

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
August 21, 2013

STUDENT a minor by and through
her Parent,¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On June 7, 2013 parent, Petitioner herein, on behalf of the student (“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 Petitioner’s Administrative Due Process Complaint Notice (HO 5) on June 17, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held on July 3, 2013, which was 11 days beyond the 15 day time timeline for holding a resolution meeting under IDEA. 34

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.

C.F.R. § 300.510(a). The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 6. The 45 day timeline began to run on July 8, 2013, the day after the 30 day resolution period ended. Following the Prehearing Conference held on July 12, 2013, I issued a Prehearing Conference Order on July 16, 2013. HO 8. My Hearing Officer Determination is due on August 21, 2013.

At all times relevant to these proceedings Petitioner
and DCPS. By agreement of
the parties, the hearing was scheduled

The legal authority for the hearing is: 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 issues³ are:

- 1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by discontinuing Student’s placement at The Pathways School without offering her an appropriate alternative placement;
- 2) Whether DCPS denied Student a FAPE by withdrawing Student from The Pathways School due to alleged truancy. DCPS was obligated to address Student’s needs and maintain the placement;
- 3) Whether DCPS denied Student a FAPE by failing to convene an IEP meeting at parent request during the spring/summer of 2012;⁴

³ The issues as stated herein are the issues as stated in my prehearing order. Petitioner’s 5-day disclosures reverted to the statement of the issues in her Complaint. I notified the parties by email that the issues as stated in the prehearing order were the issues to be heard at hearing. They had been agreed to during the prehearing conference, and Petitioner had not filed a motion asking that the issues be restated upon receipt of the prehearing order. I read the statement of the issues as drafted in the Prehearing Conference Order into the record at hearing. There was no objection

- 4) Whether DCPS denied Student a FAPE by failing have an appropriate IEP in place at any time during the 2012-2013 school year. The IEP⁵ is not valid because parent did not participate in the meeting at which it was developed;
- 5) Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability following the parent's request for a psychiatric evaluation in the fall of 2013;
- 6) Whether DCPS denied Student a FAPE by failing to evaluate her in all areas of suspected disability when it became clear that placement in a day school program was no longer able to meet Student's needs;
- 7) Whether DCPS denied Student a FAPE by failing to offer Student a placement in an appropriate therapeutic residential school from the fall of 2012 through the filing of this Complaint; and
- 8) Whether DCPS denied Student a FAPE by refusing to convene an IEP meeting to review the report from an independent psychological evaluation conducted in April 2013.

RELIEF REQUESTED

Petitioner requested:⁶

- 1) DCPS fund a residential placement or refer Petitioner to five programs from which she can select a placement in which DCPS will facilitate Student's placement;⁷
- 2) DCPS review and revise Student's IEP to reflect the psychological and the need for residential placement; and
- 3) DCPS provide Student compensatory education.⁸

⁴ This issue as originally drafted referenced an HOD filed in April 2012. (The Complaint includes a typo indicating the HOD was filed in April 2013. This is inaccurate.) The parties were reminded that I have no authority under IDEA to hear issues regarding the enforcement of HODs. Petitioner's counsel stated at hearing that she disagreed with my statement of the limitations of my authority but did not pursue her argument in this regard.

⁵ The complaint states the IEP was developed at a meeting on but the documents show it was developed . All references to June 6, 2012 have been adjusted accordingly.

⁶ Petitioner had also requested that I order the contested IEP be removed from Student's educational record should I find it was invalid. After discussion of this request and my authority under IDEA during the prehearing conference, Petitioner withdrew this request by email

⁷ At hearing Petitioner's counsel indicated Petitioner had been unable to identify a residential program that would accept Student and indicated the request for residential placement would require DCPS, in cooperation with Petitioner, to locate an appropriate placement as stated in the cover letter to her 5-day disclosures.

⁸ During the prehearing conference it was agreed Petitioner would submit a Compensatory Education Plan that meets the *Reid* requirements with her 5- day disclosures. However, Petitioner's cover letter submitting the 5-day disclosures indicates that in the event I find Student is entitled to compensatory education, she requests I order DCPS to fund an educational expert to develop a compensatory education plan. At hearing Petitioner's counsel

B. Testimony

Petitioner testified and presented the following witness:

- Principal, Nonpublic school

DCPS presented the following witnesses:

- Resolution Compliance Case Manager
- Special Education Teacher/Transition Coordinator

FINDINGS OF FACT¹⁰

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:¹¹

1. Student _____ is eligible for special education and related services under the IDEA. She is classified as a student with an emotional disability and has received special education services since the first grade. Student has a long history of behaviors that interfere with

¹⁰ The parties stipulated to the facts in the Hearing Officer Determination of April 9, 2012.

¹¹ In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. Some exhibits were introduced by both Petitioner and Respondent. The citations to exhibits reference only one party's exhibits in those instances where both parties have introduced the same exhibit.

learning. Since June 2008, when Student was 11 years old, she has been referred to special programs for placement due to her highly disruptive behaviors and inability to follow directions.

HO 7.

2. During the 2011-2012 school year, DCPS did not contact Petitioner about Student's IEP or a school placement.

3. Petitioner attempted to enroll Student in Neighborhood HS.

Neighborhood HS informed Petitioner that enrollment in high school required proof that Student had completed the eighth grade. Petitioner could not provide such documentation as Student had not completed the eighth grade. Testimony of Petitioner.

4. Neighborhood HS has a "Twilight Program" for students who are over age and under credited. Student is able to enroll at Neighborhood HS thru this program. Testimony of Teacher.

5. , Petitioner provided DCPS with a copy of an independent psychiatric evaluation dated 12/30/11. Simultaneously, Petitioner requested a meeting to review the assessment, review and revise Student's IEP as appropriate and determine an appropriate placement. DCPS did not respond. HO 7.

6. The independent psychiatric assessment diagnosed Student as having a mood disorder, a disorder of written expression and a reading disorder. The assessment indicated Student required psychological and psychiatric support at her school placement to deal with peer conflict, frustration from academic difficulties and to provide crisis intervention. HO 7.

7. Student was assigned to Nonpublic School on pursuant to the

. Nonpublic School provides services to students with emotional disabilities and learning disabilities. The school has three components: academic; vocational and therapeutic. In the school based program provided by Nonpublic School, classes are composed of 7 to 8 students

with a teacher and a teacher's assistant. Each student has an assigned therapist and receives individual and group therapy once a week. The school uses a point system for behavior management. Student attended Nonpublic School's school based program for approximately two weeks at the end of the 2011-2012 school year. She became disruptive and was suspended for two or three days in early . Student did not return to school when the suspension ended. Testimony of Principal; Testimony of Petitioner.

8. An IEP meeting was held on . The meeting was called to review and revise Student's IEP. Petitioner had agreed to this date for the meeting. However, on , Student was hospitalized at the Psychiatric Institute of Washington ("PIW") on an emergency basis. Petitioner's counsel contacted DCPS asking that the meeting be rescheduled on the morning of . DCPS held the meeting and developed an IEP without Petitioner and Student despite the request for rescheduling. This is the last IEP developed for Student. DCPS indicated it was willing to reconvene to allow Petitioner an opportunity to participate in the development of the IEP, but this did not occur. A meeting was scheduled for and subsequently cancelled because representatives of the Nonpublic School were not available to participate. Petitioner through counsel made additional requests that an IEP meeting be scheduled but this did not occur. Another meeting scheduled for was cancelled as well.

9. Nonpublic School assigned Student to its community based program for the 2012 -2013 school year. In this program a community support specialist ("CSS") is assigned to each involved student. The CSS goes to the student's residence each day to work with the student in the community individually. The CSS went to Student's residence each of the first ten days of the 2012-3013 school year. Student refused to participate in this program. On subsequent days

the Nonpublic School attempted to contact Student to re-engage her in her educational program. These efforts were not successful. Student did not attend school at all during the 2012-2013 school year. Testimony of Principal; Testimony of Petitioner.

10. DCPS completed a Truancy Referral to the District of Columbia Superior Court on . A meeting regarding Student's truancy was held . Neither Petitioner nor Student attended the meeting despite receiving notification of the meeting by telephone. At that meeting an Attendance Intervention Plan ("AIP") was developed. Neither Petitioner nor Student signed the AIP, and it is undated. The AIP forms are not fully completed. The actions to be taken to resolve Student's truancy are: daily phone calls; transportation would be provided by the school and it is to be monitored by the DCPS case manager; prior contact with Student's grandfather to engage his assistance in gaining Student's attendance; implementation of rewards and incentives; and DCPS case manager will monitor daily attendance. Student's IEP and placement were not discussed at this meeting. R 22; R 24; R 25; R 26; R 27; Testimony of DCPS Case Manager.

11. After monitoring the AIP for twenty days and determining Student was not attending school DCPS scheduled an IEP meeting on . The Letter of Invitation to this meeting indicates it is a meeting to discuss attendance and truancy. Neither Petitioner nor Student attended the meeting. As of the meeting Student had 47 unexcused absences for the school year. Student was un-enrolled from Nonpublic School, and Petitioner was notified Student could pursue re-enrollment and return to DCPS . The Prior Written Notice does not state in which school Student may re-enroll if she chooses to do so. R 29; R 30; R 31; R 32; Testimony of DCPS Case Manager.

12. Petitioner requested Student receive a psychiatric assessment on more than one occasion in the 2012- 2013 school year. R 34.

13. _____ has a self- contained program. It is housed in a separate wing of the building. Students in the program receive instruction from teachers and also participate in on-line instruction. Teacher, who works at Neighborhood HS, has extensive experience working with at-risk youth. Although Student was not able to enroll in _____ a year ago because she did not _____ grade, Student would be able to enroll in _____ Twilight Program which is for over age and under credited students. It is a dropout prevention program. Testimony of Petitioner; Testimony of Teacher.

14. Removing Student from Petitioner's home and placing Student in a group home has not resulted in Student's attending school in the past. A court attempted this option and ordered Student to attend school rather than keep her incarcerated. She acted out in the group home, did not attend school and was returned to custody. Testimony of Petitioner.

15. Student's most recent psychological assessment indicates her cognitive functioning is in the Borderline range _____ This is a regression from previous assessments when Student was functioning in the Low Average range _____ Student also has shown general regression in the _____ Tests of Academic Achievement. Her scaled scores fell in 8 of 10 comparable areas

16. Student received a psycho-educational assessment as ordered by the Superior Court of the District of Columbia in . Petitioner, through counsel, requested a meeting with DCPS to review this evaluation in

17. Student has not attended school for most of the last three school years () between the ages of 13 and 16. She has ADHD and a mood disorder. She does not take her prescribed medication. Student has refused to participate in both individual and family therapy and has reportedly attacked both her mother and her brother as well as her peers at school and in her group home. Testimony of Petitioner.

18. DCPS is requiring Student enroll in and attend her neighborhood school for before it will hold a meeting to review and revise, if appropriate, the student's IEP and determine an appropriate placement.

DISCUSSION¹³

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

I. IEP

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,

¹³ The discussion of the issues that follows does not address the issues in numerical order. I have grouped issues and rearranged the presentation of the issues for discussion to allow the discussion to more closely follow the process for the delivery of IDEA programs and services. Each issue, however, is identified by the number attributed to it in the Complaint and Prehearing Conference Order. Thus the numbering of the issues in the discussion below is not wholly sequential.

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.

A. 2012

The two issues that follow are discussed together as they involve closely related, overlapping IDEA requirements.

3) *Whether DCPS denied Student a FAPE by failing to convene an IEP meeting at parent request during the spring/summer of 2012*

4) *Whether DCPS denied Student a FAPE by failing have an appropriate IEP in place at any time during the 2012-2013 school year. The IEP dated June 7, 2012 is not valid because parent did not participate in the meeting at which it was developed*

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. An IEP meeting was scheduled during the spring/summer of 2012. The first agreed upon date June 7, 2012. Petitioner alleges that the June 7, 2012 IEP meeting was held without all required participants, specifically the parent.

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 coordinated a meeting date with Petitioner through her counsel, and the IEP meeting convened as scheduled on June 7, 2012. However, on the morning of June 7, 2012, prior to the time for the IEP meeting, Petitioner's

counsel notified DCPS that neither Petitioner nor Student was available to attend the meeting because Student had been hospitalized on an emergency basis. Counsel asked that the meeting be rescheduled. DCPS, however, rather than rescheduling the meeting, chose to proceed subsequently indicating its willingness to hold a second meeting to allow for parental input into the IEP developed on June 7, 2012. This second meeting, although scheduled at least twice, was never held. Thus the June 7, 2012 IEP which is the last identified IEP was developed without parent participation.

While the failure to include Petitioner in the 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 .

In *Doug C. ex rel. Spencer C. v. State of Hawaii, Dep't of Educ.*, 61 IDELR 91 (9th Cir. 2013), the United States Court of Appeals, in circumstances similar to those before me,¹⁴ stated,

¹⁴ The parent in *Doug C.* sent an email requesting rescheduling of an IEP meeting due to illness on the morning the meeting was to occur. When the parent was unable to confirm attendance on one of two days offered as he was not sure he would be fully recovered, the team proceeded with the meeting. In that case, unlike the instant matter, a team member subsequently met with the parent and reviewed the IEP in detail.

parental participation safeguards are "[a]mong the most important procedural safeguards" in the IDEA and that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Amanda J.*, 267 F.3d at 882, 892. We have explained that parental participation is key to the operation of the IDEA for two reasons: "Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know."

Id. at 882. In reaching this determination the Court noted that difficulty working with a parent or resulting frustration does not excuse a failure to include a parent in an IEP meeting. The June 7, 2012 IEP in the instant matter was developed with no parental participation despite Petitioner's notification of her inability to participate and her request to reschedule. Petitioner was not afforded the opportunity to address her concerns about Student and Student's needs. *See also Eley, v. District of Columbia*, 59 IDELR 189 (U.S. Dist. Ct, District of Columbia 2012). Efforts to reschedule the meeting were not successful, and Petitioner was never afforded the opportunity to discuss the IEP with the team or even a representative of the team as had occurred in *Doug C.*¹⁵

Furthermore, DCPS must ensure the IEP Team meets, as appropriate, to review and revise the IEP including addressing information provided by the parent. DCMR 5E -3008.1(d); *See also*, 34 C.F.R. 300.324(b). In the instant matter, Petitioner's counsel made several requests for an IEP meeting indicating Petitioner's desire to discuss alternative placement and Student's needs. An IEP meeting was not scheduled. Rather DCPS scheduled meetings, in the fall of 2012, to address Student's attendance/truancy issues culminating in removing Student from her then current placement without ever reviewing the proposed IEP in a meeting with parent, discussing Student's then current placement or proposing an alternative placement.¹⁶ Respondent, relying

¹⁵ I note the court in *Doug C.* did not find this after the fact discussion of the IEP sufficient to overcome the failure to assure parental participation in the development of the IEP.

¹⁶ See discussion of the issues involving placement that follows.

on *Garcia v. Bd. of Educ. of Albuquerque*, 520 F.3d 116 (10th Cir. 2008),¹⁷ suggests that the failure to provide a required IEP is not a basis for ordering a remedy when the student has demonstrated a lack of interest in attending school. In *Garcia*, the student had reached the age of majority and continued not to attend school. The Court, therefore, found that awarding the requested compensatory education remedy was unnecessary and would be wasteful of resources. In reaching this determination, the Court mooted the need to address the issue, although it did identify the issue, of the possibility that the failure to provide an IEP could be deemed a *per se* denial of FAPE. *Garcia*, however, is clearly distinguishable from the instant matter. Student, here, has not reached the age of majority. She is required to attend school. Petitioner has provided evidence that rather than the refusal to attend school reflecting simply an attitude, as in *Garcia*, the instant Student's failure to attend school and participate in classes is symptomatic of her disability. She is classified as having an emotional disability and this noncompliant truant behavior reflects that disability

It is clear the denial of parental participation in the IEP meeting where the IEP was developed resulted in harm to Student. Petitioner was unable to provide input into the development of Student's IEP. There was no review of the independent psychiatric assessment of December 2011 with Petitioner, and there was no discussion as to whether additional assessments were required.¹⁸ The IEP that was developed does not meet Student's needs. It does not address his attendance issues and truancy. It does not include the Nonpublic School's

¹⁷ Respondent actually cited the underlying district Court matter. However, the Court of Appeals decision is instructive here.

¹⁸ The team noted that they could not move forward with additional assessment because Petitioner had not signed a consent. I note this turns the IDEA requirement upside down. A parent cannot sign a consent until there is a determination as to what assessments are being recommended. The consent is for the particular assessments. It is not a general consent. 34 C.F.R. § 300.300.

decision to place Student in a community based instruction program thus indicating this decision was not discussed with Petitioner.

I, therefore, find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to convene an IEP meeting at parent request during 2012 and by failing to include parent in the IEP meeting.

8) *Whether DCPS denied Student a FAPE by refusing to convene an IEP meeting to review the report from an independent psychological evaluation conducted in April 2013.*

Under IDEA a FAPE must be available to all children eligible for special education residing in the State, here the District of Columbia, between the ages of 3 and 21. 34 C.F.R. § 300.101(a). Further, the State must assure an IEP is developed for each child with a disability. 34 C.F.R. § 300.112. DCPS stated that if Student returned to the District and enrolled in a DCPS school, DCPS would make FAPE available to her and develop an IEP. This statement confuses the provision of a FAPE with the offer of a FAPE. In order to make a FAPE available to a student, the district must define the FAPE. As noted in *Rowley*, it is the IEP that defines the FAPE. A promise to make FAPE available, without defining the FAPE, does not make FAPE available. It merely states intent.

Petitioner requested a meeting to review the report of the of the April 2013 psycho-educational assessment in May 2013. As noted above, DCPS must ensure the IEP Team meets, as appropriate, to review and revise the IEP including addressing information provided by the parent. DCMR 5E -3008.1(d); *See also*, 34 C.F.R. 300.324(b). In this instance Petitioner's counsel requested a meeting to review the psycho-educational assessment report, but none was held. DCPS indicated that it could not take any action, including holding a meeting, regarding Student until she enrolled in and was attending a DCPS school This requirement is not in

compliance with IDEA which expressly requires that a FAPE, which by definition must address a student's educational needs, be available to all students resident in a district. DCPS' requirement is an artifact of its own creation rather than an implementation of the IDEA requirement.

I note that in the instant matter this requirement is particularly troubling. Student has not attended school, with some minor exceptions, for _____ years. She is of high school age but her neighborhood high school will not let her enroll because she has not completed eighth grade. The

Program at _____ HS may allow Student to enroll but it also may have attendance requirements¹⁹ which likely would result in Student's being un-enrolled for lack of attendance, if such requirements exist. Whether the _____ Program does or does not have attendance requirements, Student does not attend school, as evidenced by her _____ years of nonattendance. Yet DCPS has indicated that in addition to enrolling in neighborhood HS, Student must attend for 30 days before DCPS will call an IEP meeting to review her educational needs, develop an appropriate IEP and placement. This is not going to occur as Student will not comply with this requirement. Petitioner has not been able to get Student to attend school, a group home could not get Student to attend school, and the Court could not get Student to attend school by issuing an order to this effect. The evidence is that her nonattendance is a symptom of her emotional disability. Yet DCPS, rather than addressing her disability and offering a FAPE as required by IDEA has stated Student must in some unstated way stop exhibiting her disability and attend school before DCPS will make FAPE available to her as IDEA requires. This appears to be the _____ special education requirements as it is likely

¹⁹ Petitioner and DCPS provided contradictory evidence in this regard through testimony of Teacher and Petitioner. No documentary evidence to resolve this disagreement was introduced. I therefore made no finding of fact with regard to the attendance requirement in the _____ t Program as both witnesses were credible but neither had knowledge sufficient to make one more reliable than the other.

that were Student able to meet DCPS attendance requirement, she would not be an eligible student with a disability under IDEA. Student does not attend because she has an emotional disability which is evidenced through multiple symptoms including non-attendance. DCPS has determined Student is accountable for the behaviors resulting from her disability and has decided it will not meet with Petitioner to develop an IEP to provide Student FAPE until she does not demonstrate at least one of the symptoms of her disability – non-attendance. Clearly, this is not the intent of the IDEA.

I therefore find, by a preponderance of the evidence that DCPS denied Student a FAPE by failing to convene an IEP meeting to review the report from an independent psychological evaluation

II. Placement

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 to the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2). .

- 1) *Whether DCPS denied Student a FAPE by discontinuing Student's placement at Nonpublic School without offering an appropriate alternative placement*
- 2) *Whether DCPS denied Student a FAPE by withdrawing Student from Nonpublic School due to alleged truancy. DCPS was obligated to address Student's needs and maintain the placement*

In the instant matter, Student was enrolled in Nonpublic School²⁰ in 2012. She initially attended the school for a few weeks. Then, after receiving a short term suspension near the end of the school year, Student stopped attending. She did not return after the suspension ended. A meeting to review and revise, as appropriate Student's IEP was held without Petitioner's participation on June 7, 2012. That IEP, which I have found to be inappropriate due to the lack of parental participation, DCPS appears to have considered to be in effect at the start of the 2012-2013 school year.

Nonpublic School, recognizing the difficulty Student had in attending school at the close of the 2011-2012 school year determined to provide Student her educational program through community based services in the 2012-2013 school year. Student, however, did not cooperate with these efforts and did not participate in the educational program offered thereby continuing her nonattendance. Nonpublic School and DCPS quickly responded to Student's nonattendance by holding a meeting in October 2012 to address her nonattendance. In addition, DCPS referred Student to District of Columbia Superior Court for truancy.

Nonpublic School and DCPS developed an attendance plan for Student at the meeting. Neither Petitioner nor Student was in attendance at this meeting and neither signed the

²⁰ This placement was made pursuant to the HOD of April 9, 2012.

plan. Following the meeting, Student's compliance with the attendance plan was monitored,²¹ and when she continued to be absent another meeting was held in November 2012. Noting that Student continued to be absent, DCPS determined that Nonpublic School was not an appropriate placement and dis-enrolled her. The documents dis-enrolling Student indicate she could reenroll in a DCPS school, and, as testified to during the hearing, following 30 days of attendance DCPS would schedule a meeting to review Student's IEP and determine an appropriate placement. The notification to Petitioner did not state the school in which Student could re-enroll. Petitioner knew _____ HS had previously indicated Student could not enroll because

_____ HS required documentation that Student had completed 8th grade. Petitioner could not provide such documentation as it did not exist. It is important to recognize that the identification of a school in which the district proposes to provide a student a FAPE is an essential element of an IEP. *See, AK ex rel. JK v. Alexandria City Schools*, 484 F. 3d 672 (4th Cir. 2007). While the notification is not an IEP, by analogy, a statement that Student was able to return to DCPS and receive services should have provided Petitioner a site at which this could occur.

I note, moreover, that there could have been no offer of an appropriate placement for Student because the _____ IEP was not appropriate and no appropriate IEP was in place. An appropriate IEP that addresses all of a student's educational needs is a necessary condition precedent to the identification of a placement in which to FAPE. A failure to offer an appropriate IEP, or to develop any IEP, prevents the provision, or even the offer, of an appropriate placement because it cannot be determined whether the proposed placement can provide the student a FAPE as defined by his/her IEP because the inappropriate IEP cannot be

²¹ I note I do not understand what DCPS monitored other than Student's on-going lack of attendance. Student did not attend school in _____ 2012. She did not attend the meeting at which the AIP was developed nor sign the plan indicating she had read it.

deemed to define FAPE. While Nonpublic School made considerable efforts to address Student's needs and provide her educational benefit²² -- unfortunately, without success, DCPS continued to have the responsibility to determine Student's educational needs, develop an appropriate IEP defining the provision of FAPE for Student and provide a placement in which the IEP could be implemented in the least restrictive environment. It did not do so. Rather than meeting its obligation to provide Student a FAPE, DCPS removed her from her educational placement without developing an appropriate IEP and identifying a placement. Further, DCPS notified Petitioner that in order to receive an offer of FAPE Student must enroll in and attend a DCPS school, noting that her absence from school precluded the development of an IEP and placement, before it would hold a meeting to develop an IEP and determine placement. Student was thus denied a FAPE both by the act of disenrollment, and by the failure to address her educational needs through an appropriate IEP and provision of placement. Yet Student did not attend school because, at least in part, she is a student with an emotional disability. DCPS used this symptom of her disability to relieve it of responsibility for the provision of an offer of FAPE to Student. Such a denial of responsibility cannot be supported.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by discontinuing Student's placement at Nonpublic School without offering her an appropriate alternative placement and by failing to address Student's educational needs as manifested by truancy.

7) *Whether DCPS denied Student a FAPE by failing to offer Student a placement in an appropriate therapeutic residential school from 2012 through the filing this Complaint*

IDEA mandates placement in the least restrictive environment.

²² Nonpublic School should be recognized for these efforts

Each public agency must ensure that -- ...[t]o the maximum extent appropriate, children with disabilities, . . ., are educated with children who are nondisabled; and . . .[s]pecial classes; separate schooling, or other removal of children with disabilities from the regular educational environment occurs 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. § 300.113 (a)(2). The determination of the appropriate placement is to be made on an individual, case-by-case basis, depending on each child's unique needs and circumstances and based on the child's IEP. *Letter to Trigg*, 50 IDELR 48 (OSEP 2007). To assure the placement decision addresses the needs of the individual child, each local education agency, here DCPS, must have available a continuum of alternative placements (regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions). 34 C.F. R. § 300.115(b)(1). This continuum of placements from least restrictive to most restrictive makes clear that placement in separate classes and placement in a separate school are distinctly different. Students who are in separate classes in general education schools have some limited opportunities to interact with their non-disabled peers while students in separate schools generally do not have such opportunities. Students in residential schools or institutions would presumably have fewer opportunities for interaction with their nondisabled peers. IDEA recognizes these differences in placement and supports their use to address the needs of an individual child.

To determine whether there was a denial of FAPE based on the failure to provide Student placement in a therapeutic, residential school from the fall of 2012 through the present I must first determine whether such a placement is appropriate. In the instant matter, Student had been enrolled in a separate school at the end of the 2011 - 2012 school year. She had exhibited difficulties in the program and in a short time stopped attending. Nonpublic School, in an effort to address her needs and provide her a program, offered an individual, community based

program in which a staff member went to Student's home to engage her in community based instruction on a daily basis of 2012. Student did not respond. She did not attend the program. Student's history further reveals that with few exceptions she has not attended school

She does not go to school when living with her mother and she did not go to school when living in a therapeutic group home. She did, however, attend 9 out of 10 days of school when incarcerated. While there have been other occasions when Student attended school for a very short period of time, the period of incarceration is the only time period presented in evidence when Student's attendance was relatively consistent and problem free.

To determine that Student requires residential placement requires that I determine such a placement is necessary for her to receive educational benefit, and I do so here. While it is clear that Student has social/emotional issues outside the school setting that do not serve as a basis for residential school placement, Student also has social/emotional issues that affect her receiving educational benefit in a day school setting. Most importantly she does not attend school. The

Addendum to the 2013 Psycho-Educational Evaluation Report, Student's most recent psychological assessment, expressly states that without intensive residential treatment Student will not participate in the educational process.²³ Her history of non-attendance supports this conclusion, and her nonattendance appears to be linked to her emotional disability in that she does not like to be told what to do and reacts negatively to efforts to obtain compliance with rules and perceived disrespect. DCPS attributes Student's negative reactions, including her nonattendance to choices, which they are, but in making this determination DCPS looks only at the surface and does not consider the connection between

²³ The examiner added that it was his opinion that residential placement was the least restrictive environment for Student. I did not rely on this opinion as I do not have evidence of the examiner's qualifications to make such an assessment. I do however rely on his judgment that Student will not participate in the educational process without such a placement as this is within the range of knowledge to be expected of a supervisory psychologist at Child Guidance Clinic for the Family Court Social Service Division of the Superior Court of the District of Columbia.

these choices and Student's underlying emotional disabilities.

Here DCPS has not considered Student's injury, her emotional disability, underlying her behavior.

This issue also requires that I determine when Student's actions were sufficient for DCPS to determine that she required residential placement. I find that DCPS should have made this determination no later than the 2012 meeting at which DCPS disenrolled Student from Nonpublic School. By this date it was clear Student would not attend a day program. She had not attended school at all during 2012. Nonpublic school had made numerous visits to her house to gain her attendance. An attendance plan had been implemented²⁴ with no effect. In fact, Student had not attended any day school program for more than a few days in years. At the November meeting, DCPS chose to disenroll Student for nonattendance rather than consider alternatives for providing Student a FAPE – including residential placement. DCPS left Student hanging without an appropriate IEP and without an appropriate placement in a residential program as of this meeting.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE from 2012 through the filing of this Complaint by failing to offer Student a placement in an appropriate therapeutic residential school.

III. Evaluation

- 5) *Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability following the parent's request for a psychiatric evaluation in the fall of 2013*
- 6) *Whether DCPS denied Student a FAPE by failing to evaluate her in all areas of suspected disability when it became clear that placement in a day school program was no longer able to meet Student's needs*

²⁴ I note again it had been developed without input from Student or Petitioner.

The IDEA requires a local education agency, here DCPS, 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). A reevaluation may occur not more than once a year unless the parent and public agency agree otherwise. 34 C.F.R. § 300.303(b). A 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, Petitioner's counsel made several requests for a psychiatric evaluation. She indicated the psychiatric evaluation was intended to review Student's needs particularly, but not exclusively, as related to the request for residential placement. 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 student must be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4). Student has an emotional disability which is impacting her education. She does not attend school and has not done so for several years. Here the request for a psychiatric evaluation was made by Petitioner's counsel acting on her behalf. Several requests for a psychiatric evaluation were made, and none was provided. Under IDEA Petitioner is entitled to the requested evaluation. DCPS does not have the option of denying or ignoring the request.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Student a psychiatric evaluation following parental request.

IV. *Residential Placement*

An award of a private school placement is prospective relief intended to insure that the student receives a FAPE in the future as required by the IDEA. *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C.Cir. 2005). The courts have identified the factors relevant to determining whether a particular placement is appropriate for a particular student. They include

- the nature and severity of the student's disability;
- the student's specialized educational needs;
- the link between these needs and the services offered by the private school;
- the placement cost;²⁵ and
- the extent to which the placement is the least restrictive environment.

Id. at 12.

In the instant matter I have determined Student requires residential placement due to her emotional disability. Without such placement Student will be unable to benefit from her education and will not receive FAPE. She does not attend school and multiple efforts to engage her in education have been unsuccessful. Her truancy appears attributable, at least in part, to her emotional disability. The only process that has any possibility of achieving success in obtaining Student's participation in education, and thus providing her educational benefit, is residential placement. Residential placement provides for monitoring and structure of Student 24 hours a day, seven days per week. Unfortunately, Petitioner has been unable to locate a residential school willing to accept Student. It is DCPS that has the responsibility of providing Student a FAPE,

²⁵ The OSSE approves private schools and sets the allowable costs for attendance for DCPS students at these schools. Here, as explained in the discussion that follows, a private school has not been selected. I, therefore, do not discuss this factor in the instant analysis of the proposed placement.

and it is DCPS that has the expertise as to available residential programs. I, therefore, conclude it is DCPS that has the responsibility of identifying a residential program both able to meet Student's needs and willing to provide Student the programs and services she requires.

V. *Compensatory Education*

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. 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). Under *Reid* “. . .the 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, I have found DCPS denied Student a FAPE by failing to develop an appropriate IEP in June of 2012 and by failing to offer Student a FAPE after dis-enrolling her from Nonpublic School in November 2012 from November 1, 2012 through the filing of this complaint on June 7, 2013. Student received no special education and related services from June 7, 2012 through June 7, 2013. It is clear that this year long failure to provide any services, addressing Student's chronic absenteeism, other than monitoring her nonattendance under the AIP developed in the Fall of 2012, resulting from her disability or to offer Student any program at all from November 1, 2012 forward have resulted in a harm. Student received no education in that time period, and compensatory education would generally be deemed appropriate. However, despite my direction to file a compensatory education plan with her 5 day disclosures, Petitioner

did not do so, indicating she is unable to provide such a plan and asking that I require DCPS hire an expert to develop a compensatory education plan in the future.

I decline to do so. Hiring an expert to independently determine both Student's educational loss and the appropriate compensatory education she requires includes no process to balance the equities or assure neutral review of the proposal. There would be no way to assure the plan does what it is supposed to do and meets legal requirements. The instant HOD holds DCPS responsible for the failure to provide student special education and related services for an extended period of time. DCPS will be providing Student residential placement as I have found this is the only placement in which Student will be able to receive educational benefit This is the only program option on the continuum of IDEA placements in which Student will access education. It is my opinion that the selected residential program in providing Student a FAPE will be in the best position to determine at an IEP meeting including parental in-put, which services, if any, beyond those available in the facility would be to Student's benefit.

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 convene an IEP meeting at parent request during the spring/summer of 2012 and by failing to include parent in the June 7, 2012 IEP meeting.
2. DCPS denied Student a FAPE by failing to convene an IEP meeting to review the report from an independent psychological evaluation conducted in April 2013.

3. DCPS denied Student a FAPE by discontinuing Student's placement at Nonpublic School without offering her an appropriate alternative placement and by failing to address Student's educational needs as manifested by truancy.
4. DCPS denied Student a FAPE from November 1, 2012 through the filing of this Complaint by failing to offer Student a placement in an appropriate therapeutic residential school.
5. DCPS denied Student a FAPE by failing to provide Student a psychiatric evaluation following parental request.

ORDER

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

1. DCPS is to provide Student a psychiatric evaluation. This evaluation is to be provided no later than September 13, 2013.
2. DCPS is to identify 3 possible therapeutic residential placements able to provide Student a FAPE and willing to accept her. The names of these proposed placements are to be provided to Petitioner, and her attorney, within 30 business days of DCPS' receipt of the instant HOD. Petitioner is to have 10 business days to select one of these three proposed placements. If she has not notified DCPS of the school selected within 10 business days, DCPS is to select one of the three schools for Student.
3. Once a residential school is selected DCPS is to complete all necessary paperwork for Student to attend the selected school and make necessary transportation arrangements, if necessary. DCPS shall fund Student's attendance at the school including all related costs for the 2012 – 2013 school year. The process for enrolling Student in the selected school shall be

completed no later than October 21, 2013, and Student shall begin attending the selected school no later than October 28, 2013.

4. DCPS shall convene an IEP meeting to develop an IEP for Student within 10 business days of DCPS' receipt of this HOD. The meeting shall include all required representatives of DCPS, Petitioner and her attorney. The team shall develop an IEP to address Student's educational needs. The IEP shall be completed on this date unless Petitioner and her attorney agree to a delay. This IEP shall be used to provide Student tutoring services while she is awaiting admission to the residential school. The tutoring services are to be provided at a time and location agreeable to Petitioner her attorney. Student is to receive 10 hours of tutoring per week. The IEP shall address Student's needs as most recently identified through assessments, and the tutoring shall address the identified needs on Student's IEP. If additional educational assessments (beyond the psychiatric evaluation required by paragraph 1, p.31, *Supra*) are determined to be necessary, parental consent shall be obtained at the meeting during which the IEP is developed. Tutoring shall proceed immediately following the development of the IEP whether or not additional assessments are required. The IEP shall identify the provision of services through tutoring as temporary and indicate the planned residential placement as Student's pending placement following acceptance.

5. After Student has attended the selected residential school for 30 days, an IEP meeting with representatives of the residential school, DCPS, Petitioner, and advisor(s) of Petitioner's choosing shall be held to review and revise the IEP, as needed. At this meeting the team shall determine whether Student requires additional compensatory education services to supplement those provided by the residential school.

6. All communications with Petitioner regarding the requirements of this HOD also shall be communicated with her counsel unless Petitioner notifies DCPS, in writing, of her opposition to including counsel in such communications.

IT IS SO ORDERED:



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).