better with his nondisabled peers. Petitioner was told she could tour [redacted] if she chose to do so. Finally, the school team members provided her with a booklet of charter options to consider. All of these actions support the conclusion that there was extensive discussion of the proposed placement at [redacted] and that Petitioner had the opportunity to provide input including her desire that Student have an alternative placement. There is no suggestion that Petitioner was not allowed to participate in the placement decision. There is nothing in IDEA that requires the team to place a student in the type of placement or the location desired by the parent. Rather the requirement is that the parent have input, just as parent did in the instant matter.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by predetermining the placement and failing to provide for parental input into the placement decision

Petitioner also contends that the potential harm to Student was not considered in proposing and ultimately placing Student at [redacted]. This is a somewhat bald assertion. Petitioner never specified what potential harm she was alleging should have been discussed at the May 2011 MDT meeting. Petitioner's argument appears to be that having attended a separate special education school, placing Student at [redacted], a general education high school, would by its nature be harmful to Student and the team should have recognized this. I disagree. The evidence is that Student progressed well while at [redacted]. The Prospect team initially proposed an inclusive education program for Student based on his academic abilities. While Petitioner suggests they told her the inclusive program was necessary if Student were to ultimately receive high school diploma, the documents do not support this contention. Moreover, as noted above, the team changed the inclusive program to a separate, full time pull out program based on parental in-put. This discussion and these action, rather than failing to consider the effects of the placement at [redacted] on Student indicate the team considered the placement at Woodson and attempted to develop an IEP and placement that would suit student's needs. I recognize that there appears to have been no discussion designated a discussion of harm, but I do not find such specific labeling is necessary where, as here, the team participated in a discussion of the student's needs and amended the IEP in response to that discussion.

I therefore find by a preponderance of the evidence that Student was not denied a FAPE by DCPS's failing to consider the harmful effects of the [redacted] placement on Student. I find

that DCPS did consider the potential harmful effects and developed an IEP that, at the time of its drafting, was intended to address Student's needs.

4) Whether DCPS has denied Student a FAPE by providing Student an inappropriate IEP in May 2012. The IEP is not calculated to provide Student educational benefit. The hours of special instruction were reduced from 26.5 in the previous IEP to 21 hours per week. Instructional services were moved from outside general education to inside general education. Behavioral services were reduced from 60 minutes each week to 30 minutes each week. There is no Behavior Intervention Plan based on a Functional Behavioral Assessment, and the transition plan is inadequate. At an October 2012 meeting, Petitioner and her advocate raised these concerns about the May 2012 IEP. DCPS did not amend the May 2012 IEP to address these concerns. In addition, the May 2012 IEP was developed without parental in-put

Under IDEA each eligible student is to receive a FAPE. A FAPE is special education and related services provided in conformity with an IEP designed to address his/her needs. Student's May 2011 IEP required he receive each week 26.5 of hours of special instruction outside the general education setting as well as 60 minutes of behavior support services outside the general education setting each week. As discussed above and below, Student did not receive all instruction and services in the designated settings. Student also did not pass all of his first semester courses in the 2011-2012 school year,

At the annual review meeting held in May 2012, Student's IEP was changed. The number of hours of specialized instruction were reduced from 26.5 to 21 each week, and the amount of behavior support was reduced from 60 minutes per week to 30 minutes per week. The setting for specialized instruction was moved from outside the general education setting to inside the general education setting. The notes from the May 2012 meeting indicate these changes were made because Student's English teacher's and Student's case manager's opinions that Student was capable of accessing some instruction in the general education setting. In reaching this conclusion they relied on Student's performance during the first semester of the school year. Student's English teacher recognized there had been a decline in Student's performance due to

attendance issues as well as some disciplinary issues. In contrast, the IEP identified many concerns under the present Level of Academic Performance in the Social/Emotional/Behavioral Development Area. The IEP states Student was not performing up to his potential, and his grades had fallen from Cs to Fs. As of the date of the development of the IEP Student was cutting classes and had been suspended on several different occasions. The IEP stated Student's lack of impulse control and inability to follow school rules would continue to have an impact on Student's academic performance. The concerns reflect some similar findings including diagnosing Student as having ADHD and recommending Student be placed in a small, well-structured and supportive, full time special education setting in some of the assessments of Student..

The change in instructional setting from outside general education to inside is supported only by one teacher's stated experience and collaboration by Student's case manager. There is no recent assessment to support such change.²⁵ There is no support from any of Student's other teachers. In light of Student's increasing poor behavior, poor attendance and severely falling grades, this is scant support for such a significant change in Student's program. Moreover, the staff at _____ also appear to question the wisdom of such a change as they ultimately do not implement it. Rather than placing Student in the inclusive, general education classes described on his IEP, in the 2012-2013 school year, they place Student in separate classes because, as stated by his case manager during hearing, they did not know how large these general education classes were going to be when they determined the appropriate setting for Student. While I recognize the efforts to adapt to Student's needs and the _____ staff willingness to recognize the error in their planning, I am concerned the _____ staff would so facilely place a student

²⁵ I address under Issue 6, *infra*, the failure to provide recent assessment despite the parent's request. Such assessment might have provided support for or against such an IEP change.

with documented needs for small classes and structure in a large general education class in a large general education high school and then assert they lacked sufficient knowledge to know these would be large classes in advance. At best this stretches credibility. At worst it is a blatant misrepresentation. Moreover, such a change to the IEP requires parental input when the IEP is developed and a second IEP meeting, with parent participation, to change the IEP when it is not implemented. 34 C.F.R. § 300.324.

As previously stated parents are to be full and active members of teams making program and placement decisions. 34 C.F.R. § 300.327. The IEP meeting held in May 2012 was held without the parent in attendance. DCPS staff testified the parent had been notified about the meeting and did not appear. The team, other than the parent was present, so the meeting went forward. This series of events does not comply with IDEA requirements to include the parent. Under 34 C.F.R. § 300.322(a), the LEA must take steps to ensure the parent is present at the meeting or is otherwise afforded the opportunity to participate. In the event the LEA is unable to convince the parent to attend, a meeting may proceed if records of attempts to arrange a mutually agreeable time and place are maintained. § 300.322(d).

In *JN v. District of Columbia*, 677 F. Supp. 2d 314, 322 (Dist. Court, Dist. of Columbia 2010) the Court discussed the need to accommodate a parent's reasonable request to reschedule an IEP meeting.

. . . the Ninth Circuit has found that refusing to reschedule an IEP meeting at the parents' request represents a significant procedural defect. In *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir.2003), the court stated that the school district violated IDEA by failing to coordinate with a student's parents to schedule the IEP, and by simply notifying parents of the meeting and refusing to honor the parents' timely rescheduling requests. *Id.* at 1079 (overruled on other grounds)

In the instant matter, the evidence shows DCPS sent parent an invitation to an MDT meeting to be held on May 10, 2012 at 9:00 AM. Despite previous emails from Petitioner's advocate in January 2012 that all requests for scheduling meetings go through legal counsel, no notification was sent to legal counsel. On May 8, 2012 Student's case manager bumped into Petitioner who was at _____ for another reason. He reminded her of the MDT meeting scheduled for May 10, 2012. Petitioner indicated she did not want to meet without her representatives. Student's case manager testified he had had one other telephone conversation with Petitioner regarding this meeting. Also on May 10, 2012 Petitioner's educational advocate sent the _____ special education coordinator an email regarding scheduling a meeting on another subject on May 11, 2013. An IEP meeting was held on May 14, 2012. Petitioner nor her representatives were present.

While this record establishes some efforts to schedule an IEP meeting with Petitioner, the evidence does not support a finding that DCPS made the necessary efforts to schedule this meeting with Petitioner. The documentation shows the notices provided both in writing and orally were for May 10, 2012. Yet the meeting was held on May 14, 2012. No effort to communicate with Petitioner's counsel, despite requests to do so were documented, and while Student's case manager testified he had another conversation with Petitioner regarding the meeting there is no documentation, as required by IDEA, supporting this averment.

For the reasons discussed above. I conclude, Student was denied a FAPE by DCPS failure to include Petitioner in the IEP meeting held in May 2012.

Petitioner also alleges the IEP is inappropriate because there is no BIP based on an FBA²⁶ and because the transition plan is inadequate. The first of these allegations must fail because the BIP cannot have been developed because the FBA was not completed. Therefore, I cannot

²⁶ I address the need for an FBA below under Issue 6.

assume, the FBA would have established a need for a BIP, and I cannot find the IEP is inappropriate because it lacks a BIP. I further find Petitioner has not met her burden of proof as to the development of the transition plan. Petitioner provided minimal evidence as to the transition plan. The May 2012 IEP includes a brief transition plan. It lacks detail. However, Petitioner did not provide support for or evidence that this minimal plan was inadequate. She did not establish the information that was missing and needed to create an adequate transition plan. I therefore find, by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to include a BIP or a more fully developed transition plan in the May 2012 IEP.

5) *Whether DCPS has denied Student a FAPE by failing to implement the May 2011 and May 2012 IEPs. Student was not placed in a full-time, separate special education program at Woodson SHS and did not receive 60 minutes of behavior support as required by the May 2011 IEP. The May 2012 IEP which called for 21 hours of special instruction in a general education setting also has not been implemented at Woodson SHS. Student has been placed in self-contained settings for some of his classes. He has not received the 30 minutes of behavior support required by this IEP*

IDEA requires a student to receive special education and related services in conformity with an IEP. 34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1. It is ironic that in the instant matter neither the fulltime pull out program required by the May 2011 IEP nor the inclusive program required by the May 2012 IEP were provided. When the May 2011 IEP was in effect fewer special education classes were provided than required by the IEP, and when the May 2012 IEP was in effect additional separate special education classes were provided beyond those required by the IEP. While the DCPS witnesses attempted to explain the rationales for the deviation from the IEP programs, there is no such rationale that can establish compliance with IDEA. It is likely that this testimony was intended both to explain away clear violations of IDEA and simultaneously demonstrate efforts to educate Student and meet his needs within the confines of the classes available at the school. However, it is as Petitioner argues. A student's

IEP program and services are to be developed and implemented based on the student's needs not on the availability of classes, programs and services at the school.

The May 2011 IEP which was in effect until May 14, 2012 when Student's next IEP was developed, required Student receive 26.5 hours of special education instruction outside the general education environment. As discussed above, this did not occur. In the 2011-2012 school year Student was enrolled in 8 classes only 5 of which complied with his IEP requirement that he receive his instruction in separate special education classes.²⁷ The May 2012 IEP required Student receive 21 hours per week of specialized instruction in the general education setting. However, Student's case manager testified that at the beginning of the 2012-2013 school year 3 of Student's 4 assigned classes were outside the general education setting. This would mean that the majority of Student's class time was to be outside the general education environment rather than inside it as required by his IEP. The case manager testified this scheduling was for Student's benefit as the classes inside the general education environment were larger than expected, and this may be true. However, under IDEA such a significant change in Student's special education program would require a meeting to develop a new IEP. I note, there was a team meeting in October 2012 but the change in Student's program was not discussed at this meeting and the IEP was not revised.

For the reasons stated above, I find by a preponderance of the evidence that Student was denied a FAPE when DCPS failed to implement the May 2011 and May 2012 IEPs as written.

I recognize that Petitioner has also alleged that Student did not receive the behavior support services required by his IEP. I do not so find. As noted above there are many reasons a particular related service session may not be provided. Some of these reasons require that the

²⁷ In order to receive 26.5 hours of special instruction outside the general education setting Student would need to receive all his instruction in separate special education classes.

session be made up and others do not. While it is clear that Student's social worker had limited knowledge of Student and his needs, this does not support a finding of a failure to provide service. The limited number of service trackers also do not support such a finding. As to the alleged failure to provide delivery of behavior support services required by Student's IEP, I find Petitioner has failed to meet her burden of proof.

6) *Whether DCPS has denied Student a FAPE by failing to conduct an appropriate re-evaluation of Student. DCPS failed to provide the parent written notice that DCPS did not need new assessments to re-evaluate Student. DCPS did not include the parent in the re-evaluation meeting. DCPS did not complete a vocational assessment on which to base the transition plan. DCPS did not complete a comprehensive psychological assessment following its own determination of the need for such an assessment nor after the parent's written and verbal requests for such an assessment. DCPS did not complete a functional behavioral assessment following the Student's escalating behavioral issues demonstrating the need for such an assessment nor following parental requests for such an assessment.*

The IDEA requires a local education agency, here DCPS, to ensure that a reevaluation of each child with a disability is conducted at least once every three years, unless the parent and public agency agree one is not necessary. 34 C.F.R. § 300.303(b). A public agency also must ensure that a reevaluation occurs if the child's educational or related service needs warrant a reevaluation or if the child's parent requests a reevaluation. 34 C.F.R. § 300.303(a). This reevaluation is to be conducted in accordance with regulations establishing the requirements for evaluation and reevaluation. 34 C.F.R. §§ 300.304 through 300.311. *Id.* These regulations require, among other standards, that the student be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

In the instant matter, Student received a psycho-educational evaluation in May 2008. His prior evaluation in this area had been in September 2004. In January 2012 Student was evaluated on the STAR reading and math diagnostic tests and prior to that he received educational evaluations on the Woodcock Johnson III in September 2010 and June 2011. In December 2011,

Petitioner's counsel sent the principal at _____ at letter requesting a reevaluation, specifically a functional behavioral assessment. This request followed Student's deteriorating behavior, particularly poor attendance, subsequent to enrolling at _____ in August 2011. These behavioral changes as well as student's co-existent falling grades should have been sufficient to alert DCPS to the need for a psychological assessment, but they were not.

A reevaluation meeting was held on January 31, 2013. Petitioner was not in attendance. However, Student, who was 14 at the time did attend. At the meeting Student was found to have continuing eligibility under IDEA. On February 6, 2012, a meeting was held with Petitioner and her advocate to review the results of the January 31, 2012 meeting. At this February meeting Petitioner and her advocate reiterated the request for an FBA and noted Student was to have had a psychological when he was still attending Prospect.²⁸ She asked that the psychological be provided at Woodson. The DCPS witnesses did not remember these requests. On September 14, 2012, the paralegal²⁹ in Petitioner's attorneys firm sent Student's case manager an email reminding him, among other items, that there had been a request for a functional behavioral assessment made in 2011 and it had not yet been completed. On October 9, 2012, at the 30 day review meeting held at Petitioner's request, Petitioner requested an independent functional behavioral assessment and an independent comprehensive psychological. DCPS indicated it would provide the FBA but Petitioner rejected this offer due to the long delay in providing the requested assessment, indicating she could not rely on DCPS' assertion that it would now be provided. DCPS also stated it could not authorize a psychological because no psychologist was present at the meeting. DCPS again offered to provide the FBA by email on October 10, 2012

²⁸ The notes from this meeting entered into evidence as J 6 stop in the middle of sentence regarding the requests for assessments. While there is no evidence suggesting Petitioner raised concerns regarding this omission, I rely on the advocate's testimony that these two assessments were discussed at that time. The lack of a complete sentence at this point in this document is concerning as it is the only such omission in the DCPS notes.

²⁹ This person had been Petitioner's educational advocate.

and stated it was unwilling to fund either an independent FBA or comprehensive psychological. DCPS never provided a form for consent for either evaluation.

IDEA requires that a reevaluation be conducted when a parent requests. There is no ambiguity in this requirement. A reevaluation is to address all areas of suspected disability. Student's increased behavioral concerns were not addressed As stated by the Court in *Cartwright v. Dist. of Columbia*, 267 F. Supp.2d 83 (D.D.C. 2003) the plain language of the IDEA regulation is that a local education agency must comply with a parent's request to reevaluate. See, 34 C.F.R. § 300.303(a)(2). It is axiomatic that a child must be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4). Here Student exhibited notable changes in behavior and achievement following his change in placement from a separate special education school to a program within a general education school. In particular, Student began to cut classes and eventually developed chronic absenteeism. The requests for a functional behavioral assessment and a comprehensive psychological were intended to help determine the bases for the decline in Student's behavior. The minimal testing provided for the reevaluation meeting by the STAR diagnostic tests cannot be said to address these behavioral concerns. The final eligibility determination report generated at the January 31, 2012 reevaluation meeting and subsequently presented to Petitioner does not address any of Student's deteriorating behavior. Moreover, Petitioner specifically requested both an FBA and a comprehensive psychological evaluation be part of the evaluative process. Assuming, *arguendo*, that DCPS decided not to provide the FBA and psychological requested and that despite the finding in *Cartwright*, DCPS could choose not to provide the assessments requested by Petitioner, a notification of the refusal³⁰ and the basis for

³⁰ It is possible DCPS might contend the email stating it would not provide the independent assessments and that it was willing to provide the FBA through its own staff is such notification. I reject such an argument and note it has not been made. The email, does not provide any information regarding the reasons for denial of the independent assessments; it does not address providing or not providing a psychological rather it indicates DCPS will review the

the refusal pursuant to 34 C.F.R. § 300.503(a)(2) would have been required. This notification was not provided. I further note, offering to provide the FBA in October 2012 after it had been requested in writing in December 2011 is far from responsive to Petitioner's request. There simply can be no reasonable rationale for this delay. Moreover, DCPS statement that it would review Student's most recent psychological to determine whether another is needed can be deemed another delay.

While the failure to provide needed assessments might under some circumstances be deemed procedural violations that are not denials of FAPE, this cannot be the case in the instant matter. In the instant matter, the failure to provide the FBA and psychological assessments impeded Student's right to a FAPE as well as impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE. 34 C.F.R. § 300.513. Here Petitioner identified areas of concern regarding Student's behavior and deteriorating school performance and asked the school district to provide the assessments necessary to reach determinations regarding these concerns. DCPS did not respond to these requests, nor did DCPS initiate assessments on its own. Rather than attempting to determine the bases for Student's behavior and performance issues, DCPS adopted a posture of blaming the student, pointing to his ever diminishing class attendance. While the fact that Student's deteriorating academic performance could be correlated with his lack of attendance was clearly true, DCPS did not attempt to determine why he was not attending, although they did attempt to address the non-attendance with behavioral interventions. However, when these behavioral interventions did not work, DCPS did not take the next step and attempt to determine why a student who had done well and attended class regularly stopped doing so. By failing to assess Student to attempt to determine the basis for his behavior, DCPS directly

old psychological; and it does not address the approximately 10 month delay from the date of the original written request for the FBA and the offer to provide it.

impeded his right to a FAPE. There was no attempt to provide Student a FAPE under the circumstances as the behavior went unassessed. The failure to assess Student with an FBA and psychological as requested by Petitioner also impeded her ability to participate in the decision making process regarding the provision of a FAPE to Student as she did not have the necessary information that would have been provided by the assessments.³¹

For the reasons discussed above I find, by a preponderance of the evidence, that DCPS failed to provide Student a FAPE when it failed to evaluate Student in the area of social/ emotional/ behavioral functioning, an area DCPS should have identified as one of suspected disability from June 25, 2010 through April 12, 2012.

I further find by a preponderance of the evidence that DCPS failed to provide Student a FAPE when DCPS failed to provide Student a functional behavioral assessment and a comprehensive psychological evaluation in response to the parent's requests. I further note DCPS did not provide a comprehensive re-evaluation at the time of the triennial review and it did not provide notice as to the reasons of its determination not to do so.

Compensatory Education

A hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 365 U.S.App. D.C. 234(D.C. Cir. 2005) citing *G. ex RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely

³¹ I note this information might have shown that the Student's deteriorating behavior and poor school performance was simply a matter of choice. It might also have shown the behavior and performance issues were symptomatic of his disability and required goals on his IEP. The failure to provide the assessments directly precluded reaching a determination regarding these concerns. DCPS failure thus worked against its own position in this matter as well as against Petitioner's.

would have accrued from special education services the school district should have supplied in the first place.” *Reid* at 524.

In the instant matter Student was denied a FAPE in both the 2011-2012 and 2012-2013 school years. He was not provided an appropriate placement in that the placement at could not provide the full time out of general education placement required by his May 2011 IEP. Further, the inclusion program required by Student’s May 2012 IEP was not provided. In addition, Petitioner was not included in all IEP/placement/re-evaluation meetings and there were not sufficient efforts made to obtain her attendance. Finally Student was neither assessed in all areas of disability, assessed in response to Petitioner’s request, nor was Petitioner provided notice regarding the reasons for not providing assessments. In the same time period, Student exhibited deteriorating behavior and failed the substantial majority of his classes.

Petitioner has proposed a compensatory education plan with two components: 50 hours of tutoring and 150 hours of mentoring. Despite Petitioner’s expert’s statements that this plan would place Student in the position he would have been had DCPS provided him a FAPE, I can find no basis for reaching such a conclusion. Petitioner has asked, and I order below that Student be placed in _____ provide support classes and incorporates counseling in its program. Petitioner’s own witness testified Student would not need the tutoring if he received support classes. Further, Petitioner’s witness’ testimony regarding the mentoring services requested appears to focus this service on community rather than school based activities. I, therefore, decline to implement the compensatory services plan proposed by Petitioner.

This is not to suggest, however, that Student should not receive compensatory services at all. Rather than providing the tutoring and mentoring services requested by Petitioner, I order below the provision of academic classes in summer school to provide Student the opportunity to

take courses toward his high school diploma. These courses are to make up for those he failed in the 2011-2012 and 2012-2013 school year and to move him toward parity with his same aged peers on the diploma track..

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS denied Student a FAPE by placing him at _____ which was not an appropriate placement in that it could not implement Student's May 2011 IEP.
2. DCPS did not predetermine Student's placement and fail to provide for parental input into the placement decision in May 2011. This issue is dismissed.
3. DCPS did not deny Student a FAPE by DCPS's failing to consider the harmful effects of the _____ placement on Student. DCPS did consider the potential harmful effects and developed an IEP that, at the time of its drafting, was intended to address Student's needs. This issue is dismissed.
4. DCPS denied Student a FAPE by failing to include Petitioner in the IEP meeting held in May 2012.
5. DCPS did not deny Student a FAPE by failing to include a BIP or a more fully developed transition plan in the May 2012 IEP. These allegations are dismissed.
6. DCPS denied Student a FAPE when it failed to implement the May 2011 and May 2012 IEPs as written. DCPS did not provide the hours of service in the settings specified under these IEPs. The remainder of the allegation regarding failure to implement these IEPs is dismissed as Petitioner did not meet her burden of proof as to failure to deliver the required behavior support services.

7. DCPS denied Student a FAPE when it failed to evaluate Student in the area of social/emotional/ behavioral functioning, an area DCPS should have identified as one of suspected disability from June 25, 2010 through April 12, 2012.
8. DCPS denied Student a FAPE when it failed to provide Student a functional behavioral assessment and a comprehensive psychological evaluation in response to the parent's requests. DCPS also denied Student a FAPE when it did not provide a comprehensive re-evaluation at the time of the triennial review and did not provide notice as to the reasons of its determination not to do so.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. DCPS provide Student an independent comprehensive psychological evaluation and an independent functional behavioral assessment. These assessments are to be completed and the reports issued within 30 calendar days of the date of this Hearing Officer Determination. These assessments are to specifically address Student's absenteeism, deteriorating behavior and deteriorating academic performance. The comprehensive psychological is also to address any other area necessary to determine the programs and services needed to provide Student a free, appropriate public education.
2. Student is to be placed at _____ for, at a minimum, the remainder of the 2012 -2013 school year and for the 2013 -2014 school year. This placement is to begin within 15 days of the date of this Hearing Officer Determination. If _____ is on Spring break on the date designated for his enrollment at _____, Student is to enroll at _____ on the first day _____ is open following Spring break.

3. Within 10 school days of the receipt of the assessment reports identified in ¶ 1, *Supra* at p.39, an IEP meeting including representatives of DCPS and of _____ and Petitioner, and her representatives if she so chooses, are to meet to review and revise the IEP, if appropriate, to address the results of the assessments and information, if any, provided by _____ representatives based on Student's performance while enrolled there.
4. Petitioner, and her representatives, if she so chooses, are to be included in all meetings regarding Student's assessments, IEPs, and placement provided pursuant to this Hearing Officer Determination.
5. Student is to attend summer school to take additional academic classes. The number of classes Student takes is to be determined by _____ staff in consultation with Petitioner. If _____ provides academic summer school classes they are to be provided there. If _____ does not provide academic summer school classes, the school to provide these services is to be determined by _____ staff in consultation with Petitioner and her advisors, if she so chooses. These classes are to be provided to Student in conformity with his IEP. In addition they are to be provided with the special education support provided during the school year, including small classes, with individualized support and instruction and minimal distractions. These services are to be provided during summer school 2013.

IT IS SO ORDERED:

March 13, 2013
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).