

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
July 25, 2013

STUDENT a minor by and through
his Parent,¹

Petitioner,
v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION
and Order on Motion for Directed Verdict

STATEMENT OF THE CASE

On May 10, 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 6) on June 4, 2013. This was fifteen days beyond the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). The Response was not filed until Petitioner

¹ Student has reached the age of majority and brings this action on his own behalf. 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.

filed a motion requesting default judgment or sanctions for the late filing on June 4, 2013. HO 5. Respondent Opposition to the motion was filed simultaneously with its response to the Complaint on June 4, 2013. HO 6. On June 5, 2013 Petitioner filed *Reply to DCPS Response to the Due Process Complaint and Opposition to Petitioner's Motion for a Default Judgment* (HO 7) as well as *Petitioner's Opposition to Respondent's Motion to Dismiss/Request for the Petitioner's Case to be Dismissed*. (HO 8) I entered an Order granting sanctions on June 9, 2013, (HO 9), shifting the burden of production to Respondent. Respondent subsequently filed *District of Columbia Public Schools's [sic] Motion to Dismiss/Motion for Summary Adjudication* on June 19, 2013 (HO 11), and Petitioner filed its opposition to the motion on June 20, 2013. HO 12. DCPS then filed a Reply to the Opposition on June 20, 2013 (HO 13). I issued an Order denying the Motion on June 23, 2013, HO 17. A resolution meeting was not held in this matter until June 21, 2013 which is 16 days beyond the 15 calendar days for such meetings required by the Individuals with Disabilities Education Act ("IDEA"). 34 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.³ HO 16. The form indicated the matter should immediately go to hearing. However, as the instant hearing had already been scheduled for July 3 and July 5, 2013 Petitioner indicated there was no need to reschedule the hearing, and Respondent expressed no disagreement with this position. The 45 day timeline began to run on June 10, 2013, the day after the 30 day resolution period ended. Following the Prehearing Conference held on June 12, 2013, I issued a Prehearing Conference Order on the same date. HO 10. My Hearing Officer Determination is due on June 24, 2013.

³ The form indicates the resolution meeting was held within the required 15 days despite the extensive delay in holding this meeting as reflected by the dates of filing and the meeting.

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq., and William Jaffe, Assistant Attorney General, represented DCPS. The special education coordinator at Attending School, in addition to testifying, attended the hearing in the capacity of party representative. By agreement of the parties, the hearing was scheduled for July 3 and 5, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

As noted *supra* at p.2, as a sanction for extremely late filing of its Response I shifted the burden of production in this matter to Respondent. After Respondent rested, following presentation of its case on the first day of hearing, Petitioner made an on the record Motion for a Directed Verdict stating Respondent had failed to meet its burden of production as to its defenses to Petitioner's issues 1, 2, 3 and 6 of the instant Complaint and possibly as to issues 4 and 5 as well. Respondent stated the burden of persuasion remained with Petitioner.⁴ When we reconvened on July 5, 2013, Respondent added to its argument in opposition to the motion stating all motions under the Student Hearing Office Standard Operating Procedures were required to be in writing,⁵ and the cases relied upon by Petitioner were not IDEA based cases. Petitioner replied that while Petitioner maintained the burden of proof, I had switched the burden of production and this must be seen as having legal meaning. It was Petitioner's position that once the burden of production is switched it must be met. If it is not met, according to Petitioner, the party with the burden of production must lose. I held the Motion for a Directed Verdict in abeyance and continued the hearing on the Complaint.

After considering Petitioner's motion and the parties' arguments, I find the Motion for a Directed Verdict is inapposite to the instant matter. The burden of proof consists of both the

⁴ Respondent's counsel indicated it was unusual to have a motion made without reference to case law. Petitioner's counsel stated she had reviewed case law. I required she provide the citations of these cases to Respondent's counsel and me that evening. She did so.

⁵ This is true as to prehearing motions. Student Hearing Office Standard Operating Procedures § 401C. The requirement for filing a written motion does not apply to motions made during the course of hearing.

burden of production and the burden of persuasion. *See, Shaffer v. Weast*, 546 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). A directed verdict addresses the burden of proof which was bifurcated here. While I shifted the burden of production to Respondent, it was as Respondent argued – the burden of persuasion remained with Petitioner. Therefore, it is necessary that I determine whether Petitioner met her burden and established a prima facie case as the issues before me. For the foregoing reasons, I **deny** Petitioner’s Motion for a Directed Verdict.

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

ISSUES

A. The issues are:

- 1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by failing to provide Student an appropriate individualized education program (“IEP”) from March 2012 through February 2013. The IEP of March 5, 2012 does not include sufficient hours of instruction. Further, following the manifestation determination review meeting held on December 4, 2013, DCPS had sufficient information to determine the need to include additional hours of specialized instruction as well as behavior supports on Student’s IEP. The IEP was not revised;
- 2) Whether DCPS denied Student a FAPE by developing an IEP on February 20, 2013 without parent involvement. Neither the parent nor her advocate were invited to an IEP meeting on this date nor were they aware an IEP was developed on this date despite having attended a meeting at the school for another purpose on February 20, 2013. The IEP developed on this date did not include sufficient hours of specialized instruction, behavior support or a behavior intervention plan (“BIP”). It did not include extended school year services. In addition, the IEP indicated specialized instruction would be provided in an inclusive classroom environment rather than in a separate special education classroom as it had been on Student’s prior IEP. Instruction in the general education setting at Student’s current school is computer based for some part of each day, and Student is unable to access such instruction;
- 3) Whether DCPS denied Student a FAPE by failing to implement the March 2012 and February 2013 IEPs as written. Student did not receive 15 hours of specialized

instruction outside the general education setting under the March 2012 IEP, and he did not receive 10 hours of specialized instruction inside the general education setting under the February 2013 IEP;

- 4) Whether DCPS denied Student a FAPE by failing to develop an IEP following the review of assessments at a meeting held on May 6, 2013. Student continued to require additional hours of specialized instruction outside the general education environment, behavior support and a BIP. The IEP was not revised at this meeting;
- 5) Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement from March 2012 through the filing of the complaint. Student requires a full time placement, out of the general education setting that can address Student's remedial needs as well as his severe learning disabilities;
- 6) Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment ("FBA") and provide Student a BIP following the manifestation determination review meeting held on December 4, 2012; and
- 7) Whether Student is entitled to compensatory education.

RELIEF REQUESTED

Petitioner requested:

- 1) Placement at a full-time, separate, non-public special education school that provides remedial services as well as behavior supports;
- 2) An independent speech-language assessment;⁶ and
- 3) Compensatory services including a Linda Mood Bell assessment and provision of services.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1	Compensatory Education Plan by Educational Advocate	June 7, 2013
P-2	Attorney Hecht RSM notes	June 21, 2013
P-3	Getting to Know Attending School	Rec'd 2012-2013 SY
P-4	Teacher Certification Documentation (NCLB)	May 21, 2013
P-5	Correspondence between DCDLG & DCPS	Dec 2012- May 2013
P-6	Report card 1 st advisory 2012-2013 SY	November 2, 2012
P-7	Student suspension papers & incident reports	October 10, 2012

⁶ The only evidence regarding the need for a speech-language assessment is a recommendation included in the confidential psychological report of April 2013. As this is the only evidence and neither party provided any testimony on the need for such an assessment, I do not discuss it and I do not order it.

		November 5, 2012
		November 28, 2013
P-8	Student work samples at Attending School 12-13 SY	2012-2013 SY
P-9	Informal Assessments from Attending School 12-13 SY	2012-2013 SY
P-10	Final Copy of Confidential Psychological Re-evaluation	April 9, 2013
P-11	Second draft of Confidential Psychological Re-evaluation	April 9, 2013
P-12	First draft of Confidential Psychological Re-evaluation	April 9, 2013
P-13	Confidential Psychological Evaluation	March 30, 2010
P-14	Woodcock Johnson Test of Achievement (WJ-III)	January 22, 2010
P-15	Withdrawn during hearing	April 11, 2013
P-16	Draft Individualized Education Plan (IEP) dated May 20, 2013 with Paralegal / Educational Advocate annotations	May 20, 2013
P-17	Draft Individualized Education Plan (IEP) dated May 20, 2013	May 20, 2013
P-18	Individualized Education Plan (IEP) created June 10, 2013	June 10, 2013
P-19	Paralegal / Educational Advocate meeting notes Senior Educational Advocate meeting notes	June 10, 2013
P-20	DCPS MDT meeting notes	June 10, 2013
P-21	Senior Educational Advocate meeting notes	May 6, 2013
P-22	Evaluation Summary Report	May 6, 2013
P-23	Final Eligibility Determination Report	May 6, 2013
P-24	Prior Written Notice (PWN) of Identification	May 6, 2013
P-25	Individualized Education Plan (IEP) dated February 20, 2013	February 20, 2013
P-26	Paralegal/Educational Advocate meeting notes Senior Educational Advocate meeting notes	February 20, 2013
P-27	DCPS MDT meeting notes	February 20, 2013
P-28	Manifestation Determination Review (MDR) worksheet	December 4, 2012
P-29	Paralegal/ Educational Advocate meeting notes Senior Educational Advocate meeting notes	December 4, 2012
P-30	DCPS MDT meeting notes	December 4, 2012
P-31	Individualized Education Plan (IEP) dated March 5, 2013	March 5, 2012
P-32	Draft Individualized Education Plan (IEP) dated March 5, 2013	March 5, 2012
P-33	Educational Advocate meeting notes	March 5, 2012
P-34	DCPS MDT meeting notes	March 5, 2012
P-35	Individualized Education Plan (IEP) dated March 10, 2011	March 10, 2011
P-36	Advocate MDT meeting notes	March 10, 2011
P-37	DCPS MDT meeting notes	March 10, 2011
P-38	Individualized Education Plan (IEP) dated April 29, 2010	April 29, 2010
P-39	Prior Written Notice (PWN) of Identification Evaluation Summary Report Final Eligibility Determination Report Evaluation Summary Report	April 13, 2010
P-40	DCPS MDT meeting notes Analysis of Existing Data Prior Written Notice (PWN) of Evaluation Acknowledgment of referral for special education letter	January 21, 2010
P-41	DCPS MDT meeting notes	October 26, 2009

P-42	Student DCPS report cards Pk-4 th grade	2005-2006SY through 2010-2011SY
P-43	Individualized Education Plan (IEP) progress report	2010-2011 SY
P-44	Letter from Interested party to Principal DCPS ES	August 25, 2009
	Letter from Petitioner to Principal DCPS ES	Undated
	Letter from Student's sister to Principal DCPS ES	August 25, 2009
P-45	Hearing Officer Determination (HOD) from IHO Bruce Ryan	July 2, 2011
P-46	Resume of Educational Advocate	Updated Fall 2012
P-47	DCPS OSE Programs and Resources Guide for Family 2013-2014 SY	2013-2014 SY
P-48	Linda Mood Bell Information & Directory	Rec'd Spring 2013
P-49	OSE Approved Non-Public Day Schools	May 24, 2013

Exhibits admitted on behalf of Respondent are:

R-01	Email correspondence between SEC and parent.	Date: various
R-02	PWN	Date: 5/6/13
R-03	BIP	Date: 6/12/13
R-04	PWN	Date: 4/13/13
R-05	Analysis of Existing Data	Date: 4/13/13
R-06	FBA	Date:
R-07	OT evaluation	Date: 4/11/13
R-08	OT service tracker	Date: 4/11/13
R-09	Disability Worksheet	Date: 5/06/13
R-10	Final Elig. Det. Report	Date: 5/06/13
R-11	Disability Worksheet- OHI	Date: 5/06/13
R-12	Disability Worksheet-Spec Learning Disability	Date: 5/06/13
R-13	Disability Worksheet- Multiple Disabilities	Date: 5/06/13
R-14	Evaluation Summary Report	Date: 4/13/13

Exhibits admitted by the Hearing Officer are:⁷

- 1 Administrative Due Process Complaint Notice filed May 10, 2013
- 2 Notice of Hearing Officer Appointment of May 10, 2013
- 3 Prehearing Conference Scheduling Letter of May 11, 2013
- 4 Prehearing Notice dated May 19, 2013
- 5 Petitioner's Motion for Default Judgment or Alternative Sanctions for Failing to File a Timely Response to Petitioner's Due Process Complaint of June 4, 2013
- 6 District of Columbia Public Schools' Response to the Administrative Due Process Complaint and Opposition to Petitioner's Motion for a Default dated June 4, 2013
- 7 Petitioner's Reply to DCPS'S [sic] Response to the Due Process Complaint and Opposition to Petitioner's Motion for Default

⁷ Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

- Judgment of June 5, 2013
- 8 Petitioner's Opposition to Respondent's Motion to Dismiss/Request
for the Petitioner's Case to be Dismissed of June 5, 2013
- 9 Order re Petitioner's Motion for Default Judgment or Alternative
Sanctions [sic] for Failing to File a Timely Response to Petitioner's
Due Process Complaint
- 10 Prehearing Conference Order dated June 12, 2013
- 11 District of Columbia Public Schools's [sic] Motion to
Dismiss/Motion for Summary Adjudication of June 19, 2013
- 12 Petitioner's Opposition to Respondent's Motion to Dismiss/Motion
for Summary Adjudication of June 20, 2013
- 13 District of Columbia Public Schools's [sic] Reply in Support of
Motion for Summary Adjudication of June 20, 2013
- 14 Miscellaneous emails
- May 13, 2013 from Petitioner re scheduling
 - Chain of May 11-14, 2013 re scheduling prehearing conference
 - Chain of June 3, 2013 re DCPS late filing of Response and possible
related motion
 - 2d chain of June 3, 2013 re DCPS late filing of Response and
possible related motion
 - Respondent email of June 4, 2013 following filing of Petitioner's
Motion for Default Judgment
 - Chain of June 10, 2013 re resolution meeting
 - Chain of June 4 – 11, 2013 re whether Respondent intended to file
a motion to dismiss with response
 - Chain of June 12, 2013 re FBA/BIP
 - Chain of June 12, 2013 re phone conference
 - Chain of June 20, 2013 re Motion to Dismiss
 - Chain of June 21, 2013 re resolution meeting
 - Multiple chains of 6.26 -6/27/13 re disclosures
- 15 List of Proposed Hearing Officer Exhibits filed June 20, 2013
- 16 Resolution Period Disposition Form of 6/21/13
- 17 Order on District of Columbia Public Schools's [sic] Motion to
Dismiss/Motion for Summary Judgment filed June 23, 2013

B. Testimony

Petitioner presented the following witnesses:

- Educational Advocate testified as an expert in the field of special education with respect to determining educational programs for students with emotional disabilities and learning disabilities and also with respect to administration and review of educational assessments
- Director of Admissions, Nonpublic School
- Paralegal/Educational Advocate
- Student.

DCPS presented the following witness:

- Special Education Coordinator (“SEC”), Attending School

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:⁸

1. Student is twelve years old. He was a sixth grader at Attending School during the 2012-2013 school year. He was classified as a student with a specific learning disability from April 2010 through May 6, 2013 when his classification was changed to Multiple Disabilities (Other Health Impaired and Specific Learning Disability). P 10; P 11; p 12; P 16; P 17; P 31; P 32; P 35; P 38; P 45; Testimony of SEC.
2. In the 2011 – 2012 school year Student attended DCPS Elementary School. He received 15 hours of special instruction per week outside the general education environment during that school year. Both his March 10, 2011 and his March 5, 2012 IEPs required that he receive 5 hours of instruction outside the general education environment in each of the following subjects: reading, mathematics and written expression. He also was to receive 60 minutes per week of occupational therapy outside the general education environment. Student made limited progress during the 2011-2012 school year. He continued to function academically well below his peers. P 31; P 32; P 33; P 34; P 35; Testimony of Paralegal/Educational Advocate.
3. Student entered Attending School at the beginning of the 2012 – 2013 school year. Attending School uses a blended learning model throughout the school. The blended learning model involves dividing the 90 minute class blocks in half. One half of the class works on

⁸ 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.

computers⁹ with a virtual teacher who is actually located in Florida, and the other half of the class works with the teacher in the classroom. After 45 minutes the students switch the instructional format so that those who were working on the computer work with the classroom teacher and *vice versa*. The virtual teacher can see the work the students are doing, and the virtual teacher is able to talk to with the students during her part of the instruction. Those elements of the virtual teacher's instruction intended for the entire class appear on a smartboard in the actual classroom. The virtual instruction is supposed to be individualized to each student's reading level. Attending School was a full inclusion school during the 2012- 2013 school year. SEC informed Petitioner of the blended learning environment at Attending School during parent –teachers night at the beginning of the 2012-2013 school year. At the same time, SEC told Petitioner Student would not receive pull out instruction because of Attending School's inclusion approach. P 3; Testimony of SEC.

4. Student is not able to effectively participate in the blended learning process. His academic skills are low, and the format used for the blended learning process is written at a third grade reading level which is higher than Student's. As the year progressed some teacher's adapted to Student's needs. Testimony of SEC.

- a. Student is able to read on a kindergarten to first grade level. He can recognize some high frequency words at grade level. His comprehension, which is lower than his word reading level, is well below grade level. Testimony of SEC.
- b. Teachers reported Student had difficulty completing assignments on the computer. Student was moved to a paper system for reading after Attending School received the April 2013 confidential psychological report indicating Student's low reading level. Student continued to be required to use the computer

⁹ Each student has his/her own computer in class.

for math, but he did not do the required work on the computer. P 9; P 10; P 29;
Testimony of SEC.

- c. Student received Fs in the first term of the 2012-2013 school year.¹⁰ P 6.
- d. Work on the computer can be overwhelming for Student. Student would become frustrated and walk out of class. He also acted like the class clown when frustrated. When academics are not involved Student can be a class leader. P 26;
Testimony of SEC.

5. DCPS was aware Student was struggling in school as of October or November of 2012.
Testimony of SEC

6. Petitioner requested a 30 day review meeting to discuss Student's needs on October 22, 2012.¹¹ There was no response to this request. This request was sent to the Principal. It was not forwarded to the SEC. A second request for a 30 day review meeting was made on December 4, 2013. P 5; Testimony of Paralegal/Educational Advocate.

7. A meeting was held on December 4, 2013. This was a manifestation determination review meeting, not the requested 30 day review meeting. The SEC did not know until the December 4, 2012 meeting that Petitioner was represented by counsel. Petitioner attended the meeting by telephone. Student had been suspended three times as of this meeting. The manifestation determination review meeting was held following an altercation on November 26, 2012. P 5; P 7; P 28; P 29; P 30; Testimony of SEC; Testimony of Paralegal/Educational Advocate

¹⁰ The SEC testified the report on student progress was incorrect but provided no basis for this statement.

¹¹ The letter to the principal requesting this meeting was sent by Fax. It identifies the subject as a request for records. A separate request for records also was sent to the principal on the same date. There also was no response to this request.

8. At the December 4, 2013 meeting the team determined Student's behavior was a manifestation of his disability. The team found Student's IEP was being implemented although he was not receiving pull-out services. Educational Advocate reminded the team an FBA and a BIP were required under the IDEA discipline procedures. During this manifestation determination review meeting the participants discussed Student's walking out of and feeling overwhelmed in math class. They also discussed Student's low completion of the on-line work required by the blended learning model. The participants in the meeting agreed to hold a second meeting on December 10, 2012 to discuss Student's triennial re-evaluation. Petitioner and her advocates provided DCPS with assessment requests for a functional behavioral assessment ("FBA") and a behavior intervention plan ("BIP"), as well as a comprehensive psychological assessment and an occupational therapy assessment. P 5; P 7; P 9; P 28; P 29; P 30; Testimony of SEC; Testimony of Paralegal/Educational Advocate; Testimony of Educational Advocate.

9. Petitioner's representatives went to Attending School for the December 10, 2013 meeting. Petitioner was available to participate by telephone. Attending school refused to move forward with the meeting, indicating Petitioner must be present in person for a reevaluation meeting. Petitioner attempted to reschedule the meeting for January 15, 2013. However, DCPS was not available on that date. The meeting was rescheduled for January 24, 2013 and then cancelled approximately 30 minutes before the meeting was scheduled to begin because the school psychologist was not available due to a death in her family P 5; Testimony of SEC; Testimony of Paralegal/Educational Advocate.

10. Attempts to communicate with Petitioner in writing can be difficult as she has limited literacy. P 10.

11. The reevaluation meeting was held on February 20, 2013. At the meeting the participants discussed Student's increasing behavior issues and his decreasing academics. For example, in math Student did little work and walked out of class daily. Petitioner reported Student had said math was too difficult, and he does not understand the instruction in the class. Student walks out of class when it is too difficult. Attending School keeps students who arrive late in the morning in tardy hall until 9:20 AM thereby increasing the time a late student is without instruction. Student also refused to do work in English class. Student works best in a one on one situation. The team also discussed Student's behavior tracking form. His English teacher thought it helped improve Student's behavior. Student's math teacher did not think it was helpful, and his science teacher thought it helped sometimes. It was agreed an FBA/BIP, occupational therapy assessment and a comprehensive psychological assessment would be completed. DCPS had not received consent for evaluation until this meeting despite emails sent to Petitioner, rather than her representative, in December 2012 regarding the need for consent. Student's IEP was not discussed during this meeting. P 5; P 26; P 27;¹² Testimony of SEC; Testimony of Student; Testimony of Paralegal/Educational Advocate; Testimony of Educational Advocate.

12. At another time of the day, without Petitioner or her advisors in attendance, the team reviewed, revised and developed a new IEP for Student. The February 20, 2013 IEP decreased Student's hours of specialized instruction from 15 to 10 and moved all instructional services to the general education environment. The decrease in hours and provision of all instruction in the general education environment were made to reflect the services Student was actually receiving at Attending School. This IEP also decreased Student's hours of Occupational Therapy from 60 minutes per week to 120 minute per month. The IEP indicates Petitioner and her advisors

¹² This document indicates it was drafted during a January 2013 meeting, but no such meeting occurred. There was however a February 2013 meeting.

attended this meeting in person; yet there are no signatures on the IEP. Petitioner became aware this IEP existed only when her advisors reviewed the April 2013 comprehensive psychological assessment report which references the IEP. Attending School did not provide Petitioner or her representatives a copy of this IEP after it was completed. P 5; P 10; P 11; P 26; P 26; P 27; Testimony of SEC; Testimony of Paralegal/Educational Advocate.

13. On March 20, 2013 SEC notified Paralegal/Educational Advocate that Student's assessments would be completed by April 11, 2013, and a meeting to review the assessments had to be scheduled. The SEC stated Petitioner had to attend in person. P 5.

14. Petitioner has difficulty attending meetings in person because she has children she has to supervise, and she has limited funds so paying for transportation to the school can be difficult. Petitioner is able to participate in meetings by telephone. Testimony of Paralegal/ Educational Advocate.

15. The confidential psychological assessment final report was issued on April 9, 2013.¹³ On the Reynolds Intellectual Assessment Student earned a composite intelligence index score of 86 which indicates mild deficit. His scores on the Wide Range Achievement Test Fourth Edition were in the low or lower extreme. His highest score was at the 4th percentile rank in math computation, and his lowest score was at the 0.1 percentile rank in sentence completion, a test of reading comprehension. Social/emotional/behavioral assessment revealed significant behavior concerns that impact Student's functioning in the school setting including instructional time, academic learning and ability to comply with classroom expectations. The results of the

¹³ There are three versions of the psychological report in the record (P 10; P 11; P 12) Petitioner's representatives thought the first version of the psychological they received was incomplete. Following inquiry, the psychologist reported the first version provided was an incomplete draft and apologized. Following receipt of the second version, Petitioner's counsel discussed the need for additional information and the psychologist issued a third version P 10; Testimony of Paralegal/Educational Advocate.

assessment support Student's classification being multiple disability (specific learning disability and other health impairment). P 10.

16. The assessments were reviewed at a meeting held on May 6, 2013. This included reviews of the FBA,¹⁴ which was completed in April,¹⁵ and the confidential psychological. No BIP¹⁶ had been created although Attending School had been using a behavior checklist since approximately October 2012. Each teacher rated Student on his classroom performance in four areas: behavior, completion of assignments, homework, and arriving on time. In February 2013 the school added personnel whom Student could access when he was having difficulties. DCPS indicated it had 30 days to revise the IEP but would complete the revision earlier and forward it to Petitioner's representatives. R 3; R 6; Testimony of SEC.

17. At the May 6, 2013 meeting Student's classification was changed to multiple disabilities, and his program was changed to a full time program, outside of the general education environment.¹⁷ A draft of the IEP¹⁸ reflecting these changes was completed and sent to Petitioner's representatives on May 20, 2013, after the instant Complaint was filed. The IEP was revised. The June 10, 2013 version of this IEP indicates the program is to be full time, outside of general education, but the description of the supplemental supports and service under the LRE section still suggests the Student should be educated both in general education and outside general education. P 16; P 17; P 18; R 5; R 10; R 14; Testimony of SEC.

¹⁴ The FBA states Student does not have an IEP. It also reflects a general lack of awareness of Student's behavioral and educational needs.

¹⁵ The document itself is undated. The SEC testified it was completed in April.

¹⁶ A behavior intervention plan was completed June 12, 2013, well after the filing of the instant Complaint. R 3.

¹⁷ The Final Eligibility Report does not indicate Student is to have a full time program. The SEC testified this was in error. R 10; Testimony of SEC.

¹⁸ This IEP indicated special instruction is to be provided inside the general education environment. The agreement was that these services were to be provided outside the general education environment. DCPS acknowledged at hearing that this was an error on their part. Testimony of SEC.

18. Student had attendance issues throughout the 2012-2013 school year. He frequently arrived late and was held in a tardy hall until approximately 9:20 AM. Student was absent due to asthma and suspensions. Petitioner contacted the school when he was kept home due to asthma. Petitioner provided documentation of Student's asthma to the front office. On one occasion Student was out of school for one week because Attending School would not let him return until his mother accompanied him. R 6; Testimony of SEC; Testimony of Paralegal/Educational Advocate

19. Attending School was not appropriate for Student in the 2012-2013 school year. Testimony of SEC.

20. Student requires reading instruction that will teach him phonics and a sight word vocabulary He also needs to develop reading comprehension skills. Student requires additional practice to master multi-digit addition and subtraction, and he needs to develop greater understanding of the concepts underlying addition and subtraction. Student requires extensive guided support in developing written language skills. He needs assistance understanding his disabilities and how they affect his daily behavior. Student's classroom should be calm and well-organized and include consistent behavior management. Interventions with Student should be done in a non- critical manner. Tasks should be broken down into step by step directions. P 10; Testimony of Educational Advocate.

21. Student wants to act appropriately in school, and he wants to learn. Testimony of Student.

22. Attending School will have a non categorical, self-contained, therapeutic program in the 2013-2014 school year. It will be composed of two classrooms. Each room will have a certified teacher, an aide and a behavior specialist. There will be a maximum of 10 students in each classroom. Two full-time social workers will be assigned to the program. Art therapy will be

provided. The program will address daily living skills and behavior, but this is not the totality of the program. Student would receive reading instruction through the Wilson Reading program in this class. Student would still work on the computer in the virtual learning environment.

However he would receive teacher support during the time on the computer, and he would be required work on the computer for less time than in the 2012-103 school year. Testimony of SEC.

23. Nonpublic School is a full time, non-public, therapeutic day school providing academic and vocational services to special education students from ages 5 through 21. The middle school has 22 students who are assigned to classes based on grade level, cognitive ability and diagnosis. Classes have a maximum of 9 students. There is a 3-1 student- adult ratio. Each class has a lead teacher and a teaching assistant. Other adults also may be in the classroom. All lead teachers hold certifications in special education and/or the content area they teach. All students are on behavior management plans. Hallways are closely monitored. A staff of seven psychologists, four art therapists, five speech language specialist, two occupational therapists and a psychiatric consultant provide services to students at Nonpublic School. The school provides tutoring for students with low academic skills as well as reading programs and interventions. Remedial, ramp up classes also are available. The school is approved by the Office of the State Superintendent of Education in the District of Columbia. Nonpublic School is able to provide Student a full time, out of general education program. Nonpublic School is able to implement Student's IEP. Student has visited the school and has been accepted. Testimony of Director of Admissions, Nonpublic School.

24. The Compensatory Education Plan developed by Educational Advocate is intended to compensate Student for the lack of appropriate services during the 2012- 2013 school year.

Because he did not receive appropriate services during the 2012-2013 school year, Student did not progress. He fell further behind his peers. While his cognitive assessments between January 2010 and March 2013 stayed relatively consistent, Student showed little progress academically in this three year period.¹⁹ Standardized evaluations showed 6 months gain in word reading, no change in spelling and decreases in sentence completion and math computation during this time frame. The plan proposes Student be evaluated by the Linda Mood Bell²⁰ program and then receive between 120 and 150 hours of Linda Mood Bell service in reading, written language and mathematics. The intent is to put Student in the place he would have been had he received an appropriate program in the 2012- 2013 school year. Student is to receive these services for 4 hours per day when not in school and fewer hours per day if received on week-ends when Student is in school. P 1; P 48; Testimony of Educational Advocate.

DISCUSSION

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. PROVISION OF FAPE

Under the IDEA each local education agency is required to provide a free appropriate public education (“FAPE”) to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense,

¹⁹ This information is provided as an underpinning to the compensatory education request. The proposed plan makes clear it addresses only the loss of instruction in the 2012-2013 school year.

²⁰ Student received Linda Mood Bell services in the 2011- 2012 school year. P 34

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

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.

1) *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP from March 2012 through February 2013. The IEP of March 5, 2012 does not include sufficient hours of instruction. Further, following the manifestation determination review meeting held on December 4, 2013, DCPS had sufficient information to determine the need to include additional hours of specialized instruction as well as behavior supports on Student's IEP. The IEP was not revised*

- March 5, 2012 IEP

On March 5, 2012 an annual IEP review meeting was held at DCPS Elementary School, Student's then current school of attendance. Petitioner did not attend the meeting. However, Paralegal/Educational Advocate attended the meeting in her capacity as educational advocate for Petitioner albeit in a different position from the one she currently holds. The IEP²¹ developed at that meeting required that Student receive 5 hours of instruction outside the general education environment per week in each of the following subjects: reading, mathematics and written

²¹ This is the IEP with which Student entered Attending School for the 2012-2013 school year.

expression. He also was to receive 60 minutes per week of occupational therapy outside the general education environment.

At hearing, Paralegal/Educational Advocate testified that she had concerns about this IEP at the time of the meeting. She stated she did not think Student was making educational progress and she did not think the March 2012 IEP provided him a FAPE. She stated at hearing that she thought the DCPS team members were not accurately reflecting Student's academic abilities and progress at the meeting.²² The documentary evidence, however, does not support this position. Neither the witness' notes from that meeting nor DCPS's notes indicate the Paralegal/Educational Advocate expressed any concern about the IEP or Student's progress during the meeting. Rather, the notes indicate Paralegal/Educational Advocate asked many questions. At hearing Paralegal/Educational Advocate testified she was trying to collect information, and in this she was successful. However, there is no evidence she took any action suggesting any concern with this IEP during the meeting or following it. Rather, at the end of the meeting, Paralegal/Educational Advocate stated she would debrief Petitioner on the results of the meeting, adding she did not think the SEC should take the IEP to Petitioner for her signature as Petitioner had not attended the meeting.

Thus Petitioner's current assertion that the March 5, 2012 IEP did not provide Student sufficient hours of instruction appears to be a determination made in retrospect with little support. The evidence supporting this contention is simply testimony regarding what one person, the Paralegal/Educational Advocate, states she was thinking on a particular day approximately 15 months earlier. This is weak evidence, and while I do not question the Paralegal/Educational Advocate's voracity, her statement regarding her internal thought process does not establish the

²² There is a discrepancy between Student's academic levels as reported by DCPS staff at the meeting and at least some academic levels reported on the IEP.

IEP in question did not address Student's needs. While the IEP and staff reports as to Student's abilities are not in sync, there is little basis, if any, for finding the IEP did not provide Student sufficient hours of instruction, and I decline to do so.²³ I have no basis for determining that the number of hours of instruction in this IEP were not appropriate as opposed to any other aspect of the IEP or even that the IEP was not designed to provide Student some educational benefit. See *Rowley, supra* at p. 29.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to include a sufficient number of hours of instruction on Student's March 5, 2012 IEP.

- Failure to revise the IEP following the December 2012 manifestation determination review meeting

IDEA requires that the IEP team revise a student's IEP to address, among other items, any lack of expected progress toward the annual goals and in the general curriculum, the child's anticipated needs and other unspecified matters. 34 C.F.R. § 300.324(b)(1)(ii). In the instant matter, as noted *supra* at pp. 19 & 20, Student entered Attending School with an IEP requiring he receive 15 hours of pull out instruction in reading, written language and mathematics for the 2012-2013 school year. Attending School did not have the capacity to provide such a program. Attending School used an inclusion model. All students were in classes using a blended learning model that incorporated virtual learning through the use of personal computers. The program used to implement this blended learning model on the computers was written at a third grade level which was well above Student's reading level. Thus while the blended learning model was

²³ In making this determination I note DCPS offered no evidence regarding the content of this IEP. Despite this lack of a defense, Petitioner's evidence regarding the number of hours of instruction on this IEP was so limited that I find Petitioner did not meet her burden of proof and there is no denial of FAPE in this regard.

intended to be modified to each student's learning level, this did not and could not occur for Student because Student was and is unable to read at the third grade level.

Student could not access his education as presented. Teachers reported Student either did not do the work or was unprepared. Rather than considering whether the inclusive, blended learning model was appropriate for Student the teachers tended to blame him for his disabilities which prevented him from accessing the instruction. Student earned failing grades in the first grading period of the 2012-2013 school year. Petitioner became concerned about Student's progress and requested a thirty day review meeting in October 2012. School personnel were aware Student was struggling in October or November 2012. As Student became more and more frustrated in a learning environment that worked for most if not all of the other students in Attending School, but not for Student, his behavior deteriorated. Yet there was no response to Petitioner's request for a thirty day review meeting. By the end of November 2012, Student had received three suspensions resulting in a manifestation determination review meeting being held on December 5, 2012.

At the December 5, 2012 meeting, the team agreed Student's behavior was a manifestation of his disability. They discussed his difficulties both educationally and behaviorally. However, rather than review and revise Student's IEP, or schedule a meeting to do so, the team agreed to schedule a reevaluation meeting. This began a long process, replete with repeated meeting cancellations, which resulted in Student essentially standing in place until almost the end of the 2012-2013 school year. Thus from at least October or November 2012, when Petitioner and the school became aware of and/or communicated concern about Student's progress through the end of the 2012-2013 school year Student did not receive a program or services that provided him a FAPE. Even the SEC recognized this when she testified that

Attending School had not been appropriate for Student during the 2012-2013 school year. Moreover, at the December 5, 2012 meeting there was express discussion of Student's needs both for instructional intervention and behavioral intervention, but no action to revise Student's IEP was undertaken.

It is particularly concerning that Attending School lost focus on Student in their efforts to implement the reevaluation process. While it is true it was important to schedule Student's reevaluation, including the needed assessments, there is no reason Attending School could not have met and developed an interim IEP while the reevaluation process proceeded. Awareness of Student's needs²⁴, his academic and behavioral struggles as well as Petitioner's request for a thirty day review²⁵ should have provided sufficient information to Attending School that an IEP review meeting was necessary. Instead they got lost in the excitement of their innovative program²⁶ and the technicalities²⁷ of the reevaluation process and lost a child for an entire school year.

For the reasons stated above I find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to revise his IEP following the December 5, 2012 manifestation determination review meeting.

2) *Whether DCPS denied Student a FAPE by developing an IEP on February 20, 2013 without parent involvement. Neither the parent nor her advocate were invited to an IEP meeting*

²⁴ I discuss Attending School's failure to implement Student's IEP under Issue 3), *Infra*.

²⁵ This request was sent to the Principal of the school who is responsible for responding to the request either directly or by forwarding the request to the SEC. Neither of these actions occurred.

²⁶ The program as described in SEC's testimony is exciting and innovative. It has demonstrated significant results for the school, and, I assume, the vast majority of students attending the school, and for this Attending School should be recognized.

²⁷ It is noteworthy that at least some of the delay in this process was based on DCPS' misunderstanding or misapplication of the IDEA requirements for a reevaluation. For example, DCPS insisted Petitioner attend reevaluation meetings in person and cancelled meetings when she did not appear. There is no such requirement in IDEA. DCPS stated that before it could authorize particular assessments, a meeting had to be held to determine whether the assessments were necessary, but IDEA requires that a reevaluation be conducted if the student's parent so requests, and she had done so during the December 5, 2012 meeting which she attended by telephone. 34 C.F.R. § 300.303; *See also, Cartwright v. District of Columbia*, 267 F.Supp2d 83 (D.D.C. 2003)

on this date nor were they aware an IEP was developed on this date despite having attended a meeting at the school for another purpose on February 20, 2013. The IEP developed on this date did not include sufficient hours of specialized instruction, behavior support or a behavior intervention plan (“BIP”). It did not include extended school year services. In addition, the IEP indicated specialized instruction would be provided in an inclusive classroom environment rather than in a separate special education classroom as it had been on Student’s prior IEP. Instruction in the general education setting at Student’s current school is computer based for some part of each day, and Student is unable to access such instruction

Parental participation is a key element of IDEA. Parents are to be full and active members of teams making program and placement decisions. 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. In the instant matter, Petitioner and her representatives participated in a reevaluation meeting on February 20, 2013. DCPS did not allow discussion of Student’s IEP during this meeting. However, several months later, when reviewing the confidential psychological report finalized in April 2013, Petitioner’s representatives learned an IEP had been developed on this same date. Petitioner and her representatives were not included in the meeting in which this IEP was developed, nor had they been invited to the IEP meeting. Petitioner and her representatives were unaware the February 20, 2013 IEP had been developed for approximately two months.²⁸

The IEP developed on this date decreased Student’s hours of specialized instruction from 15 to 10 and moved all instructional services to the general education environment. The SEC testified the changes to the IEP were made to reflect the services Student was actually receiving at Attending School. This IEP also decreased Student’s hours of Occupational Therapy from 60 minutes per week to 120 minute per month. This process turned the IDEA on its head. An IEP is intended to provide a description of the program and services necessary for a student to receive a

²⁸ I note Petitioner’s ignorance of the existence of this IEP indicates DCPS had not sent Petitioner nor her representatives a copy of this IEP, as required by IDEA, after it was developed. 34C.F.R. §§ 300.321, 300.322 & 300.503.

FAPE. It is not intended to be based on what a particular school can provide. Rather it is intended to be based on the needs of the individual student for whom the IEP is written. § 300.320. *See also*, D.C. Code § 30.3009. Here, after recognizing Student was struggling academically, the IEP team met without the parent, and decreased his services. Here, after recognizing Student was struggling in his inclusion classes, the IEP team met without the parent, and eliminated all pull out instruction from Student's IEP. Here, after recognizing Student was struggling behaviorally due to his disabilities, the IEP team met, without the parent, and failed to include a BIP or any behavioral services in the IEP.

To determine whether an IEP provides a student a FAPE, a hearing officer must make two inquiries: 1) Did the district procedurally comply with the IDEA and its implementing regulations; and 2) Is the IEP reasonably calculated to provide educational benefit to the student? *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982). In the instant matter the IEP developed on February 20, 2013 fails as to both prongs of the *Rowley* test. There is no doubt the IEP developed on February 20, 2013 was developed without parent participation. Thus there was no compliance with the procedural requirements of IDEA requiring such participation. Secondly, the IEP, by DCPS' own witness' statement, was intended to reflect the program and services Attending School was providing Student not the program and services he needed in order to receive a FAPE. As noted, the SEC stated Attending School was not appropriate for Student in the 2012-2013 school year. Therefore, changing the IEP to reflect the program and services provided to Student by Attending School was not appropriate.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE when it developed an IEP on February 20, 2013 without parental involvement.

I further find by a preponderance of the evidence that the February 20, 2013 IEP did not provide Student a FAPE.

3) *Whether DCPS denied Student a FAPE by failing to implement the March 2012 and February 2013 IEPs as written. Student did not receive 15 hours of specialized instruction outside the general education setting under the March 2012 IEP, and he did not receive 10 hours of specialized instruction inside the general education setting under the February 2013 IEP*

IDEA requires that special education and related services are to be provided to a student in conformity with his/her IEP. Student entered Attending School at the beginning of the 2012-2013 school year with an IEP that required he receive 15 hours of special instruction outside the general education environment each week. There is no evidence, and DCPS does not contend, Student ever received such services while at Attending School. Rather, Respondent asserts Petitioner was aware of the model of instruction at attending school and that Student would receive all his instruction in the general education setting as the school provided inclusive instruction. In particular Respondent asserts the configuration of program and services was explained to Respondent at a parent-teacher's night event sometime at the beginning of the school year. Respondent further asserts Petitioner did not object to this method of instruction and, therefore, can be viewed as having agreed to it.

Assuming, *arguendo*, that Respondent's assessment of Petitioner's understanding and view of the program at Attending School is correct, Petitioner's alleged tacit agreement to an inclusive program does not relieve DCPS of its requirement to implement Student's IEP as written. Rather than provide Student the 15 hours of pull out instruction required by his IEP Student was required to attend regular education classes and attempt to access education, for at least part of the time, through a computer program written at least one or two grades above his reading level. By arguing Petitioner's alleged agreement to this delivery of service, Respondent

appears to be placing Student's subsequent academic failures and behavioral responses at Petitioner's feet rather than accepting its responsibility for failing to implement Student's IEP.

In reaching my determination that DCPS denied Student a FAPE by failing to implement the March 2012 IEP from the start of the 2012-2013 school year through the development of the February 2013 IEP, I am not also finding DCPS failed to implement the February 2013 IEP thereby denying Student a FAPE. Rather, as I have already determined the February 2013 IEP did not provide Student a FAPE, I find a determination as to whether it was implemented has no legal implication. If the February 2013 IEP had been implemented, Student would not have received a FAPE, and if the February 2013 IEP was not implemented Student still would not have received a FAPE as Attending School did not and was not able to implement Student's then existing IEP. Attending School provided a one size fits all program to all students and that program did not fit Student; it did not provide him a FAPE.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE from the start of the 2012-2013 school year through the filing of this Complaint by failing to provide the Student a FAPE as defined by his March 2012 IEP and by failing to develop an IEP in February 2013 designed to provide Student some educational benefit at an IEP meeting that included parental participation.

4) Whether DCPS denied Student a FAPE by failing to develop an IEP following the review of assessments at a meeting held on May 6, 2013. Student continued to require additional hours of specialized instruction outside the general education environment, behavior support and a BIP. The IEP was not revised at this meeting

The assessments completed by DCPS were reviewed at a meeting held on May 6, 2013. This included the FBA, which was completed in April,²⁹ and the comprehensive psychological. At the May 6, 2013 meeting Student's classification was changed to multiple disabilities, and his

²⁹ The document itself is undated. The SEC testified it was completed in April.

program was changed to a full time program.³⁰ The instant Complaint was filed four days after this May 6, 2013 meeting. While agreement was reached at the meeting, all of the changes to Student's written IEP resulting from this meeting were completed following the filing of the instant Complaint.³¹

In general, IEPs are to be in effect as soon as possible following the meetings at which they are revised. D.C. Code § 30.3010. Here, the team agreed to revisions of the IEP at the May 6, 2013 meeting. Petitioner is correct. The IEP draft was not completed at the May meeting. However, there is no requirement that this occur. The requirement is that the IEP is to be in effect as soon as possible following the meeting at which it was revised. DCPS agreed to provide a written draft IEP to Petitioner's representatives quickly following the May 6, 2013 meeting. Petitioner filed this Complaint four days later. Under these circumstances I cannot find there was an unacceptable delay in the development of the IEP. As of the date of the filing of the Complaint, DCPS was in the process of providing a written IEP to Petitioner. This does not constitute an unnecessary delay. On the other hand, a BIP for this Student was to have been completed following the manifestation meeting in December 2012. A delay in providing a BIP until after the filing of the instant Complaint cannot be deemed reasonable.³²

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to develop an IEP at the May 6, 2013 meeting. I further find by a preponderance

³⁰ The Final Eligibility Report does not indicate Student is to have a full time program. The SEC testified this was in error. R 10; Testimony of SEC.

³¹ A draft of the IEP³¹ reflecting these changes was completed and sent to Petitioner's representatives on May 20, 2013. A revised June 10, 2013 version of this IEP indicates the program is to be full time outside of general education, but the description of the supplemental supports and service under LRE still suggests the Student should be educated both in general education and outside general education.³¹ A BIP, based on the April FBA, was completed June 12, 2013.

³² I note the FBA required to predate the BIP was completed in April. While the FBA itself is unduly late, surely the BIP should have been completed immediately following the FBA development.

of the evidence that DCPS denied Student a FAPE by failing to complete a BIP from December 20, 2012³³ through the filing of this complaint.

II. PLACEMENT

5) *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement from March 2012 through the filing of the complaint. Student requires a full time placement, out of the general education setting that can address Student's remedial needs as well as his severe learning disabilities*

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).

I have already determined, *supra* at pp. 21-22, that there is no basis for determining the March 2012 IEP did not provide Student a FAPE. That IEP required Student receive 15 hours of instruction outside the general education environment each week. Thus there is no evidence indicating the March 2012 IEP did not provide Student an appropriate placement.

On May 6, 2013 the IEP team determined the Student required a full time special education placement outside the general education environment. This determination was made

³³ In selecting this date I am allowing time for DCPS to have completed an FBA before developing a BIP, as the process requires.

following review of the April 2013 FBA and the April 2013 confidential psychological. The instant issue thus turns on whether the determination that Student required such a placement was made on a timely basis or whether the IEP team should have made this determination earlier. I have determined that DCPS denied Student a FAPE by failing to revise Student's IEP after the December 5, 2012 manifestation determination review meeting. I have further found the February 20, 2013 IEP did not provide Student a FAPE. At the December 5, 2012 meeting there was extensive discussion of Student's needs both academically and behaviorally. However, rather than taking the needed steps to review and revise Student's IEP, DCPS, as discussed extensively, *supra* at pp. 22-24 , began a long attenuated, reevaluation process which culminated in the determination that Student required a full-time placement outside of the general education environment. Even allowing that DCPS decision to proceed with a reevaluation prior to revising Student's IEP and determining appropriate placement was the correct decision, it does not follow that DCPS had no responsibility for completing the reevaluation and then the IEP review and revision and placement determination earlier than May 2013, following almost one full school year in which Student did not receive a FAPE. The completion of the FBA and confidential psychological which were reviewed at the meeting in which the decision to move Student to a full time placement occurred could have been completed by the February 20, 2013,³⁴ the date on which an inappropriate IEP was developed without parental involvement.

For the above reasons, I find, DCPS denied Student a FAPE from February 20, 2013 through May 10, 2013, the date of the filing of this Complaint by failing to provide Student a full time special education placement outside the general education environment.

³⁴ I have selected this date as DCPS was able to hold an IEP meeting on this date, albeit without parent involvement, and the time between Dec.5, 2012 and this date is similar to the time between this date and the date the assessments were completed in April.

FUNCTIONAL BEHAVIORAL ASSESSMENT

6) *Whether DCPS denied Student a FAPE by failing to conduct an FBA and provide Student a BIP following the manifestation determination review meeting held on December 4, 2012*

IDEA requires that when the team determines at a manifestation determination review that the conduct leading to the student's suspension resulting in a change of placement was a manifestation of the student's disability, the IEP team must conduct a functional behavioral assessment and implement a behavioral intervention plan.³⁵ 34 C.F.R. § 300.530(f). In the instant matter a manifestation determination review meeting was held on December 4, 2013 following a suspension for an altercation that occurred on November 26, 2013. The team determined the behavior was a manifestation of Student's disability. Therefore, the IEP team was required to conduct an FBA and implement a BIP. *Id.* Educational Advocate reminded the team the FBA and BIP were required during this meeting.

Rather than making arrangements to obtain Petitioner's consent for the required FBA at this meeting, a follow-up meeting was scheduled for December 10, 2013. The December 10th meeting was cancelled because Petitioner did not appear in person, and again, DCPS made no arrangements to obtain Petitioner's consent for the FBA. A January 2013 meeting was cancelled due to a psychologist's absence.³⁶ Finally a reevaluation meeting was held on February 20, 2013 and consent for the FBA and other assessments was obtained.

At hearing DCPS noted that as soon as consent was obtained the DCPS began the process for initiating the assessments. While it may, in some circumstances, make sense to complete the consent for assessment process for all needed assessments at the same time, the process here was attenuated and combined assessments required for different purposes. DCPS argues the

³⁵ In circumstances where an FBA and/or a BIP existed prior to the behavior leading to the suspension resulting in the manifestation review meeting other requirements may apply.

reevaluation meeting was necessary, not only to obtain the required parental consent but to allow the appropriate related service personnel the opportunity to determine whether a particular assessment was necessary.

IDEA requires the completion of the FBA in the circumstances of the manifestation determination review meeting described here. The related service personnel could not determine the FBA was not necessary as it was mandated. Educational Advocate reminded DCPS of this FBA/BIP requirement on December 5, 2013. Yet DCPS did not act. Rather than making multiple efforts to obtain the required signature for the FBA, DCPS sent Petitioner emails and then waited. There was no effort to engage Petitioner's counsel or her office in the efforts to obtain the signature. There was no home visit. The lack of action resulted in the mandated FBA being delayed from December 5, 2013 until April 2013 after the February 20, 2013 meeting.³⁷

The FBA and subsequent BIP developed following a finding of manifestation are intended to address the behavior that resulted in the suspension leading to the manifestation meeting. *Id.* The FBA provided following the February 20, 2013 meeting states it is to explain the behaviors Student exhibits in the classroom including disruptive behavior, which may include the behavior identified in the November 2012 disciplinary event. However, it is unlikely the conditions that resulted in the behavior remained static for the minimum of three months between the incident and the development of the FBA.³⁸ Moreover, the BIP that was written following this FBA was not finalized until after the filing of the Complaint in this matter – many months after the disciplinary related incident. Clearly this cannot have met the intent of IDEA in

³⁷ The FBA is not dated.

³⁸ I repeat again here my concern that the FBA does not reflect an understanding of Student and his disability and related needs. For example, the FBA states the Student does not have an IEP. He obviously did and had had one for years. It comments on a problem related to Student taking notes in class without apparent understanding that Student is unable to take notes due to his very low reading and writing skills.

requiring an FBA and BIP be developed and implemented following a finding of manifestation to address the behavior leading to the disciplinary incident. *Id.*

DCPS attempted to argue that the BIP had been implemented even before it was written. In making this argument DCPS referenced the behavioral checklist that had been in place since October. Following the February 20, 2013 meeting Attending School added resource staff to Student's plan. These resource staff were available to Student to help him when he was having a difficult time, and, based on SEC's testimony, it appears these staff were helpful. However, despite these additional efforts, DCPS did not meet the IDEA requirements.

The BIP that is implemented is to be in writing so that all staff who work with Student can implement it. Relying on word of mouth does not support consistent implementation of a BIP which is necessary for it to be effective. More importantly, the BIP following a manifestation determination is supposed to be based on an FBA. Even were I to accept, which I do not, that Attending School was implementing a BIP that was not in writing, the alleged BIP was not based on an FBA as it was not completed until April.

For the reasons stated above I find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct an FBA and provide Student a BIP following the manifestation determination review meeting held on December 4, 2012

III. COMPENSATORY EDUCATION

7) *Whether Student is entitled to compensatory education.*

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) *citing G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts

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

The compensatory education plan proposed in the instant matter is intended to place Student in the position he would have been had he received an appropriate program in the 2012-2013 school year. Based on the many denials of FAPE found in the instant matter it is clear that Student lost an entire year of FAPE. This means that a student who was already years behind his peers academically fell even further behind. In addition, his frustration leads to the development of behavioral issues. Therefore, the proposal to provide Student Linda Mood Bell services of 150 to 200 hours seems woefully inadequate, and further, Petitioner suggests there is a prospective aspect to this proposal in that it might help Student move faster during the 2013-2014 school year. Prospective assistance is not intended to be part of a compensatory education plan.

Nonpublic School has stated it is able to both provide content instruction to Student and help remediate his low level skills. This would be done in a therapeutic environment providing an array of supports to address Student’s behavioral issues as well. While Educational Advocate testified that Student would require Linda Mood Bell services even if Nonpublic School provided remedial intervention, I find this position to lack credibility. I also have concerns that overloading Student with too much school, that is the Linda Mood Bell program and Nonpublic School, could result in Student’s again feeling overwhelmed by the academic push. I therefore, decline to require DCPS provide Student Linda Mood Bell services. This is not to say Student is not entitled to compensatory education. Rather than additional tutorial services, I find the only way to compensate Student for the loss of an entire year of FAPE and the resultant relative

increase in Student's academic deficits is to provide him placement at Nonpublic School for the 2013-2014 school year.³⁹

CONCLUSIONS OF LAW

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

1. DCPS did not deny Student a FAPE by failing to include a sufficient number of hours of instruction on Student's March 5, 2012 IEP.
2. DCPS denied Student a FAPE by failing to revise his IEP following the December 5, 2012 manifestation determination review meeting.
3. DCPS denied Student a FAPE when it developed an IEP on February 20, 2013 without parental involvement.
4. The February 20, 2013 IEP did not provide Student a FAPE.
5. DCPS denied Student a FAPE from the start of the 2012-2013 school year through the filing of this Complaint by failing to provide the Student a FAPE as defined by his March 2012 IEP and by failing to develop an IEP in February 2013 designed to provide to provide Student some educational benefit at an IEP meeting that included parental participation.
6. DCPS did not deny Student a FAPE by failing to develop an IEP at the May 6, 2013 meeting.
7. DCPS denied Student a FAPE by failing to complete a BIP from December 20, 2012⁴⁰ through the filing of this complaint, May 10, 2013.
8. DCPS denied Student a FAPE from February 20, 2013 through May 10, 2013, the date of the filing of this Complaint by failing to provide Student a full time special education placement outside the general education environment.
9. DCPS denied Student a FAPE by failing to conduct an FBA and provide Student a BIP following the manifestation determination review meeting held on December 4, 2012

³⁹ Because I am placing Student at Nonpublic School as compensatory education, it is not necessary that I determine whether placement at Nonpublic School would be appropriate for Student under *Branham*. Moreover, I note that placing Student at Nonpublic School as compensatory education does not change the nature or character of that placement. Student's placement under IDEA is Nonpublic School.

⁴⁰ In selecting this date I am allowing time for DCPS to have completed an FBA before developing a BIP, as the process requires.

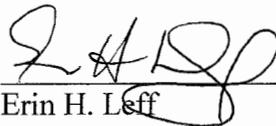
ORDER

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

- 1) Petitioner's Motion for a Directed Verdict is DENIED;
- 2) DCPS shall place Student at Nonpublic School for the 2013-2014 school year. This placement is to include transportation and all related services deemed necessary for the Student to receive a FAPE;
- 3) An IEP meeting is to be held within 30 calendar days of the start of the 2013-2014 school year. At this meeting DCPS, representatives of the Nonpublic School, Petitioner, and her representative(s), if she so chooses, are to review and revise, if appropriate, Student's IEP to assure he receives a FAPE during the 2013-2014 school year;
- 4) If, during the course of the 2013-2014 school year, Nonpublic School determines Student requires tutoring to supplement the Nonpublic School program, Nonpublic School is to notify Petitioner and the DCPS representative of DCPS assigned to Nonpublic School. Petitioner and her representative(s), if she so chooses, are to select a tutor with the assistance of Nonpublic School to provide the tutoring in coordination with Nonpublic School. DCPS is to assure arrangements are made to fund this tutoring within 10 business days of receipt of the notification from Nonpublic School.

IT IS SO ORDERED:

July 24, 2013
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).