

**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
May 03, 2013

STUDENT, a minor, by and through
his Parent¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On February 19, 2013 Parent, 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”).³ 20 U.S.C.A. §1415(f)(1)(A).

Respondent DCPS filed a Response to Parent’s Administrative Due Process Complaint Notice

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 This case was originally assigned to a different hearing officer who, on February 22, 2013, issued an order bifurcating the original complaint into an expedited and non-expedited matter. (HO 2) The expedited matter (case # 2013-0089B) was heard by the originally assigned hearing officer and, on March 25, 2013, I was assigned to hear the instant non-expedited issues. I did not receive information regarding the resolution session. The original hearing officer denied DCPS’s Motion to continue Due Process Hearing on March 5, 2013. (HO 7)

(HO 4) on March 1, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). The 30-day resolution period ended on 03/21/13, the 45-day timeline to issue a final decision began on 03/22/13 and the final decision is due by 05/05/13. (HO 9)

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq. of the D.C. Disability Law Group, P.C., and Lynette Collins, Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was scheduled for April 10 and 11, 2013. The hearing was held and concluded on April 10, 2013 in Room 2004 of the Student Hearing Office.

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 FAPE by failing to implement Student's April 2012 and December 2012 Individualized Education Programs ("IEP") during the 2012-2013 school year; specifically, (a) Student did not receive all of the 20 hours/week of specialized instruction that was prescribed by his IEPs - from the beginning of the school year until the 12/05/12 IEP was developed, Student received only 4-5 hours/week of specialized instruction outside of general education and since the 12/05/12 IEP was developed, Student did not receive any specialized instruction outside of general education; and (b) Student did not receive any of the speech-language and behavioral support services prescribed by his IEP (one hour/week each);
- 2) Whether DCPS denied Student a FAPE by failing to provide Student with appropriate IEP on 12/05/12; specifically, (a) the IEP indicated Certificate Track even though Petitioner requested that Student be placed on the diploma track; (b) the IEP should reflect 100% specialized instruction and related services outside of general education in a therapeutic setting; (c) the IEP contained outdated, three year old present

levels of performance, goals, baselines, impact statements and needs statements; (d) the IEP was developed by an inappropriate IEP Team in that the team did not include Petitioner who was not invited to the meeting, a psychologist or social worker to interpret assessment results, and a DCPS representative who was knowledgeable about other school locations; and (e) the IEP did not contain an updated Behavioral Intervention Plan that was based on a recent Functional Behavioral Assessment;

3) Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by failing to conduct a Functional Behavioral Assessment since the beginning of the 2012-2013 school year to assess Student's negative behaviors in school that consisted of absconding from class, missing class and failing to follow the directives of school personnel; and

4) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement/location of services since 12/05/12; specifically, School could not provide the following services to address Student's Emotional Disturbance disability: (a) 20 hours/week of specialized instruction outside of general education, or (b) 100% specialized instruction outside of general education in a therapeutic setting.

RELIEF REQUESTED

Petitioner requested:

1) DCPS to convene an IEP meeting that includes Petitioner and a full IEP team within 10 school days, to revise Student's IEP to include (a) current present levels of performance, needs, goals and impact statements, (b) exit category of diploma track, (c) 27.5 hours/week of specialized instruction outside of Prehearing Order 2013-0089 (Non-Expedited) general education, and (d) a therapeutic environment in a separate special education day school;

2) DCPS to place and fund Student at a nonpublic school of Petitioner's choice, possibly _____ School and _____ School; and

3) An award of compensatory education consisting of tutoring outside of school to compensate Student for DCPS' failure to provide Student with services required by his IEP since the beginning of the 2012-2013 school year and DCPS' failure to provide Student with full-time special education services in a therapeutic environment since 12/05/12.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1	Correspondence between DCPS & SHS	February 2013
P-2	Educational Advocate's MDT notes from MDR meeting	February 6, 2013
P-3	Paralegal's minutes / MDT notes from MDR meeting	February 6, 2013
P-4	DCPS's MDT notes from MDR meeting	February 6, 2013
P-5	Incident Report regarding incident taking place at MDR meeting	February 6, 2013
P-6	Incident Report regarding incident taking place on 1/23/2013 & related documents	January 23, 2013
P-7	Superior Court notice showing court monitoring of student	February 7, 2013
P-8	Incident statements and Incident History from 1/23/2013 & related documents	January 23, 2013
P-9	Student class schedule, transcript, and report cards	2012-2013 SY
P-10	Individual Education Plan (IEP) dated September 30, 2011	September 30, 2011
P-11	Individual Education Plan (IEP) dated April 25, 2012	April 25, 2012
P-12	Individual Education Plan (IEP) dated December 5, 2012	December 5, 2012
P-13	Witness Resumes	Updated Fall 2012
P-14	NCLB Teacher Certification documents and corresponding request	March 21, 2012
P-15	Compensatory Education Plan by Ida Jean Holman, Ph.D.	April 2, 2013
P-16	DCPS Policy Manual titled "Missed Related Service Sessions and Due Diligence Guidelines"	May 2012
P-17	DCPS documents showing DCPS policy on attendance	Printed April 3, 2013
P-18	OSE Approved Non-Public Day Schools as of 2.28.2013	February 28, 2013

There were no exhibits admitted on behalf of Respondent; none were provided with

Respondent's 5 day disclosures.

Exhibits admitted by the Hearing Officer are:

- 1 Administrative Due Process Complaint Notice of February 19, 2013
- 2 Order on Bifurcation dated February 22, 2013
- 3 Prehearing Notice (with attachment) of February 22, 2013
- 4 District of Columbia Public Schools' Response of March 1, 2013 to Parent's Administrative Due Process Complaint
- 5 DCPS's Motion to Continue Due Process Hearing dated March 4, 2013
- 6 Revised Prehearing Notice (with attachment) dated March 5, 2013
- 7 Order on DCPS's Motion to Continue Due Process Hearing dated March 5, 2013
- 8 District of Columbia Public Schools' Response to Petitioner's Due Process Complaint dated March 8, 2013
- 9 Prehearing Order dated March 25, 2013
- 10 Notice of Hearing Officer Appointment (Erin Leff) dated March 25, 2013
- 11 DCPS' Proposed Location of Services at the Due Process hearing dated March 27, 2013
- 12 Petitioner's Notice of Proposed School Placement for Upcoming Due Process Hearing dated April 1, 2013
- 13 Miscellaneous emails
 - 2/21/13 from HO Dietrich re bifurcating the expedited issues in the complaint
 - 3/21/13 from HO Dietrich re the amount of time needed for hearing
 - email chain re posture of case as an expedited matter and filing on location of services
 - chain re Prehearing Order on non-expedited issues and the procedures to follow re evidence at the hearing
 - 2d chain re bifurcated nature of case and procedural posture

- 3/27/12 from HO Leff re filing of Proposed Hearing Officer Exhibit List at future date
- 3/29/13 re PHC on April 3, 2013
- 3/29/13 from HO clarifying conference on 4/3/12 is status conference rather than formal PHC

B. Testimony

Petitioner testified and presented the following witnesses:

- Student
- Chitalina Khanchalern, Paralegal and Advocate, D.C. Disability Law Group, P.C.
- Dr. _____, Assistant Education Director,
- Ida Jean Holman, Ph.D., admitted as an expert in special education as it relates to the development of compensatory education plans.

DCPS presented no witnesses.

FINDINGS OF FACT

Based upon the evidence presented,⁴ I find the following facts by a preponderance of the evidence:

⁴ Other than Respondent's stipulation entered at the beginning of the hearing held on April 10, 2013, the only evidence presented in this matter was provided by Petitioner.

During cross examination of one of Petitioner's witnesses, Respondent's counsel attempted to use one of Student's school records for purposes of impeachment. Petitioner objected and, after a lengthy discussion, I ultimately sustained Petitioner's objection. I did so because the IDEA regulations are clear that any party to a hearing may prohibit the introduction of any evidence that has not been disclosed at least 5 days before the hearing. 34 C.F.R. § 300.512(a)(3). In this instance Respondent made clear that she was not attempting to introduce the document and intended to use it only for impeachment purposes which, in most instances, would be an acceptable process. However, this effort, in my view, ran counter to the intent if not the express IDEA provision. The document from Student's school record had not been provided in Respondent's 5 day disclosures. It had not been provided in response to Petitioner's requests for documents. *See*, P 1; Testimony of Khanchalern. (I note, parenthetically the possible FERPA violation raised by the failure to provide the document in response to a student records request.) Yet Respondent's counsel appeared at hearing with the document and attempted to use the document in an effort to show Petitioner's witness' testimony was not credible. If I had allowed Respondent to use the document for impeachment purpose, some small bit of information previously unknown to Petitioner would have been included in the record. By failing to provide the document to Petitioner in advance, Respondent prevented Petitioner from taking the document into consideration in preparing her case. Special education due process hearings are intended to address the needs of the student who is the recipient of the IDEA service or lack of service in question. Therefore, all relevant documents are to be exchanged at least 5 days in advance of the hearing. Respondent's counsel, in preparing her case, recognized this document was relevant; she brought it to the hearing and attempted to use it. By failing to provide Petitioner with the document in advance of the hearing combined with the failure to provide the document in response to a student records request, Respondent precluded Petitioner from having the benefit of knowledge of the information contained in the document when preparing her case and, in so doing, lost sight, I

1. Student is _____ years old. He is in the _____ grade at _____ High School (_____), his neighborhood school. He receives special education and related services as a student with an emotional disability. This is Student's first year at Spingarn. P 10; P 11; P 12; Testimony of Student; Testimony of Petitioner.
2. Student's date of birth is February 23, 1998. P 10; P 11; P 12.
3. In the 2011-2012 school year Student attended _____ School – (_____). An annual review meeting was held at _____ on April 24, 2012. A new IEP was developed for Student at this meeting. The IEP includes goals in the areas of reading; mathematics; written expression; communication/speech and language; and emotional, social, and behavioral development. The IEP includes statements of present levels of performance, student needs and impact related to Student's _____ grade year at _____ when he was 14. This IEP required Student receive: 20 hours of special instruction outside the general education setting for 7.5 hours per week in reading, 10 hours per week in mathematics and 2.5 hours per week in written expression. Student also was to receive 1 hour of behavior support services and 1 hour of speech-language services outside the general education setting each week. The IEP also included the provision of the following supports identified under other classroom aids and services: assistive technology, remedial math, flexible grouping and a behavior intervention plan. This IEP states Student is to participate in the regular statewide assessment with accommodations. It states Student will receive a high school certificate at age 21. In contrast, the IEP also states Student's projected date of graduation is June 15, 2016. The IEP states Petitioner was in attendance at the meeting.⁵ P 11.

believe, of the focus on the child in the instant proceeding. I further note 34 C.F.R. § 300.513(a) requires DCPS to comply with a request for records without unnecessary delay and before any due process hearing. DCPS did not comply with this requirement.

⁵ This is typed on the cover page. There is no signature page included with the exhibit.

4. Student enrolled at _____ for the first time in at the beginning of the 2012-2013 school year. _____ s a full inclusion school, with the exception of a reading resource class. Class periods at _____ are 50 minutes long. Student's general education classes include approximately 30 students each. For the first semester Student was assigned to one class, Reading Resource, outside the general education environment. Testimony of Khanchalern; Testimony of Student; P 9; P 14; P 15.

5. The multidisciplinary team at Spingarn held an annual IEP review meeting for Student on December 5, 2012. This IEP, like the prior IEP, includes goals in the areas of reading; mathematics; written expression; communication/speech and language; and emotional, social, and behavioral development. The present levels of academic achievement and functional performance in reading written expression and mathematics, however, appear to be the same as those that were stated on Student's IEP when he was a sixth grader at _____ School. The statements of needs and impact on the student, other than in speech, also appear to be the same as those that were stated on Student's IEP when he was a sixth grader at _____ Elementary School (and included on Student's 9/30/11 IEP from _____). The December 5, 2012 IEP requires, like the April 2012 IEP, Student receive: 20 hours of special instruction outside the general education setting for 7.5 hours per week in reading, 10 hours per week in mathematics and 2.5 hours per week in written expression. Student also was to receive 1 hour of behavior support services weekly. The December 2012 IEP changes Student's required speech-language services outside the general education setting from 1 hour per week to 240 minutes per month. This IEP includes the same supports identified in the April 2012 IEP under other classroom aids and services: assistive technology, remedial math, flexible grouping and a

behavior intervention plan. This IEP, like the April 2012 IEP, states Student is to participate in the regular statewide assessment with accommodations. It also states, as did the previous IEP, Student will receive a high school certificate at age 21, and includes the contrasting statement that Student's projected date of graduation is June 15, 2016. P 10; P 11; P 12.

6. Petitioner did not attend the December 5, 2012 IEP meeting. She was not invited and did not know the meeting was occurring. The IEP indicates Student was in attendance. However, Student did not attend this meeting. He was not in school when this IEP meeting was held. He was out of school on suspension. Testimony of Petitioner; Testimony of Student; Testimony of Khanchalern.

7. Kano Hudson served as both the individual who can interpret assessment results and the agency representative at the December 5, 2012 IEP meeting. Kano Hudson is a Special Education Coordinator. P 3; P 10.

8. Student did not receive the related services on his IEPs during the 2012-2013 school year. He did not receive either behavior support services or speech/language services. The behavior intervention implemented at Spingarn was limited to directing Student to go to his case manger if he was having difficulty. Testimony of Student; Testimony of Khanchalern; Testimony of Holman.

9. Student does not attend classes consistently at He often arrives at school late, and he cuts classes he does not want to attend. He walks the halls and often is not where he is supposed to be. Student tends to skip his Algebra class because he does not like it. In addition, Student has been suspended multiple times during the 2012-2013 school year and has missed approximately 20 additional days because he was sick, at the doctor or overslept. Respondent's policy is to mark students as absent for the day if a student misses 60% of his/her classes.

Student has a total of 47 absences for the current school year.⁶ P 2; P 17; Testimony of Student; Testimony of Khanchalern;

10. A manifestation determination review meeting combined with an IEP review meeting was held on February 6, 2013. Both Petitioner and Student attended this meeting. They were accompanied by their advocate and by the paralegal from their attorney's office. It was at this meeting Petitioner learned there had been an IEP meeting on December 5, 2012. Testimony of Khanchalern; Testimony of Holman; Testimony of Petitioner; Testimony of Student.

11. Student requires an IEP providing full time special education services. He needs small classes and/or small group instruction. He requires a behavior intervention plan. Student is easily angered and his disruptive behavior escalates rapidly. He requires behavior support services on an on-going basis. Student also requires a plan to address his attendance issues. P 10; P 11; Testimony of Student; Testimony of Khanchalern; Testimony of Holman; Stipulation of Respondent.

12. DCPS policy requires that an IEP meeting be convened within 15 school days of the third missed related service session when a student receives 1 – 2 service sessions per week of the same service. P 16.

13. () is a full time, non-public, therapeutic day school providing academic and vocational services to special education students from ages 5 through 21. The therapeutic day school has a little more than 80 students in the high school (upper school) program. Classes have a maximum of 10 students. There is a 3-1 student- adult ratio. Each class has a lead teacher and a teaching assistant. Other adults also may be in the classroom. All lead teachers hold certifications in special education and/or the content area they teach. All

⁶ There is no attendance record in evidence. I, therefore, cannot determine whether these 47 absences include days of suspension, unexcused absences or excused absences or some combination of these possibilities.

students are on behavior management plans. Hallways are closely monitored. A staff of eight psychologists, one social worker and two art therapists provide individual and group therapy and crisis management services. A psychiatrist is available for medicine management if needed. The school is approved by the Office of the State Superintendent of Education in the District of Columbia. Students attending [redacted] from the District of Columbia on the diploma track, if successful, receive a diploma from DCPS. [redacted] is able to provide Student a full time, out of general education program as required by his IEP. Student has visited the school and has been accepted. P 18; Testimony of Warnke; Testimony of Student.

14. Petitioner's compensatory education plan is based on Dr. Holman's determination that [redacted] did not provide Student the programs and services required by his IEPs during the 2012-2013 school year and her assessment of the resultant harm. The Compensatory Education Plan recommends Student take two, credit classes in summer school and receive 75 hours of mentoring services at a rate of one or two hours of mentoring service per week. P 15; Testimony of Holman.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by Petitioner, witness testimony and the record in this case. As Respondent introduced no exhibits and presented no witnesses at hearing, Petitioner's evidence is uncontroverted. While, as in all matters, witness' credibility varied to some degree from one witness to another, I find all witnesses in this matter were credible.

I. PROVISION OF FAPE

Under the IDEA each local education agency is required to provide a free appropriate public education (“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, D.C. Code § 30.3007. If a student’s behavior impedes the student’s learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* 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).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA’s procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

1) *Whether DCPS denied Student a FAPE by failing to implement Student’s April 2012 and December 2012 Individualized Education Programs (“IEP”) during the 2012-2013 school year; specifically, (a) Student did not receive all of the 20 hours/week of specialized instruction that was prescribed by his IEPs - from the beginning of the school year until the 12/05/12 IEP was developed, Student received only 4-5 hours/week of specialized instruction outside of general education and since the 12/05/12 IEP was developed, Student did not receive any specialized instruction outside of general education; and (b) Student did not receive any of the speech-language and behavioral support services prescribed by his IEP (one hour/week each)*

Both Student’s April 2012 and December 2012 IEPs required he receive 20 hours of special education instruction outside the general education environment each week. Both IEPs also required he receive one hour of behavior support services and approximately the same amount of speech/language services outside the general education environment each week. It is uncontroverted that Student was not scheduled in a manner to allow Student to receive the services required by his IEP while at .

The evidence presented at hearing shows Student was scheduled to attend general education classes, with the exception a first semester Reading Resource class, at during the 2012 -2013 school year. The Reading Resource class met for one 50 minute period each day for the first semester of the 2012-2013 school year resulting in a total of 250 minutes, or 4.17 hours, of special instruction outside the general education environment each week. This is not

close to the 20 hours required by Student's IEP. Whether Student's general education classes received special education support does not change the fact that [redacted] did not, and, apparently, could not provide the program on Student's IEPs as [redacted] is essentially a full inclusion school, a school that provides special education services in the general education classroom. Student's IEPs, including the one developed at [redacted], clearly state Student required special instruction outside the general education environment. It is noteworthy, in this regard, that Respondent stipulated on the record at the start of due process hearing in the instant matter that DCPS was willing to provide Student with a fulltime special education IEP. Such an IEP likely would require even more time outside the general education environment.

Student's IEPs also required he receive the related services of behavior support and speech language. Student testified he did not receive these services. Respondent's cross-examination suggested this failure to provide services may have been due to Student's chronic absenteeism. However, while Petitioner acknowledged Student's attendance was an issue, no evidence on Student's specific attendance issues was introduced at hearing. Student did acknowledge, during his testimony, he often was not in the location he was supposed to be during the school day. He also stated he had missed approximately 20 days for reasons other than suspension. In addition, Student has been suspended on multiple occasions, including an extended suspension.

Even if Student had attended school as required and stayed in his assigned classes he would not have received the special instruction outside the general education environment required by his IEPs. Moreover, there was no suggestion of any effort to engage Student in his related services. In addition, [redacted] did not follow the DCPS policy of holding an IEP meeting following the third missed service when a student misses more than three service sessions of one

type of related service. The only IEP meeting held at Spingarn was in December 2012. Student had attended _____ since school began in the 2012-2013 school year. There is no evidence that Student received either of the IEP required related services from the start of school through the remainder of school year and no meetings were held to following his third missed service.

I, therefore, find by a preponderance of the evidence DCPS denied Student a FAPE by failing to implement Student's April 2012 and December 2013 IEPs. Student did not receive the special instruction outside the general education environment required, nor did he receive the behavior support services and speech/language services specified on these two IEPs.

2) *Whether DCPS denied Student a FAPE by failing to provide Student with appropriate IEP on 12/05/12; specifically, (a) the IEP indicated Certificate Track even though Petitioner requested that Student be placed on the diploma track; (b) the IEP should reflect 100% specialized instruction and related services outside of general education in a therapeutic setting; (c) the IEP contained outdated, three year old present levels of performance, goals, baselines, impact statements and needs statements; (d) the IEP was developed by an inappropriate IEP Team in that the team did not include Petitioner who was not invited to the meeting, a psychologist or social worker to interpret assessment results, and a DCPS representative who was knowledgeable about other school locations; and (e) the IEP did not contain an updated Behavioral Intervention Plan that was based on a recent Functional Behavioral Assessment.*

An IEP is the memorialization of an IEP team's determination of FAPE for a particular child. In the instant matter, Petitioner has shown the IEP does not include the components required. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009.

(a) Petitioner alleged the IEP places Student on the certificate track while Petitioner requested he be on diploma track. While an IEP team is not required to write an IEP that concurs with every parental request, the instant IEP does not clearly indicate whether Student is on the certificate track or the diploma track. The December 5, 2012 IEP indicates Student is on the certificate track and should be exiting school at age 21. It then identifies a proposed exit date of June 15, 2016. Student will be 18 on June 15, 2016. This exit date therefore suggests Student

will be receiving a high school diploma. As Petitioner was not invited to and did not attend the IEP meeting⁷ at which this December 5, 2012 IEP was developed and DCPS offered no evidence in this regard, it is unclear whether DCPS intended Student be on the certificate or diploma track.

I, therefore, find by a preponderance of the evidence that the December 2012 IEP is inappropriate because the Student cannot both graduate on June 15, 2016 when he is 18 and complete school on the certificate track when he is 21.

(b) Petitioner alleged the December 5, 2012 IEP was inappropriate because Student requires a full-time, out of general education placement in a therapeutic environment. Counsel for DCPS stipulated at the beginning of the instant hearing that DCPS was willing to provide Student a full-time IEP. By so doing DCPS has conceded Student's need for a fulltime placement. DCPS did not provide any evidence suggesting there had been any change in Student's school performance since the development of the December 2012 IEP. I therefore conclude the Student's current need for a fulltime IEP, acknowledged by the DCPS stipulation, can be reasonably attributed retroactively to the IEP decisions made in December 2012.⁸

Petitioner's witnesses, including Student, candidly discussed his behavioral needs and the need to provide him a behavior program that will address Student's anger issues. It is noteworthy, I believe, that Student, himself, identified the proposed placement at _____ as placement at a behavior school. His testimony suggested he thought the focus on his behavior in this kind of therapeutic environment would be of benefit to him.

⁷ Thus it is clear she did not request he be on the diploma track during this meeting.

⁸ When Petitioner and her advisors raised the issue of a fulltime placement at the February 2013 meeting, DCPS did not discuss any changes in school performance that would support an increase in hours of service, nor was the IEP changed. DCPS' failure to provide information regarding the need for additional services at this time supports my determination that nothing occurred subsequent to the December 5, 2013 meeting to alter DCPS' assessment of Student's need for a full time placement. By making the stipulation, DCPS has, in effect, recognized Student's need for full time services retroactively. Moreover, Petitioner convincingly argued that Student's behavior deteriorated from the outset of his placement at Spingarn and therefore that fulltime placement was necessary.

I, therefore, find by a preponderance of the evidence that the December 5, 2012 IEP is inappropriate because Student requires a full time placement outside of general education in a therapeutic environment when it was drafted.

(c) Student's 12/5/12 IEP includes, as alleged by Petitioner, three year old present levels of performance, impact and needs statements. These appear to have been picked-up from the September 2011 IEP developed at . Moreover, the April 25, 2012 IEP included statements of present levels of performance, needs and impact that were current at the time that IEP was written, and could be deemed current when the December 2012 IEP was developed.

The goals in an IEP are to be based on the Student's current needs and performance so that the student's progress in the general education curriculum can be measured. *See*, 34 C.F.R. § 300.320. The goals on the December 5, 2012 IEP, it should be noted, are neither identical to those on the Blow-Pierce IEP from 2011 nor to the goals on the April 25, 2012 IEP. Thus the goals on the December 25, 2012 IEP, at best, are detached from Student's current needs and performance levels as there is no suggestion the team was aware of Student's current needs and performance levels when the IEP was drafted. At worst the goals are based on undocumented or speculative information. In either circumstance, the goals do not serve their intended purpose. They do not address Student's needs and they do not establish a basis for measuring Student's progress because they are not founded on a documented baseline.

I, therefore, find, by a preponderance of the evidence that Student's December 5, 2012 IEP was inappropriate because it contained statements of present levels of performance, needs and impact that were out of date.

(d) IDEA sets the membership of the IEP team. The team is to include:

- The parent
- Not less than one regular education teacher of the student

- Not less than one special education teacher of the student
- A representative of the public agency
- An individual who can interpret the instructional implications of evaluation results
- Others at the school or parent's discretion.

34 C.F.R. § 300.321.

Petitioner alleges that the December 5, 2012 IEP meeting was held without all required participants. Petitioner states the team was inappropriate in that it did not include a psychologist or social worker to interpret assessment results or a DCPS representative who was knowledgeable about other school locations. The IDEA does not require that the individuals identified by Petitioner attend an IEP meeting, and Petitioner's assertions alone do not establish the need for such attendees. Petitioner argued that a psychologist or social worker had to be present to interpret evaluation results. The regulations, however, do not specify the professional training of the person attending the meeting to interpret the instructional implications of evaluation results. The regulations also do not specify who can serve as the representative of the public agency. The comments to the final regulations make clear the agency, here DCPS, may determine who is able to serve as the representative of the public agency. Federal Register, Vol. 71.No. 156, p. 46670 (Aug. 14, 2006). DCPS designated Kano Hudson, a special education coordinator, to serve as both the individual who can interpret assessment results and the agency representative at the December 5, 2012 IEP meeting.

I note the IDEA does require the agency representative to be knowledgeable about the availability of resources of the public agency, 34 C.F.R. § 300.321(a)(4)(iii). Petitioner argues, and her witnesses testified, that Mr. Hudson does not have this knowledge in that he does not know what locations of service are available to provide programs and services to Student, but there was no factual underpinning to these assertions. I do not know whether Mr. Hudson has

knowledge of DCPS' resources, nor do I know whether Mr. Hudson has the authority to commit agency resources as required by the comments to the regulations. Federal Register, Vol. 71.No. 156, p. 46670 (Aug. 14, 2006). I only know Petitioner does not think Mr. Hudson has this knowledge or authority. Without evidence regarding Mr. Hudson's actual knowledge and authority, I cannot find he lacked the knowledge of agency resources nor the authority to commit agency resources based solely on the opinions of Petitioner's witnesses.

I, therefore, find, by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to have a psychologist, social worker or DCPS representative knowledgeable about other school locations at the December 5, 2012 IEP meeting.

However, for the reasons that follow, I conclude the December 5, 2012 IEP was developed by an inappropriate IEP team. One of the basic principles of IDEA is that a team of specified participants is to make decisions about the content of an individual Student's IEP. This team is to include the parent, 34 C.F.R. § 300.321(a)(1), and the public agency is to take steps to ensure the parent's presence at the IEP meeting. 34 C.F.R. § 300.322(a). In the instant matter, DCPS failed to invite Petitioner to the December 5, 2012 IEP meeting. An IEP meeting may occur without a parent in attendance only if the agency is unable to convince the parent to attend. Further the agency must make detailed records of the attempts to contact the parents. *Id.* No evidence of any effort to include Petitioner was presented in the instant matter.

While the failure to include Petitioner in the December 5, 2012 IEP meeting can be deemed a procedural violation and therefore not a violation that would result in a remedy, a procedural violation may result in a determination that the student has been denied FAPE if the violation caused substantive harm. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). Procedural violations can result in a finding of a denial of FAPE if the procedural

violation “significantly impeded the parents' opportunity to participate in the decision-making process.” *Eley, v. District of Columbia*, 59 IDELR 189 (U.S. Dist. Ct, District of Columbia 2012), citing 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Lesesne*, 447 F.3d at 830; *Taylor*, 770 F. Supp. 2d at 109-10; *Stein*, 709 F. Supp. 2d at 67; See also *J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 320-21 (D.D.C. 2010) Here, Petitioner’s ability to participate in the decision making process was clearly significantly infringed upon – it was completely denied. Petitioner did not and could not participate in the decision making process because she was not invited to the meeting and had no knowledge it was occurring.

It is clear this denial resulted in harm to Student. Petitioner was unable to provide in-put into the development of Student’s IEP. The IEP that was developed has been determined not to meet Student’s needs. It did not address his attendance issues. It did not provide sufficient hours of service. It did not include a behavior plan to address Student’s anger and acting out behavior. These are areas of concern that Petitioner has identified and requested DCPS address in interactions outside the December meeting. Excluding her from the meeting precluded her raising them for discussion and possibly impacting the development of Student’s IEP.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to include Petitioner in the December 5, 2012 IEP meeting. The IEP that resulted was developed by an inappropriately constituted team.

(e) For a student whose behavior impedes his/her learning or that of other, the IEP team is to consider positive behavioral interventions and supports as well as other strategies to address the behavior. 34 C.F.R. § 300.324(a)(2)(i). In the instant matter, the December 5, 2012 IEP includes multiple behavior goals. The majority of these goals, however, appear to be the goals from his September 2011 IEP that are based on three year old data. The plan implemented

at _____ as described by Student, relied primarily on his seeking out his case manager when he was having difficulties. This plan did not work.

Petitioner alleges Student should have had a Behavior Intervention Plan (“BIP”) based on a current Functional Behavior Assessment (“FBA”). The concept underlying this assertion is obvious. FBAs and BIPs are processes required by the IDEA under specific circumstances related to discipline. *See* 34 C.F.R. § 300.530(d)(ii) & (f)(1)(i). While the FBA/BIP process is mandated under certain circumstances related to discipline, it is applicable to other situations as well. IDEA provides the floor beneath which a district may not fall in terms of the actions to be taken to address the needs of an eligible student with a disability; it does not provide a ceiling. A district may choose to do more than is required. As discussed in more detail, *Infra* in Section II, Functional Behavioral Assessment, the need for an FBA should have been addressed at the December 5, 2012 IEP meeting as Student’s behavior through the school year was deteriorating. The goals directed at Student’s behavior were not based on current information. The intervention directing him to seek his case manager also was not based on current information. There is no suggestion that the behavior interventions were individualized to Student’s needs, and, therefore, did not provide him a FAPE. Student’s behavior continued to deteriorate resulting in a long term suspension a few weeks later.

I therefore find, based on a preponderance of the evidence that Student was denied a FAPE. DCPS should have provided Student a BIP based on a current FBA in the December 5 2012 IEP.⁹

⁹ I note, on December 5, 2012 it was clear Student’s behavior was such that the team was required to consider positive behavioral interventions and supports. The team did include goals on Student’s IEP and create a behavior intervention plan that in practice proved to be inadequate. However, as I have already determined the present levels of performance, needs and impact statements used for developing these goals were out of date, these goals cannot be said to address Student’s then current behavior. Furthermore, under the circumstances, the provision of a FAPE to

II. FUNCTIONAL BEHAVIORAL ASSESSMENT

3) *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by failing to conduct a Functional Behavioral Assessment since the beginning of the 2012-2013 school year to assess Student's negative behaviors in school that consisted of absconding from class, missing class and failing to follow the directives of school personnel.*

According to the Office of Special Education Programs ("OSEP") a functional behavioral assessment is "a systematic process for describing problem behavior, and identifying the environmental factors and surrounding events associated with problem behavior." OSEP Smart Start Functional Behavioral Assessment. It is the basis for developing a behavior intervention plan for a student whose behavior interferes with his/her ability to access his/her education. It is the foundation for the interventions and strategies a team is to consider in developing such a student's IEP. 34 C.F.R. § 300.324(a). See also, D.C. Code § 30.3007. "The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008).

In the *Harris* case the Court in addressing the District's failure to authorize an independent FBA noted the student in question had demonstrated significant behavioral problems and, despite the parent's request for an independent FBA, had not been assessed the student in the behavioral area in an extended period of time. The Court noted, in finding the FBA was an educational evaluation that should have been provided to the student in question, that the FBA creates a fundamental connection to the quality of a disabled child's education. *Id.*

this student in particular required conducting an FBA and developing a BIP to effectively address Student's behavioral needs.

In the instant matter, Student demonstrated on-going behavioral problems during his enrollment at He often did not attend class; he roamed the halls and frequently was not in his assigned location. Student has a history of aggression that was not addressed by a clear, behavior plan based on an analysis of Student's behavioral triggers and his responses to them. Rather, he was provided a behavioral plan that can at best be characterized as informal. It relied on Student receiving behavioral counseling, which did not occur, and it, even more informally, required that he seek out his case manager when he was having difficulties. These approaches did not provide Student either the structure or the support to help him gain behavioral control. Instead Student's disruptive behavior in school escalated, resulting in a long term suspension. A functional behavioral assessment would have been the first step in developing a plan to address Student's behavioral needs. This did not occur, and the result was Student was suspended.

I note the team at the Manifestation Determination Review found Student's behavior resulting in the long term suspension was not a manifestation of his disability. However, in the companion case to the instant matter the hearing officer found the behavior resulting in the long term suspension was a manifestation of Student's disability. This determination suggests a well-developed Behavior Intervention Plan, based on a functional behavior assessment was needed. The school, rather than addressing all of Student's needs in developing his IEP selected from among them. Student's behavioral needs were neither assessed nor appropriately addressed.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to comprehensively evaluate Student by failing to conduct a Functional Behavioral Assessment since the beginning of the 2012-2013 school year to assess Student's negative behaviors in school.

III. APPROPRIATE PLACEMENT

4) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement/location of services since 12/05/12; specifically, High School could not provide the following services to address Student's Emotional Disturbance disability: (a) 20 hours/week of specialized instruction outside of general education, or (b) 100% specialized instruction outside of general education in a therapeutic setting.

As discussed *Supra* under Issue 1, Student's December 2012 IEP required he receive 20 hours of specialized instruction outside the general education setting each week. did not provide student these hours of instruction nor could it. Thus it is clear Student did not receive an appropriate placement in compliance with his IEP. Further, again as discussed *Supra*, DCPS stipulated at the start of the hearing that it would provide Student a full time IEP thereby recognizing, albeit retroactively, that Student required even more specialized instruction than that provided in his IEP.

Petitioner here asks that I find based on the evidence presented that Student required a full time placement in a therapeutic setting at the time the December 5, 2012 IEP was developed, and this I decline to do. While it is clear that the program and services Student was receiving under the April 2012 IEP that was in effect prior to the December 2012 IEP required a similar configuration of services, these services were not provided. I, therefore, cannot determine whether Student's current needs for a more restrictive environment would have resulted if Student had received the services required by his April 2012 IEP. That is, if he had received 20 hours of special instruction outside the general education environment as well as speech and behavior support services during the first semester of the 2012-2013 school year, Student may have demonstrated better learning and behavior. The failure to provide these services must be seen as at least one causal factor in his declining behavior and poor academic performance. Therefore the need for more intensive services in a more restrictive setting could not be established at that time.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE when he was placed in Spingarn High School, his neighborhood school, because he did not and could not receive the programs and services detailed on his 12/5/12 IEP at that school.

IV. 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* “. . . inquiry must be fact specific and. . .the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid* at 524.

In the instant matter Petitioner has established Student was denied a FAPE when DCPS failed to 1) implement Student’s April 2012 and December 2012 IEPs; 2) develop an appropriate IEP on December 5, 2012; 3) conduct a functional behavioral assessment during the 2012-2013 school year; and 4) place Student at a school that could provide him the hours of special instruction outside the general education environment and the related services required by his December 2012 IEP. As a result of these failures to provide FAPE, Student was harmed in that his academic and emotional/behavioral issues were not addressed appropriately.

For the reasons that follow, I find Petitioner’s plan is calculated to provide the educational benefits that likely would have accrued had DCPS provided the required programs and services for one component and not for the other. It is clear that Student received little educational benefit from the 2012-2013 school year. He failed most of his classes and his

behavior deteriorated. The proposal to provide Student two classes during summer school directly address the loss of educational benefit. Student earned almost no credits during the 2012-2013 school year because he was placed in classes without the support he needed. His own testimony made clear that he was not benefitting from the general education classes to which he was assigned. The opportunity to earn two credits over the summer will allow Student to move closer to the position he would have been had he been provided instruction outside the general education setting, where he would have had an opportunity to learn, as required by his IEP.

On the other hand, the request for 75 hours of mentoring is a much attenuated one, and I decline to order it. The nexus with Student's lost educational benefit was not established by the plan itself or by Dr. Holman's testimony. In so finding, I do not question that improved self-esteem would be of benefit to Student, and I do not question that this improved self-esteem might contribute to better school performance. However, Student will be attending a separate, special education school (See discussion *Infra*) that provides intensive behavioral services intended, among other things, to improve Student's ability to function in school. Additional mentoring services would in some ways be duplicative of those services to be provided at Accotink, and, therefore, I will not order the mentoring services be provided.

V. PLACEMENT AT ACADEMY

Petitioner has asked that Student be placed in a full time separate, special education, therapeutic school as a remedy for DCPS failures to provide him a FAPE. IDEA requires that a student's placement 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).

In the instant matter, Petitioner has demonstrated the need for a highly structured, self-contained placement. Student has significant emotional disabilities which require on-going intensive intervention. [redacted] has programs and services in place to address these needs. There is a staff of psychologists, a social worker and art therapists to provide individual and group therapy, and behavior support and intervention, and a psychiatrist can provide medication management if needed. In addition, [redacted] provides small classes with a low student teacher ratio which will allow Student to receive the structured academic support he requires. DCPS, in contrast, was not able to provide the services required by Student’s IEPs in the 2012-2013 school year. Rather than providing 20 hours of special instruction outside the general education setting, Student was scheduled for general education classes. He was unable to benefit from the instruction in these classes resulting in academic failure and deteriorating behavior. DCPS did not provide appropriate interventions for Student’s behavior which appears to have created a spiral of poor behavior followed by discipline followed by more poor behavior. Student spent less and less time in class. Student now appears to require more intensive interventions, following upon DCPS’ failures to provide him a FAPE, than he needed at the start of the 2012-2013 school year. [redacted] in contrast, has a strong behavior management system, closely monitors students to assure they are in their assigned locations when they are in school and provides small classes to support Student’s learning.

I, therefore, find, by a preponderance of the evidence, that [redacted] Academy is an appropriate placement for Student.

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 failing to implement Student's April 2012 and December 2012 IEPs. Student did not receive the special instruction outside the general education environment required, nor did he receive the behavior support services and speech/language services specified on these two IEPs.
2. DCPS denied Student a FAPE by developing an inappropriate IEP on December 5, 2012 for the following reasons:
 - a) The IEP states Student would both graduate on 6/15/2016, when he will be 18, and would receive a high school certificate at age 21;
 - b) The IEP is not a full time (27.5 hour) IEP outside the general education environment;
 - c) The statements of present levels of performance, student needs and impact were out of date and could not establish a documented baseline for the development of goals;
 - d) The IEP did not include a BIP based on a current FBA; and
 - e) Failing to include Petitioner in the December 5, 2012 IEP meeting. The IEP that resulted was developed by an inappropriately constituted team.
3. DCPS did not deny Student a FAPE by failing to have a psychologist, social worker or DCPS representative knowledgeable about other school locations at the December 5, 2012 IEP meeting.
4. DCPS denied Student a FAPE by failing to comprehensively evaluate Student by failing to conduct a Functional Behavioral Assessment since the beginning of the 2012-2013 school year to assess Student's negative behaviors in school.

5. DCPS denied Student a FAPE when he was placed in High School, his neighborhood school, because he did not and could not receive the programs and services detailed on his 12/5/12 IEP at that school.
- 5) DCPS did not deny Student a FAPE by failing to provide Student a special education placement including 100% specialized instruction outside of general education in a therapeutic setting under the December 5, 2012 IEP.
- 6) Student is entitled to compensatory education.
- 7) Academy is an appropriate placement for Student.

ORDER

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

1. Student is to be placed at the Academy. DCPS is to fund all costs of Student's attendance at Accotink Academy including tuition, transportation, related services and all other associated costs.
2. DCPS is fund student's enrollment in two different courses during summer school in 2013. These courses are to be courses, such as English or Algebra that will make up for the lack of credits Student earned during the 2012-2013 school year. The classes are to be provided at Academy, if has such course offerings available. If not, DCPS and Petitioner are to agree to another location, similar to that provides the intensive behavior management and low student staff ratio Student requires for the summer school courses. The meeting to make the determination as to the location of the summer school program shall occur within 10 school days of the receipt of this Hearing Officer Determination. The meeting shall include a DCPS representative knowledgeable

1. of the summer school options, a DCPS representative able to effect Student's enrollment in the selected site, Petitioner and her representatives, if she chooses to include them.
2. Student shall begin attending _____ either at the beginning of summer school, if Accotink has the classes identified above, or at the beginning of the 2013-2014 school year.
3. Within 15 school days of receipt of this HOD, an IEP meeting to review and revise, as appropriate, Student's IEP shall be held. It is to include representative(s) of DCPS, the _____ team, Petitioner and her representative(s), if she so chooses. The IEP revision must reflect Student's enrollment in a full time separate, special education program. In addition, the IEP shall include current present levels of performance, needs, goals and impact statements, and an exit category of diploma track.

IT IS SO ORDERED:

May 3, 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).