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

OSSE
STUDENT HEARING OFFICE
2012 SEP -6 AM 8:54

Parent,[1] on behalf of,
Student,

Petitioner,

Date Issued: September 5, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is a rising grade student attending School A. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive six and one half (6.5) hours per week of specialized instruction inside of the general education setting, six and one half (6.5) hours per week of specialized instruction outside of the general education setting and two hundred forty (240) minutes per month of behavioral support services outside of the general education setting.

On June 25, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to conduct the annual review of the student's IEP on or before June 23, 2012; failing to convene a complete IEP Team on May 24, 2012 by failing to include the student's special education teacher as a team member; failing to revise the student's IEP to include appropriate transition services and goals based on the results of the student's most recent vocational evaluation and the agreement of the May 24, 2012 IEP Team members; failing to fully implement the student's June 23, 2011 IEP by failing to provide the student approximately 100 hours of specialized instruction, college visits, career exploration, job shadowing opportunities and instruction in personal budgeting; and by failing to provide the student with a placement capable of implementing his June 23, 2011 IEP. In regard to the issue

[1] Personal identification information is provided in Appendix A.
[2] The student was sixteen (16) years old when the Due Process Complaint was filed.

raised by the Petitioner regarding the placement of the student pursuant to the student's June 23, 2011 IEP, the Hearing Officer found that Hearing Officer Virginia Dietrich determined this issue in a September 11, 2011 Hearing Officer Determination (HOD) and therefore the issue was barred by the doctrine of *res judicata*. Petitioner objected to the Hearing Officer's finding that the issue was previously decided.

As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, an IEP Team meeting, including all relevant IEP Team members, to review and revise the student's academic goals; the student's IEP to be amended to increase the student's time devoted to transition activities by three (3) hours per month and to include transition goals for the student to research academic and admission requirements for postsecondary culinary arts programs, participate in career exploration involving careers in writing, registering for the Scholastic Aptitude Test (SAT) with accommodations, SAT preparation, independent living and participation in a transition class; placement in and funding for a private special education day school; transportation as a related service; and compensatory education.

On July 12, 2012, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline starts to run on July 26, 2012, following the conclusion of the 30-day resolution period, and ends on September 8, 2012.

On July 20, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that the student's June 23, 2011 and May 24, 2012 IEPs were properly developed and implemented; and the student has not been denied a FAPE.

On July 20, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. The Hearing Officer issued the Prehearing Order on July 24, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On August 2, 2012, Petitioner filed Disclosures including twenty-three (23) exhibits and six (6) witnesses.[3] On August 6, 2012, the Petitioner filed an additional exhibit. The Respondent agreed to the late disclosure. On August 4, 2012, Respondent filed Disclosures including four (4) exhibits and three (3) witnesses. The Petitioner agreed to a one day extension for the Respondent's Disclosures based on a family emergency for the Respondent counsel's.

The due process hearing commenced at approximately 9:11 a.m. on August 10, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, the scheduled time to begin the due process hearing, Petitioners' attorney was present. The Respondent's attorney arrived at approximately 9:05 a.m. The Petitioner's attorney was not able to reach the Petitioner by telephone until approximately 9:10 a.m. The Petitioner elected for the hearing to be closed.

[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Petitioner's Exhibits 1-6, 8, and 11-24 were admitted without objection. Following Respondent's objection to Petitioner's 7 and 9-10, Petitioner withdrew Exhibit 7. Petitioner's Exhibits 9-10 were admitted over Respondent's objections. Exhibit Respondent's exhibits 1-4 were admitted without objection.

The hearing concluded at approximately 4:05 p.m. following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to review the student's June 23, 2011 IEP at least annually, and whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to convene an IEP Team meeting, with all relevant IEP Team members, on May 24, 2012, and whether this failure constitutes a denial of a FAPE?
3. Whether DCPS denied the student a FAPE by failing to include appropriate transition goals and services based on the student's June 27, 2011 Vocational Evaluation and May 2012 vocational assessment during the student's May 24, 2012 IEP Team meeting?
4. Whether DCPS denied the student a FAPE by failing to implement the student's June 23, 2011 IEP, specifically, by failing to provide approximately 100 hours of specialized instruction from February 2012 through June 2012 and by failing to provide the student with college visits, college exploration, job shadowing and opportunities and instruction involving personal budgeting?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 1, 12 and 14; Respondent's Exhibits 2 and 3)
2. The student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and receives services under the disability category of OHI. (Petitioner's Exhibit 12; Parent's Testimony)

3. The student's goal is to become a chef. He intends to attend the Culinary Institute of America. (Petitioner's Exhibits 11 and 14; Respondent's Exhibit 2; Parent's Testimony; Student's Testimony)
4. The student has a full scale IQ of 96, which is in the Average range of functioning. The student's Verbal Comprehension Index, Perceptual Reasoning Index and Working Memory Index are in the Average range. His Processing Speed Index is in the Below Average. (Petitioner's Exhibit 12)
5. In May 2011, the student's academic functioning was Average in Oral Language, Average in Basic Reading, Average in Written Expression and Below Average in Mathematics. (Petitioner's Exhibit 12)
6. The student's June 23, 2011 IEP prescribes eleven (11) hours a week of specialized instruction within the general education environment, five (5) hours per week of specialized instruction outside of the general education environment, sixty (60) minutes per week of behavioral support services, one (1) hour per year of job shadowing, five (5) hours per year for a college visit at Bowie State University, sixty (60) minutes per month of career exploration, two hundred forty (240) minutes per week of vocational training and sixty (60) minutes per month of personal budgeting. (Petitioner's Exhibit 1)
7. The student has a high level of interest in the Artistic areas. The student does not have adequate knowledge about researching or obtaining a job and how to demonstrate work habits and attitudes preferred by employers. (Petitioner's Exhibit 11)
8. The student desires to live independently after graduating from high school. (Petitioner's Exhibits 11 and 14; Respondent's Exhibit 2)
9. The student's June 27, 2011 Vocational Evaluation includes: a recommendations for the report to be reviewed by the student's classroom staff, service providers and caregivers; a list of transition planning books; a recommendation for the student to complete a workbook to assist the student with self-advocacy; a recommendation for the student to participate in activities requiring the use of dictionaries, encyclopedias, community resources, map reading and phone books; a suggestion that the school program provide a variety of pre-vocational activities such as reading maps, basic money management, exposure to health and safety activities, exposure to filling out applications, participation in work related tasks and recognizing needs for self-advocacy; a list of useful websites; a list of online resources for artistic programs; a list of planning resources for students with special needs; a list of resources for the field of culinary arts; and a list of online magazines. (Petitioner's Exhibit 11)
10. The student had numerous absences due to suspensions at the school he attended prior to his enrollment in School A in February 2012. (Petitioner's Exhibits 12, 16, 20; Parent's Testimony)
11. Prior to his enrollment at School A, the student visited college campuses. (Student's Testimony)
12. In February 2012, the student transferred to School A. (Parent's Testimony; SEC's Testimony)
13. School A has a block schedule with four (4) classes per day which last ninety (90) minutes per day. (SEC's Testimony)

14. At School A, the student was placed in English, history, Life Skills and culinary arts classes. (Petitioner's Exhibits 5 and 6; Parent's Testimony; Student's Testimony; SEC's Testimony)
15. The student's Life Skills class was taught by a special education teacher. (Petitioner's Exhibit 24; SEC's Testimony)
16. The student's English class was supported by a paraprofessional rather than a special education teacher. (Petitioner's Exhibit 24; Parent's Testimony; SEC's Testimony)
17. At School A, the student was not placed in a math class because of difficulties with and errors in the student's transcript. (Petitioner's Exhibits 5, 6, 8, 13 and 14; Respondent's Exhibit 2; SEC's Testimony)
18. The student worked closely with his culinary arts teacher who is a renowned chef. The culinary arts teacher engaged in conversations with the student about culinary arts programs, provided guidance to the student regarding careers in culinary arts and offered to fund the student's tuition at the Culinary Institute of America, should he be accepted. (Student's Testimony)
19. On March 30, 2012, the student was receiving average grades in all of his general education classes. (Petitioner's Exhibit 5)
20. On April 24, 2012 that the student was in danger of failing English because he was often off-task during class. (Petitioner's Exhibit 4; Parent's Testimony)
21. On May 10, 2012, the student had a 2.58 grade point average. (Petitioner's Exhibit 6)
22. On May 24, 2012, DCPS held an IEP Team meeting for the student. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)
23. Present at the May 24, 2012 IEP Team meeting were the parent (by telephone), a special education teacher, an evaluator, the special education coordinator (acting as the LEA representative), a general education teacher (by telephone), an RSA representative, a social worker and the parent's attorney. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)
24. The parent and the parent's attorney were present for the duration of the IEP Team meeting. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)
25. The parent's attorney informed the IEP Team that she and the parent did not want the student present at the meeting. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
26. The special education teacher who attended the meeting was the student's case manager but did not directly instruct the student. (Parent's Testimony; SEC's Testimony)
27. The special education teacher who attended the meeting conferred with the student's special education and regular education teachers prior to the IEP Team meeting. (SEC's Testimony)
28. The special education teacher assigned to the student's history class neither attended the student's May 24, 2012 IEP Team meeting nor provided any written information to the IEP Team regarding the student's progress in history. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony)
29. The parent did not agree that the attendance of a special education teacher of the student was not necessary. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)

30. The parent refused to participate in the discussion regarding the student's IEP goals without the presence of a special education teacher currently instructing the student. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)
31. The May 24, 2012 IEP Team discussed the accuracy of the student data in the local educational agency's (LEA's) database, the student's class sizes, whether the student was receiving the specialized instruction as indicated in his IEP, postsecondary transition matters, the student's academic functioning in math and English, the student's math goals and the certifications of the student's teachers. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2; Parent's Testimony; SEC's Testimony)
32. The May 24, 2012 IEP included updated math present level of educational performance and math goals identical to the student's June 23, 2011 IEP; updated reading present level of educational performance and updated reading goals based on input from the student's English teacher; updated written expression present level of educational performance and updated written expression goals based on input from the student's English teacher; the addition of emotional/social/behavioral present level of performance and behavior/emotional goals; and updated the student's postsecondary transition plan by adding vocational assessment results and developing new postsecondary transition goals. (Petitioner's Exhibits 1 and 14; Respondent's Exhibit 2; SEC's Testimony)
33. On May 24, 2012, the student was earning a grade letter "C" in English. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
34. The student's May 24, 2012 IEP prescribes six and one half (6.5) hours per week of specialized instruction inside of the general education setting, six and one half (6.5) hours per week of specialized instruction outside of the general education setting, two hundred forty (240) minutes per month of behavioral support services outside of the general education setting, one (1) hour per month of vocational counseling, two (2) hours per year of college and career counseling, one (1) hour per year of job shadowing, one (1) hour per month of vocational training and sixty (60) minutes per month of personal budgeting. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
35. The May 24, 2012 IEP Team reviewed information from a Brigance assessment, a student interview and an Interest Inventory conducted on May 23, 2012. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
36. The May 24, 2012 IEP Team developed goals which relate to the student researching and identifying entrance requirements for culinary arts programs; registering for the SAT; identifying the skills, abilities, and education required to work as a chef; investigating the job availability, salary range and available benefits of a chef; learning ways to budget; and learning to utilize local public transportation. For the student's education and training goals, the postsecondary plan prescribes vocational counseling and college and career counseling services. For the student's employment goals, the student's postsecondary plan prescribes job shadowing and vocational training services. For the student's independent living goals, the postsecondary plan prescribes personal budgeting services. The postsecondary transition plan also includes the academic and elective courses of study the student needs to obtain his goals. (Petitioner's Exhibit 14; Respondent's Exhibit 2)

37. The May 24, 2012 meeting ended when the IEP Team had to evacuate the building because of the activation of the school's fire alarm. (Petitioner's Exhibits 8 and 14; Respondent's Exhibit 2)
38. The draft IEP was finalized at the end of the May 24, 2012 IEP Team meeting. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
39. From February 2012 through June 2012, when present at school, the student received behavioral support services as prescribed in his IEPs. (Petitioner's Exhibit 8; Respondent's Exhibit 4; Parent's Testimony)
40. During the 2011-2012 school year, the student did not complete a college tour or engage in personal budgeting. (Student's Testimony)
41. At the end of the 2011-2012 school year, the student received passing grades in all of his classes at School A. (Parent's Testimony; Student's Testimony; SEC's Testimony)
42. The student is on track to graduate. (SEC's Testimony)
43. In the past 18 months, the Petitioner filed three other due process complaints. The Petitioner requested placement in a private special education day school in each of the three previous due process complaints. In one of the three cases, the Petitioner withdrew the requested relief of a private special education day school. In all three HODs resulting from the due process complaints, the Hearing Officers found that placement at a public school was appropriate for the student. (Petitioner's Exhibits 20, 21 and 22)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The

United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

Issues #1 and #2

The Petitioner alleges that DCPS failed to convene an IEP Team meeting, with all relevant IEP Team members, on May 24, 2012 and by failing to convene a proper IEP Team meeting, failed to review the student's June 23, 2011 IEP at least annually.

Pursuant to the IDEA regulations at 34 CFR §300.324(b), each public agency must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; the results of any reevaluation conducted under §300.303; information about the child provided to, or by, the parents, as described under §300.305(a)(2); the child's anticipated needs; or other matters. Additionally, 34 CFR §300.321(a) requires the public agency must ensure that the IEP Team for each child includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; (4) a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities and is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child with a disability.

A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent of the child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. A member of the IEP Team may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if the parent, in writing, and the public agency consent to the excusal and the member

submits, in writing to the parent and IEP Team, input into the development of the IEP prior to the meeting. 34 CFR §300.321(e).

On May 24, 2012, DCPS held an IEP Team meeting for the student. Present at the meeting were the parent (by telephone), a special education teacher, an evaluator, the special education coordinator (acting as the LEA representative), a general education teacher (by telephone), an RSA representative, a social worker and the parent's attorney. The special education teacher who attended the meeting was the student's case manager but did not directly instruct the student. The parent did not agree that the attendance of a special education teacher of the student was not necessary. The parent's attorney informed the IEP Team that she and the parent did not want the student present at the meeting. DCPS was prepared to, and in fact, conducted the IEP Team meeting as scheduled although the parent refused to participate in the discussion regarding the student's IEP goals without the presence of a special education teacher currently instructing the student. The parent and the parent's attorney were present for the duration of the IEP Team meeting.

The May 24, 2012 IEP Team discussed the accuracy of the student data in the LEA's database, the student's class sizes, whether the student was receiving the specialized instruction as indicated in his IEP, postsecondary transition matters, the student's academic functioning in math and English, the student's math goals and the certifications of the student's teachers. The meeting ended when the IEP Team had to evacuate the building because of the activation of the school's fire alarm.

The draft IEP, which was finalized at the end of the IEP Team meeting, included updated math present level of educational performance and math goals identical to the student's June 23, 2011 IEP; updated reading present level of educational performance and updated reading goals based on input from the student's English teacher; updated written expression present level of educational performance and updated written expression goals based on input from the student's English teacher; the addition of emotional/social/behavioral present level of performance and behavior/emotional goals; and updated the student's postsecondary transition plan by adding vocational assessment results and developing new postsecondary transition goals. The Petitioner presented no evidence which suggested that the academic and behavioral/emotional goals in the student's May 24, 2012 IEP were inappropriate. The Petitioner specifically challenged the student's postsecondary transition goals in Issue #3.

The Hearing Officer concludes that DCPS reviewed the student's June 23, 2011 IEP, at least annually, by conducting an IEP Team meeting on May 24, 2012. At that meeting, the IEP Team reviewed the student's IEP. Specifically, the IEP Team decided to continue with the student's math goals, made changes to the student's reading and written expression goals, added behavioral/emotional goals and made changes to the student's postsecondary goals. The IEP Team also discussed the student's progress and updated the student's present levels of performance.

The Hearing Officer concludes that DCPS did not convene an IEP Team meeting, with all relevant IEP Team members, on May 24, 2012 in that the IEP Team did not consist of a special education teacher of the child as required by 34 CFR §300.321(a)(3). However, the

Hearing Officer concludes that this procedural violation does not constitute a denial of FAPE. An "IDEA claim is viable only if ...procedural violations affected the student's substantive rights." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828,834 (D.C.C. 2006). In this case, the special education teacher at the student's May 24, 2012 IEP Team meeting was the student's case manager and conferred with the student's special education and regular education teachers prior to the IEP Team meeting. Further, the Petitioner presented no evidence which suggested that the annual goals developed for the student on May 24, 2012 were inappropriate for the student. Therefore, the absence of a special education teacher of the student did not impede the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child or cause a deprivation of educational benefit. While the parent refused to participate in the discussion regarding the student's reading and written expression goals, the parent had the opportunity to participate in the decision-making process and refused to avail herself of the opportunity.

The Petitioner failed to meet its burden with respect to Issues #1 and #2.

Issue #3

Beginning not later than the first IEP to be in effect when the child turns sixteen (16), or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services (including courses of study) needed to assist the child in reaching those goals. 34 CFR §300.320(b); *see also* 5 DCMR §E-3009.3.

A transition plan must include appropriate measurable postsecondary goals related to training, education, employment, and where appropriate, independent living skills, and the transition services (including courses of study) needed to assist the child in reaching those goals. *See* 34 CFR §300.320(b). Transition services include a coordinated set of activities that promote movement from school to post-school activities and activities based on the individual child's needs, taking into account the child's preferences and interests. Transition services for children with a disability may be special education, if provided as specially designed instruction, or related services, if required to assist a child with a disability to benefit from special education. *See* 5 DCMR §E-3001.1; *see also* 34 CFR §300.43.

The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or the denial of a FAPE. *Board of Education v. Ross*, 486 F.3d 267, 276 (7th Cir. 2007) (despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be "deferred" was a procedural violation); *A.S. v. Madison Metro School Dist.,* 477 F.Supp.2d 969, 978 (D. Wis. 2007) (allegation of inadequate transition plan treated as a procedural violation).

In the present matter, the Petitioner alleged that DCPS denied the student a FAPE by failing to include appropriate transition goals and services based on the student's June 27, 2011 Vocational Evaluation and May 2012 vocational assessment during the student's May 24, 2012 IEP Team meeting. The record contains the student's June 27, 2011 Vocational Evaluation but

does not contain the student's May 2012 vocational assessment except as incorporated into the student's May 24, 2012 postsecondary transition plan.

The student's June 27, 2011 Vocational Evaluation includes ten recommendations. One recommendation is a recommendation for the team members working with the student. Six recommendations list resources, such as books and websites, which may be helpful for the student and team members assisting the student with transition. One recommendation guides the student to dictionaries, encyclopedias, community resources, map reading, the phone book and internet research. One recommendation suggests that the student would benefit from counseling services to understand the consequences of his drug use. One recommendation states that the school program should provide the student with a "variety of prevocational activities to assist him with sharpening related skills as he transitions into young adulthood." The narrative of the evaluation states that the student highest level of interest fell within the Artistic areas and that the student's goal is to pursue a career in culinary arts. The evaluation also notes that the student does not have adequate knowledge about researching or obtaining a job and how to demonstrate work habits and attitudes preferred by employers. The student indicated that he would like to live independently after graduating from high school.

Transition assessment data capturing the student's interests is the common thread in transition planning and it should define the transition goals and services in the IEP, and link directly to the transition services and activities. *Brandywine Sch. Dist.*, 111 LRP 64084 (SEA DE 2011). The June 27, 2011 Vocational Evaluation was consistent with the student's testimony that his goal is to become a chef and he intends to attend the Culinary Institute of America.

On May 24, 2012, the student's IEP Team updated the student's postsecondary transition plan. The May 24, 2012 IEP Team reviewed information from a Brigance assessment, a student interview and an Interest Inventory conducted on May 23, 2012. The IEP Team developed goals which relate to the student researching and identifying entrance requirements for culinary arts programs; registering for the SAT; identifying the skills, abilities, and education required to work as a chef; investigating the job availability, salary range and available benefits of a chef; learning ways to budget; and learning to utilize local public transportation. For the student's education and training goals, the postsecondary plan prescribes vocational counseling and college and career counseling services. For the student's employment goals, the student's postsecondary plan prescribes job shadowing and vocational training services. For the student's independent living goals, the postsecondary plan prescribes personal budgeting services. The postsecondary transition plan also includes the academic and elective courses of study the student needs to obtain his goals.

A FAPE need not provide the "absolutely best" or "potential-maximizing" education. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010) (citation and internal quotation marks omitted). The FAPE need only be "appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit." *Id.* at 433 (citations and quotation marks omitted). The Hearing Officer concludes that the postsecondary transition plan developed for the student on May 24, 2012 contains appropriate transition goals and services which are designed to provide meaningful benefit. Additionally, the goals and services in the student's May 24, 2012 postsecondary transition plan are based on information in the student's

June 27, 2011 Vocational Assessment and the results of the assessments conducted for the student on May 23, 2012. The goals and services address the student's desire to become a chef, his limited knowledge of how to become a chef, his need to register for the SAT and his desire to live independently.

The Petitioner failed to meet its burden with regard to Issue #3.

Issue #4

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. Typically, a material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia,* 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

The student's June 23, 2011 IEP prescribes eleven (11) hours a week of specialized instruction within the general education environment, five (5) hours per week of specialized instruction outside of the general education environment, sixty (60) minutes per week of behavioral support services, one (1) hour per year of job shadowing, five (5) hours per year for a college visit at Bowie State University, sixty (60) minutes per month of career exploration, two hundred forty (240) minutes per week of vocational training and sixty (60) minutes per month of personal budgeting. Given that the total amount of service prescribed on the student's June 23, 2011 IEP exceeds the amount of time in a school day, it is possible, even likely, that the two hundred forty (240) minutes per week of vocational training was a typographical error. However, there was no evidence presented which suggested that the amount of service was listed in error.

The student's May 24, 2012 IEP prescribes six and one half (6.5) hours per week of specialized instruction inside of the general education setting, six and one half (6.5) hours per week of specialized instruction outside of the general education setting, two hundred forty (240) minutes per month of behavioral support services outside of the general education setting, one (1) hour per month of vocational counseling, two (2) hours per year of college and career counseling, one (1) hour per year of job shadowing, one (1) hour per month of vocational training and sixty (60) minutes per month of personal budgeting.

The Petitioner alleged that DCPS did not implement approximately 100 hours of specialized instruction from February 2012 through June 2012 and by failed to provide the student with services according to his transition plan, specifically, college visits, college exploration, job shadowing and opportunities and instruction involving personal budgeting.

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000), the Firth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements

of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia,* 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.,* 200 F.3d at 349, n. 2.

In February 2012, the student transferred to School A. At School A, the student was placed in English, history, Life Skills and culinary arts classes. The classes were ninety (90) minutes per day each. The student's Life Skills class was taught by a special education teacher. DCPS argued that the student's English and history classes were inclusion classes with special education teacher support however the record does not support this contention. It is uncontested that the student's English class was supported by a paraprofessional rather than a special education teacher and there is no indication that the special education teacher assigned to the student's history class was ever present in the classroom. The student testified that he had only one interaction with the special education teacher reportedly assigned to the history class and the special education teacher neither attended the student's IEP Team meeting nor provided any written information to the IEP Team regarding the student's progress in history. The student was not placed in a math class because of difficulties with and errors in the student's transcript.

From February 2012 through June 2012, the student received ninety (90) minutes per day or seven and one half (7.5) hours per week of specialized instruction outside of the general education environment. The Hearing Officer concludes that the student received specialized instruction outside of the general education environment in excess of the specialized instruction as prescribed by his June 23, 2011 and May 24, 2012 IEPs. The Petitioner did not allege that the student did not receive the behavioral support services prescribed on his June 23, 2011 and May 24, 2012 IEPs. Additionally, DCPS provided evidence that, when present, the student's behavioral support services were indeed provided and the Parent testified that the student received behavioral support services. The Hearing Officer concludes that from February 2012 through June 2012, the student did not receive specialized instruction within the general education environment as prescribed by his June 23, 2011 and May 24, 2011 IEPs.

In some cases, the failure to provide the requisite number of hours of instruction or services provided in the student's IEP has been found to be a material failure to implement. *See Sumter County School District 17 v. Heffernan ex rel. T.H.,* 642 F.3d 478 (4th Cir. 2011) (in receiving only seven and one half to ten of the fifteen hours of instruction dictated by his IEP, the district court concluded that the missing hours, in combination with the school's failure to utilize the teaching techniques specified in the IEP, amounted to a failure to implement the student's IEP); *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007) (the school failed to implement the student's IEP by denying him five of the eight to ten hours of math instruction required in the student's IEP). By contrast, in *Catalan v. District*

of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007), the Court found that since the student received consistent speech therapy, the failure to provide all of the required sessions was not a material deviation from the student's IEP; and in *Savoy v. District of Columbia,* 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012) the Court held that there was no failure to implement where the District provided ten minutes less of specialized instruction per day that was on the student's IEP and the student's educational program was sufficient to confer educational benefit.

In the present case, the student has a full scale IQ of 96, which is in the Average range of functioning. The student's Verbal Comprehension Index, Perceptual Reasoning Index and Working Memory Index are in the Average range. His Processing Speed Index is in the Below Average. In May 2011, the student's academic functioning was Average in Oral Language, Average in Basic Reading, Average in Written Expression and Below Average in Mathematics. On March 30, 2012, the student was receiving average grades in all of his general education classes and on May 10, 2012, the student had a 2.58 grade point average. While the student's English teacher informed the student's parent on April 24, 2012 that the student was in danger of failing English because he was often off-task during class, on May 24, 2012, the student was earning a grade letter "C" in English. The student received passing grades in all of his classes at School A.

While the difference in the minutes the student missed in specialized instruction is quantitatively significant, at no point during the due process hearing did the Petitioner argue that the missing specialized instruction deprived the student of educational benefit. *See Savoy v. District of Columbia,* 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012). The Psychologist testified as to the student's "need" for a full-time special education program. The appropriateness of the student's placement in a public school not only was not at issue in this case but also has been decided by Hearing Officers in three prior due process cases in the course of the past year. The Parent testified that the student "seems" to be going downhill but offered no specific or even general testimony of the subject area, skill or educational goal in which the student may be regressing. The Tutor testified regarding recommendations for relief and stated that if the student receives tutoring he will be "able to stay on task and with his class instead of falling behind." The Tutor also testified that the student has not yet mastered the IEP goals in the student's June 23, 2011 IEP and continues to have difficulties with writing, spelling and subject-verb agreement and is making inconsistent progress with tutoring benchmarks. However the student need not master all of his IEP goals in order to receive educational benefit and the record indicates that the student had numerous absences due to suspensions prior to his enrollment in School A in February 2012. The SEC testified that the student's teachers reported that limited support in general education classes is effective for student.

The IDEA only requires DCPS to provide the student with an educational program "sufficient to confer some educational benefit." *Leonard ex rel. Leonard v. McKenzie,* 869 F.2d 1558, 1562 (D.C. Cir. 1989) *(quoting Rowley,* 458 U.S. at 189) (internal quotation marks omitted). The Hearing Officer concludes that the failure of DCPS to provide the specialized instruction within the general education environment as prescribed by the student's June 23, 2011 and May 24, 2012 IEPs did not deny the student a FAPE because the student received educational benefit within the general education environment even without the specialized instruction. While the Hearing Office is concerned that DCPS did not enroll the student in a math course for the second semester of the 2011-2012 school year, the Petitioner did not meet its

burden in proving that the student's math goals were not addressed in other classes or that a math course was necessary for the student to remain on track to receive a high school diploma.

Likewise, the record indicates that during the 2011-2012 school year, DCPS did not ensure that the student completed a college tour or engaged in personal budgeting. However, it is clear from the record that the student worked closely with his culinary arts teacher who is a renowned chef. The culinary arts teacher engaged in conversations with the student about culinary arts programs and offered to fund the student's tuition at the Culinary Institute of America, should he be accepted. While DCPS did not implement all of the student's secondary transition services, the Hearing Officer concludes that the failure of DCPS to implement all transition services for the student, in this case, does not constitute a denial of FAPE. The student spent ninety (90) minutes per day with a renowned chef, spoke with the chef about culinary arts programs, was offered a scholarship to his school of choice by the culinary arts teacher and received guidance pertaining to culinary arts and becoming a chef. The student is firm in his pursuit of gaining admission to the Culinary Institute of America and has visited other college campuses in the past. The Petitioner did not present evidence that the student suffered harm by not visiting Bowie State University, not engaging in college exploration or not job shadowing. The student's goal related to personal budgeting was carried over to his May 29, 2012 IEP.

The Petitioner failed to meet its burden with regard to Issue #4.

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: September 5, 2012

Melanie Byrd Chukoln
Hearing Officer