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

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| Student,[1]<br>Petitioner, | Date Issued: August 29, 2012 |
| | Hearing Officer: Melanie Byrd Chisholm |
| v. | Case No: 2012-0441 |
| District of Columbia Public Schools,<br>Respondent. | Hearing Dates: August 22-24, 2012 |
| | Room: 2003 |

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STUDENT HEARING OFFICE
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# HEARING OFFICER DETERMINATION

## BACKGROUND AND PROCEDURAL HISTORY

The student is a year old female, who is currently a rising grade student registered at School A. The student's current individualized education program (IEP) lists Emotional Disturbance (ED) as her primary disability and provides for her to receive four (4) hours per week of specialized instruction outside of the general education setting, fifteen (15) hours per week of specialized instruction within the general education setting and four (4) hours per month of behavioral support services outside of the general education setting.

On June 19, 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: (1) failing to evaluate the student in all areas of suspected disability and to identify all of the child's special education and related services needs; (2) failing to comprehensively evaluate the student by failing to conduct a functional behavioral assessment (FBA) and develop an appropriate behavior intervention plan (BIP); (3) failing to review and revise the student's October 5, 2011, December 13, 2011 and May 29, 2012 IEPs after new evaluations were received; (4) failing to develop appropriate IEPs on August 29, 2011, October 5, 2011 and May 29, 2012 which were reasonably calculated to confer educational benefit, specifically, by failing to conduct age appropriate transition assessments and/or a vocational evaluation and failing to include appropriate specific present levels of performance and baseline data; (5) failing to implement the student's IEPs during the 2011-2012 school year; (6) failing to provide the student timely notice about the IEP meeting; (7) failing to allow the student to participate in the IEP meeting; (8) failing to determine a proper placement for the 2011-2012 and

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[1] Personal identification information is provided in Appendix A.

2012-2013 school years; and (9) changing the student's placement from School B to School A. As relief for these alleged denials of FAPE, Petitioner requested, *inter alia*, compensatory education; placement in and funding for a private special education day school; transportation services; one-on-one tutoring for each day of services missed; services at the Lindamood-Bell program; an independent comprehensive psychological evaluation with clinical components, an independent speech-language evaluation and an independent FBA; all evaluations recommended by the independent evaluations; and within 10 days of the receipt of the independent evaluations, an IEP meeting to review and revise the student's IEP and discuss compensatory education.

On June 28, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the complaint during the remainder of the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on July 20, 2012, following the conclusion of the 30-day resolution period, and ends on September 2, 2012.

On July 9, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that DCPS has agreed to conduct the evaluations recommended in the student's May 15, 2011 Neuropsychological and Clinical evaluation; DCPS conducted an FBA and developed a BIP however the FBA and BIP were not finalized; DCPS is not obligated to execute every recommendation contained in an evaluation; on May 18, 2012, DCPS issued an Independent Educational Evaluation Letter for the purpose of a vocational assessment; School B implemented the student's IEP during the 2011-2012 school year; DCPS provided the student with a Letter of Invitation on May 9, 2012, inviting her to the May 29, 2012 IEP Team meeting; DCPS made several attempts to contact the adult student and her guardian by phone regarding the May 29, 2012 IEP Team meeting, to no avail; the student's 2011-2012 educational placement was based on a settlement agreement and the student progressed while at School B; the student's school placement for the 2012-2013 school year is able to implement her current IEP; School B is closing due to low enrollment; and the student has not been denied a FAPE and has not suffered a loss of educational benefit.

On July 11, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. During the Prehearing Conference, the partied stipulated that School A is the student's home school and the student's placement in School B was agreed upon by both parties pursuant to the August 29, 2011 Settlement Agreement. The Hearing Officer issued the Prehearing Order on July 11, 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 issues as outlined in the Order.

The issues as listed in the Prehearing Order were: (1) Whether DCPS failed to provide the student a FAPE by failing to assess the student in all areas of suspected disability, specifically by failing to conduct a speech-language evaluation a psychological evaluation and a clinical evaluation? (2) Whether DCPS failed to provide the student a FAPE by failing to conduct a FBA for the student during the 2011-2012 school year? (3) Whether DCPS failed to provide the student a FAPE by failing to develop an appropriate BIP for the student during the

2011-2012 school year? (4) Whether DCPS failed to provide the student a FAPE by failing to review the student's May 15, 2011 neuropsychological evaluation and revising the student's IEP based on the results of the evaluation? (5) Whether DCPS failed to provide the student a FAPE by failing to develop an appropriate transition plan for the student based on age-appropriate transition assessments, specifically a vocational assessment, in the student's August 29, 2011, October 5, 2011 and/or December 13, 2011 IEPs? (6) Whether DCPS failed to provide the student a FAPE by failing to develop appropriate IEPs for the student on August 29, 2011, October 5, 2011, December 13, 2011 and/or May 29, 2012, specifically, by failing include the appropriate present levels of performance and baseline data and failing to develop appropriate goals and objectives on the student's IEPs? (7) Whether DCPS failed to provide the student a FAPE by failing to implement the student's IEP during the 2011-2012 school year, specifically, the student's April 24, 2009 BIP? (8) Whether DCPS failed to provide the student a FAPE by failing to determine a proper placement during the student's August 29, 2011, October 5, 2011, December 13, 2011 and/or May 29, 2012 IEP Team meetings, specifically, by failing to place the student in a full-time out of general education placement? (9) Whether DCPS failed to provide timely and adequate notice to the student of her May 29, 2012 IEP Team meeting and whether this failure constitutes a denial of FAPE? (10) Whether DCPS failed to allow the student to participate in her May 29, 2012 IEP Team meeting and whether this failure constitutes a denial of FAPE?

On August 6, 2012, and revised on August 7, 2012, Respondent filed an unopposed Motion to Continue based on the unavailability of a key witness. The Hearing Officer held a status conference on August 6, 2012 and counsels for Petitioner and Respondent requested that the three hearing dates remain in succession rather than dividing the third day. Both parties and the Hearing Officer had available three consecutive days the week following the original scheduled hearing dates. As such, the Respondent requested an extension of the 45-day timeline for seven (7) calendar days to September 9, 2012. On August 8, 2012, the Hearing Officer issued an Interim Order for Continuance, extending the 45-day timeline by seven (7) days and rescheduling the hearing for August 22-24, 2012.

On August 6, 2012, Respondent filed Disclosures including thirteen (13) exhibits and three (3) witnesses. On August 15, 2012, Petitioner filed Disclosures including twenty (20) exhibits and twelve (12) witnesses.[2]

On August 16, 2012, the Respondent filed a second unopposed Motion to Continue, based on the unavailability of a second witness and the scheduling of employee termination case. The Hearing Officer found that no exceptional circumstances existed to grant leave to seek a second continuance in the case. On August 17, 2012, the Hearing Officer issued an Order Denying Respondent's Motion to Continue and confirmed the September 9, 2012 deadline for the Hearing Officer to issue the Hearing Officer Determination.

On August 21, 2012 the Respondent filed a Motion to Reconsider Respondent's Motion to Continue and more clearly outlined exigent circumstances. However, on August 21, 2012, Petitioner withdrew consent to continue the case. On August 22, 2012, verbally on the record, the Hearing Officer denied the Respondent's Motion to Reconsider stating that the student is a

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

year old student and each day the hearing is not held is a day which the student may be being denied a FAPE, the Hearing Officer would not able to reschedule a three-day hearing until mid-October, there was no longer consent from the Petitioner and a continuance would be highly prejudicial to Petitioner because the Petitioner's counsel had secured witnesses and was ready to present his case on the scheduled date.

The due process hearing commenced at approximately 9:30 a.m. on August 22, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed. The Respondent was represented by Linda Smalls, Esq. on August 22, 2012, by Victoria Healy, Esq. on August 23, 2012 and by Lynette Collins on August 24, 2012.

Petitioner's exhibits 1-8, 10-12 and 14-20 were admitted without objection. Respondent objected to Petitioner's Exhibit #9 based on the fact that DCPS had not been provided a copy of the evaluation prior to receiving Petitioner's Disclosures. Citing 34 CFR §300.512, the Hearing Officer admitted Petitioner's Exhibit #9 over Respondent's objection. Respondent requested that Petitioner's Exhibit #13 be admitted properly identified as "page 1 of the student's May 17, 2012 transcript" as the second page of the transcript was omitted. Petitioner's Exhibit 13 was admitted and identified as "Page 1 of the Student's May 17, 2012 Transcript." Petitioner also requested to enter Petitioner's Exhibit #21 into the record, although the exhibit was not included in Petitioner's 5-day Disclosures. The Respondent objected to the late disclosure. Citing 34 CFR §300.512, the Hearing Officer did not admit Petitioner's Exhibit #21. Respondent's exhibits 1-13 were admitted without objection.

The Respondent requested that the administrative records from the Petitioner's two prior due process complaints be included in the record. The Hearing Officer declined to include the administrative records from Petitioner's two prior due process complaints, noting that the Hearing Officer does not have access to prior administrative records and that the present matter could and must be decided on the present record.

The Petitioner requested that Issue #7 as outlined in the Prehearing Order be changed to state "Whether DCPS failed to provide the student a FAPE by failing to implement the student's IEP during the 2011-2012 school year, specifically, the student's June 23, 2010 BIP?" The Respondent objected to the change of the issue as outlined in the Prehearing Order. The Hearing Officer declined to change the issue as outlined in the Prehearing Order because 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 and neither party disputed the issues as outlined in the Order. Further, the Hearing Officer noted that the identification of the April 24, 2009 BIP was specifically discussed during the Prehearing Conference.

At the close of Petitioner's case, the Respondent moved for a Summary Judgment on Issues #1 through #8 as outlined in the Prehearing Order. Respondent argued that the record did not contain enough evidence for Petitioner to meet its burden. The Hearing Officer granted Summary Judgment on Issues #1, #2, #7 as outlined in the Prehearing Order and Issue #8, as outlined in the Prehearing Order, for the student's August 29, 2011, October 5, 2011 and December 13, 2011 IEPs. The Hearing Officer denied Summary Judgment for Issues #3, #4, #5

and #6 as outlined in the Prehearing Order and Issue #7, as outlined in the Prehearing Order, for the student's May 29, 2012 IEP.

The hearing concluded at approximately 1:51 p.m. on August 24, 2012, 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 provide the student a FAPE by failing to develop an appropriate BIP for the student during the 2011-2012 school year?
2. Whether DCPS failed to provide the student a FAPE by failing to review the student's May 15, 2011 neuropsychological evaluation and revising the student's IEP based on the results of the evaluation?
3. Whether DCPS failed to provide the student a FAPE by failing to develop an appropriate transition plan for the student based on age-appropriate transition assessments, specifically a vocational assessment, in the student's August 29, 2011, October 5, 2011 and/or December 13, 2011 IEPs?
4. Whether DCPS failed to provide the student a FAPE by failing to develop appropriate IEPs for the student on August 29, 2011, October 5, 2011, December 13, 2011 and/or May 29, 2012, specifically, by failing include the appropriate present levels of performance and baseline data and failing to develop appropriate goals and objectives on the student's IEPs?
5. Whether DCPS failed to provide the student a FAPE by failing to determine a proper placement during the student's May 29, 2012 IEP Team meetings, specifically, by failing to place the student in a full-time out of general education placement?
6. Whether DCPS failed to provide timely and adequate notice to the student of her May 29, 2012 IEP Team meeting and whether this failure constitutes a denial of FAPE?
7. Whether DCPS failed to allow the student to participate in her May 29, 2012 IEP Team meeting and whether this failure constitutes a denial of FAPE?

## 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 5, 6, 7, 8, 10 and 20; Respondent's Exhibits 3, 7 and 13)
2. The student has reached the age of majority, has not been determined to be incompetent and is entitled to appropriate measureable postsecondary goals based upon age appropriate transition assessments. (Petitioner's Exhibits 5, 6, 7, 8, 9, 10 and 20; Respondent's Exhibits 2, 3 and 13; Grandmother's Testimony; Student's Testimony; Special Education Teacher's Testimony)
3. School A is the student's home school. (Stipulated Fact)
4. The student has five credits remaining before she obtains a high school diploma. The courses needed for graduation include English III, English IV, history (unspecified) and Spanish II. (Respondent's Exhibit 13; SEC's Testimony)
5. The student has a history of attention deficit and hyperactivity disorder (ADHD), depressive disorder and behavioral and academic difficulties. Her disability category is ED. Her behavioral difficulties include oppositional, maladaptive and self-mutilating behaviors. She has had multiple psychiatric placements for suicidal thoughts. (Petitioner's Exhibit 10; Respondent's Exhibit 13; Grandmother's Testimony)
6. From 2006 through 2010, the student was placed in a residential treatment center out of the District of Columbia. (Petitioner's Exhibits 8, 10, 13; Respondent's Exhibit 6; Grandmother's Testimony; Student's Testimony)
7. In January 2010, the student was functioning on a at the 5.3 grade level equivalent in math calculation, 3.4 grade level equivalent in math fluency, 5.4 grade level equivalent in math applied problems and 5.6 grade level equivalent in quantitative concepts. The student's overall reading grade equivalence was 2.9. The student's overall score in writing skill was at a 4.5 grade equivalence. (Petitioner's Exhibit 20; Respondent's Exhibits 3 and 6)
8. The student's full scale IQ is 84, in the low average range. (Petitioner's Exhibit 10; Respondent's Exhibit 13)
9. For the 2010-2011 school year, the student attended a private special education school in the District of Columbia metro area, which provided school and residential services for the student. (Petitioner's Exhibit 10; Respondent's Exhibit 13; Grandmother's Testimony; Student's Testimony)
10. The student has not had suicidal thoughts in the past two years and is making progress utilizing coping skills to manage her behavior. (Student's Testimony)
11. The student is motivated, has a positive attitude, works hard and responds well to teacher redirection. (Petitioner's Exhibits 2 and 20; Respondent's Exhibits 3 and 9; Student's Testimony; Special Education Teacher's Testimony)
12. The student enjoys math and feels confident in her math abilities. She is able to use a scientific calculator and is most successful with differentiated and small group instruction in math. The student needs occasional intervention to assist her in progressing with reading and to check for the student's understanding of assignments that need to be read. While writing is a weakness for the student, she enjoys poetry. The student needs differentiated instruction and frequent intervention in writing instruction. (Petitioner's Exhibits 2, 10 and 20; Respondent's Exhibits 3 and 13; Student's Testimony; Special Education Teacher's Testimony)

13. During the summer of 2010, the student worked at a local university in the maintenance department. She worked directly with two other people and performed well in the work environment. The student likes to work with her hands and is motivated to graduate with a full high school diploma. (Student's Testimony)
14. With the exception of two courses during the 2009-2010 school year, the student performed at an average or above average level for all academic classes. (Petitioner's Exhibit 13)
15. The student's placement in School B was agreed upon by both parties pursuant to an August 29, 2011 Settlement Agreement. (Stipulated Fact)
16. School B was a public special education program under the direction of the DCPS Office of Special Education until its closure in June 2012. (Special Education Teacher Testimony)
17. While at School B, the student did not exhibit inappropriate behaviors. She participates meaningfully in behavior support services. (Petitioner's Exhibit 20; Respondent's Exhibit 3; Student's Testimony; Special Education Teacher's Testimony)
18. While at School B, the student had excessive absences. The majority of the absences were due to medical appointments or trips to the emergency room. (Petitioner's Exhibits 2, 3, 4, 14 and 20; Respondent's Exhibits 3, 8 and 9; Grandmother's Testimony; Student's Testimony; Special Education Teacher's Testimony)
19. When the student was not in school at the beginning of the school day, the student's Special Education Teacher would call the student and her grandmother to ensure that the student would get to school. The student would notify the school of her whereabouts and bring documentation of medical appointments when requested. Following an absence, the Special Education Teacher would work one-on-one with the student to ensure that the student continued to progress academically. The student was able to make up all work missed during an absences. (Petitioner's Exhibit 20; Respondent's Exhibit 3; Special Education Teacher's Testimony)
20. While at School B, the student struggled with her English and Spanish classes but was able to successful complete her work with one-on-one assistance from the Special Education Teacher. She also would use strategies such as downloading the English-to-Spanish or Spanish-to-English translator. (Student's Testimony; Special Education Teacher's Testimony)
21. The student struggles with asking for help in an environment with a large group of students. At School B, the student was educated in a group of six (6) or seven (7) students but was in a room with 36 to 42 other students. (Student's Testimony)
22. The student received two grade letter A's and one grade letter B while at School B. The student won awards for her school performance at School B. (Respondent's Exhibit 9; Special Education Teacher's Testimony)
23. The present levels of performance on the student's August 29, 2011, October 5, 2011, December 13, 2011 and May 29, 2012 IEPs are derived from the student's January 27, 2010 Woodcock Johnson. (Petitioner's Exhibits 5, 6 and 7; Respondent's Exhibit 6)
24. The student's math, reading, written expression and behavior goals are identical on her August 29, 2011, October 5, 2011 and December 13, 2011 IEPs. The academic

goals generally provide for the student to improve or increase in skill. (Petitioner's Exhibits 5, 6 and 7)

25. The student's August 29, 2011 and October 5, 2011 postsecondary transition plans do not list assessment tools used, dates the assessments were administered or results of the assessments. (Petitioner's Exhibits 6 and 7)
26. The student's December 13, 2011 IEP contains information regarding the student's academic, functional, employment and other interests; assessment tools used to develop the transition plan; dates the assessment tools were administered; interpretation of the results of the assessment tools; a long range goals which relate to the student's areas of interest and personal goals; and time for services to assist the student in achieving goals. (Petitioner's Exhibit 5)
27. The short-term goals on the student's August 29, 2011, October 5, 2011 and December 13, 2011 postsecondary transition plans are identical, general, vague and not measurable. (Petitioner's Exhibits 5, 6 and 7)
28. The student does not know the requirements needed to become an auto mechanic or how to apply for a scholarship for a postsecondary program. (Petitioner's Exhibit 20; Respondent's Exhibit 3; Student's Testimony)
29. During the 2011-2012 school year, the Special Education Teacher made several attempts to access the student's most recent evaluations including phoning the student's previous schools, phoning School B's previous director and requesting a copy of evaluations from the student's educational advocate. The Special Education Teacher had access to an educational evaluation that was completed in 2011. (Petitioner's Exhibit 3Special Education Teacher's Testimony)
30. An independent neuropsychological evaluation was completed for the student on May 15, 2011. (Petitioner's Exhibit 10; Respondent's Exhibit 13; Special Education Teacher's Testimony)
31. The student's general verbal comprehension abilities are in the low average range; general perceptual reasoning abilities are in the average range; ability to sustain attention, concentrate and exert mental control is in the low average range; and ability in processing simple or routine visual material is in the low range, her recall and memory for visual details and special location are in the extremely low range. The student's neuropsychological impairments have a direct effect on her ability to perform academically. (Petitioner's Exhibit 10; Respondent's Exhibit 13; Psychologist's Testimony)
32. An IEP Team meeting for the student was scheduled for and completed on May 29, 2012. The student initially agreed for the meeting to be held on May 29, 2012. After the May 29, 2012 meeting was scheduled and a Letter of Invitation was sent to the student on May 8, 2012, the student informed DCPS that her grandmother would be out of town and that she did not want to hold the meeting on a date her grandmother would not be present. The student's grandmother agreed to participate in the meeting via telephone. DCPS attempted to phone the student on May 29, 2012 however the student refused to participate in the meeting because of the unavailability of her grandmother. (Petitioner's Exhibit 20; Respondent's Exhibits 1, 2, 3, 4, 10, 11 and 12; Grandmother's Testimony; Student's Testimony; Special Education Teacher's Testimony)

33. DCPS continued with the May 29, 2012 meeting because the student's IEP needed to be finalized before School A closed in mid-June 2012. (Special Education Teacher's Testimony)
34. The student's May 29, 2012 IEP includes detailed present levels of performance which incorporate the student's current needs, necessary supports, teacher observations and student reports of her strengths, weaknesses and interests. The IEP Team made significant changes to the student's annual goals both by doubling the number of annual goals and developing more specific goals for the student to master. (Petitioner's Exhibits 5 and 20; Respondent's Exhibit 3)
35. Prior to the May 29, 2012 meeting, the Special Education Teacher and School A program director discussed placement options with the student. The student expressed to the Special Education Teacher that she did not want to attend a STAY program, the programs offered by DCPS that are most similar to the program at School B. (Special Education Teacher's Testimony)
36. The IEP Team discussed the schools with STAY programs as placement options for the student but rejected those locations of service because the student specifically asked not to be placed in those programs. (Special Education Teacher's Testimony)
37. The student's May 29, 2012 IEP Team determined that School A was an appropriate placement for the student. (Respondent's Exhibit 4; Special Education Teacher's Testimony)
38. School A is a public school which offers inclusion, resource and self-contained special education classes. (SEC's Testimony)
39. The student is enrolled in inclusion classes for English III and IV, a self-contained history class, a regular education Spanish class, a special education "Learning Lab" where she is able to get assistance in any academic area from a special education teacher and a transition class which focuses on the transition to college and preparations for college applications. The student would have access to a computer in all classes although instruction would not be given on the computer. (SEC's Testimony)
40. The student's English classes have approximately 27 students enrolled with a special education and a general education teacher. The student's history class has 12 to 15 students enrolled and the student's Spanish II class has less than 15 students. The student would receive behavioral support services from the school social worker. (SEC's Testimony)
41. The School A SEC does not have experience in working with students with auditory and visual processing or memory deficits. (SEC's Testimony)
42. School C is a private special education day school located in the District of Columbia. School C educates students in grades 8-12 who are 13-22 years old. School C primarily serves students with specific learning disabilities, multiple disabilities, other health impairments and ADHD. School C has a Certificate of Approval from the Office of the State Superintendent for Education (OSSE). (School C HOS's Testimony)
43. School C offers English, math, science, history, technology, business management and art. The school currently does not have science teacher on staff. The school's English and history teachers hold certifications in special education and their content areas, the math teacher holds a certification in special education and the technology,

business management and art teachers hold certifications in their content areas. (School C HOS's Testimony)

## 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. Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

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. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

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. Therefore, 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).

Issue #1

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)). In the District of Columbia, there are specific provisions in the District of Columbia Municipal Regulations that relate to BIPs. According to DCMR 5-3007.3, if a student's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

In the present matter, the student has a history of oppositional, maladaptive and self-mutilating behaviors. The student has had an extensive mental health history, beginning in 2003 and continuing through her placement in a residential treatment facility until 2010. She has had multiple psychiatric placements for suicidal thoughts. Notwithstanding her extensive history, the student has not had suicidal or self-harming thoughts in the past two years and did not exhibit any behavior problems during the 2011-2012 school year. During the 2011-2012 school year, the student was motivated, had a positive attitude and responded well to teacher redirection.

While the student did not exhibit behavior problems while in school, she did have numerous absences during the 2011-2012 school year. The Petitioner argued that the student's truancy was a behavior for which a BIP should have been developed. DCPS has an "affirmative duty" to address a student's truancy. *R.B. v. Mastery Charter School*, 762 F. Supp.2d 745 (E.D. Pa 2010) (District had duty to respond to absences through educational intervention). Further, courts in the District of Columbia have recently held that the failure to create BIPs to address behavior issues can result in a material deprivation and lead to a finding of FAPE denial. *See Long v. District of Columbia*, 780 F. Supp.2d 49, 61 (D.D.C. 2011) (in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); *Shelton v. Maya Angelou Charter School*, 578 F.Supp.2d 83 (D.D.C. 2008) (FBA/BIP required where learning disabled student was suspended).

However, in the present case, both Petitioner's and Respondent's witnesses testified that the majority of the student's absences were to attend medical appointments or for trips to the

emergency room. Further, when the student was not in school at the beginning of the school day, the student's Special Education Teacher would call the student and her grandmother to ensure that the student would get to school and following an absence, the Special Education Teacher would work one-on-one with the student to ensure that the student continued to progress academically. The student was able to make up all work missed during an absences, concluded the year with grade letter A's and B's and won awards for her school performance.

The Hearing Officer concludes that the quality of the student's education during the 2011-2012 school year was not linked to her absences and that her absences did not impede her learning or that of others. In this case, the student's absenteeism did not warrant a BIP. *See Rodriguez v. San Mateo Union High Sch. Dist.*, 357 F. App'x 752 (November 13, 2009) (the 9th U.S. Circuit Court of Appeals agreed with the District Court and an administrative law judge that the student's truant behavior was not severe enough to warrant a BIP).

The Petitioner failed to meet its burden with respect to Issue #1.

Issue #2

In developing an IEP, the IEP Team must consider the results of the most recent evaluation of the child. See 34 CFR §300.324(a)(iii). Additionally, the IEP Team must revise a child's IEP, as appropriate, to address information about the child provided to, or by, the parents. See 34 CFR §300.324(b)(ii)(C). In the present matter, the student was administered a private neuropsychological evaluation, which was completed on May 15, 2011. The neuropsychological evaluation was not administered by DCPS.

The Petitioner alleged that DCPS failed to provide the student a FAPE by failing to review the student's May 15, 2011 Neuropsychological Evaluation and revising the student's IEP based on the results of the evaluation. However, the record does not contain evidence that DCPS was in receipt of this evaluation prior to August 6, 2012, the date Disclosures were due for the due process hearing. The Petitioner argued that the Special Education Teacher admitted in an April 20, 2012 IEP Team meeting that the neuropsychological evaluation had not been reviewed by DCPS however the record indicates that the Special Education Teacher was aware of an *educational* evaluation conducted in 2011. The record further indicates that the Special Education Teacher made several attempts to access the student's most recent evaluations including phoning the student's previous schools, phoning School B's previous director and requesting a copy of evaluations from the student's educational advocate. During the due process hearing, the Special Education Teacher testified that she recalled seeing the year of 2010 on the most recent evaluation provided to the IEP Team.

The Petitioner did not prove by a preponderance of the evidence that DCPS was provided a copy of the May 15, 2011 Neuropsychological Evaluation prior to the student's IEP Team meetings. Therefore, the Hearing Officer is unable to conclude that DCPS was provided the student's May 15, 2011 Neuropsychological Evaluation prior to the student's IEP Team meetings. Thus, DCPS had no way to consider the student's May 15, 2011 Neuropsychological Evaluation when the public agency revised the student's IEPs.

The Petitioner failed to meet its burden with respect to Issue #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.

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. An IEP transition plan satisfies the requirements if, for example, it includes a "discussion of transition services under IDEA." *Pace v. Bogalusa City School Bd.,* 137 F.Supp.2d 711, 717 (E.D. La. 2001).

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).

The Petitioner alleged that DCPS failed to develop appropriate transition plans for the student based on age-appropriate transition assessments, specifically a vocational assessment, in the student's August 29, 2011, October 5, 2011 and/or December 13, 2011 IEPs. The student's August 29, 2011 IEP was developed based on a Settlement Agreement however the Settlement Agreement addressed the student's placement/location of services and did not address secondary transition goals and objectives. The student's August 29, 2011 postsecondary transition plan does not specifically list assessment tools used to develop the transition goals. Further, the "date administered" and "results" sections for the transition assessments are blank. The transition goals are general, vague and not measurable. For example, the student's education and training goal is, "[The student] will practice needed postsecondary education strategies." Likewise, the student's employment goal is, "Given the right support, improvements in vocational skills, and further career exploration, [the student's] potential placement could be to work in the community with minimal support." Finally, the student's independent living goal is, "[The student] will acquire the necessary daily living skills to allow for independent functioning in a variety of environments." Additionally, there is no time or frequency stated for the transition services listed and the student's anticipated date of achievement is June 29, 2011, two months before the development of the IEP.

While the student's disclosed October 5, 2011 IEP contained a "draft" stamp across the IEP, the IEP contains signatures of some IEP Team members who attended the October 5, 2011 IEP Team meeting. Therefore, the Hearing Officer concludes that the IEP Team finalized the

draft reviewed at the October 5, 2011 IEP Team meeting. The postsecondary transition plan in the October 5, 2011 IEP is identical to the August 29, 2011 postsecondary transition plan with the exception of the anticipated date of achievement.

The student's December 13, 2011 IEP contains information regarding the student's academic, functional, employment and other interests; assessment tools used to develop the transition plan; dates the assessment tools were administered; interpretation of the results of the assessment tools; a long range goals which relate to the student's areas of interest and personal goals; and time for services to assist the student in achieving goals. However, the student's "short-term measureable goals" are identical to the goals in the August 29, 2011 and October 5, 2011 IEPs.

It is clear from the record that the student's August 29, 2011 and October 5, 2011 transition plans did not 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 needed to assist the student in reaching those goals. While transition assessments were administered to the student prior to the development of the student's December 13, 2011 IEP, the student's short-term goals were not based upon the assessment results and neither the long-term nor the short-term goals are measurable.

Procedural violations raise a viable claim only if the procedural violations affect the student's substantive rights under the IDEA. *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (United States Court of Appeals, District of Columbia (2006)). The student is a 20-year old student who has five (5) credits remaining before she obtains a high school diploma. Although she is close to graduation, she does not know the requirements needed to become an auto mechanic or how to apply for a scholarship for a postsecondary program. The Hearing Officer concludes that the failure of DCPS to include measureable education and training and employment goals in the student's August 29, 2011, October 5, 2011 and December 13, 2011 transition plans is a procedural violation that affected the student's substantive rights under the IDEA in that the lack of an appropriate transition plans impeded the child's right to a FAPE and caused a deprivation of educational benefit for the student. Had the student had appropriate postsecondary transition goals and services, the student would have received education on what is needed to become an auto mechanic and how to apply for auto mechanic programs. With five (5) credits left to graduate, the student does not know if she has taken the proper classes and has the other necessary prerequisites to be prepared for an auto mechanics program.

The Petitioner has met its burden with respect 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. An IEP must include a statement of the child's present levels of academic achievement and functional performance and a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education

curriculum and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR §300.320(a)(1) and (2).

The Petitioner alleged that DCPS failed to provide the student a FAPE by failing to develop appropriate IEPs for the student on August 29, 2011, October 5, 2011, December 13, 2011 and/or May 29, 2012, specifically, by failing include the appropriate present levels of performance and baseline data and failing to develop appropriate goals and objectives on the student's IEPs.

The student's August 29, 2011, October 5, 2011 and December 13, 2011 IEPs indicate that the student's present level of performance in math is "on a 4.9 grade level." In reading the student's present level of performance is "at a 2.9 grade level." For written expression, the IEPs state that the student's "skills are on a 4.5 grade level." In the IEPs, the student present level of performance for behavior is described as, "few negative peer interactions, horseplay and instigation in school and at the unit. At times, [the student] is able to maintain behaviors that are appropriate and she maintains a level that is positive." The student's math, reading, written expression and behavior goals are identical on her August 29, 2011, October 5, 2011 and December 13, 2011 IEPs. The academic goals generally provide for the student to improve or increase in skill. For example, the student's math goal is to "improve skills in problem solving, calculations and practical/functional usages of mathematics." Likewise, the student's reading goal is "to increase basic reading skills, organize new information and improve reading comprehension." The student's written expression goal is "to increase basic reading skills, organize and improve reading comprehension in conjunction with improved written expression." The student's behavior goal is to "exhibit pro-social behaviors 100% of the time for 3 consecutive weekly sessions." It is important to note that only three and one half (3 ½) months elapsed between the August 29, 2011, October 5, 2011 and December 13, 2011 IEPs.

The student's May 29, 2012 IEP includes detailed present levels of performance which are based on January 27, 2010 evaluation data and incorporate the student's current needs, necessary supports, teacher observations and student reports of her strengths, weaknesses and interests. The May 29, 2012 IEP Team made significant changes to the student's annual goals both by doubling the number of annual goals and developing more specific goals for the student to master. For example, one of the student's math goals is to "calculate perimeter, circumference and area of geometric figures, such as circles, triangles and trapezoids with 80% accuracy." One of the student's written expression goals is to "edit a piece of writing to make it more effective (i.e. improve the logic, support statements with facts and use words that will be more meaningful to the audience) with at least 75% accuracy." One of the student's behavior goals is to "identify and address barriers to school attendance with 80% accuracy."

There was no evidence presented which indicated that the student's present levels of performance or baseline data was anything other what is listed in her August 29, 2011, October 5, 2011 and December 13, 2011 and May 29, 2012 IEPs. Additionally, while the Petitioner suggested that the student should have goals for visual and auditory processing deficits and low memory functioning and the student's academic goals in her August 29, 2011, October 5, 2011 and December 13, 2011 IEPs appear to be somewhat general, the Petitioner presented no evidence which indicated that the student's math, reading and written expression academic goals

or her behavior goal on her August 29, 2011, October 5, 2011, December 13, 2011 and May 29, 2012 IEPs were inappropriate. The present levels of performance seem consistent with the report from the student's teacher regarding present levels of achievement discussed in the April 20, 2011 IEP Team meeting and the present levels of performance on the May 29, 2012 IEP are consistent with the Special Education Teacher and student testimonies. Additionally, the student's present level of performance for behavior was consistent with the Special Education Teacher's testimony of the student's classroom behavior. There was no educational data presented which suggested that the student was functioning at a level different than those listed in the student's IEPs or that different academic or behavioral goals were needed for the student.

Likewise, there was no evidence presented which supported the Petitioner's contention that the student needs IEP annual goals to address visual and auditory processing deficits and low memory functioning. The evidence supports that specific teaching methods should be used with the student, specifically, presenting information through multiple modalities, to address her visual and auditory processing deficits and low memory functioning rather than developing annual IEP goals and objectives.

Even had the Hearing Officer found that the student's present levels of performance, baseline date and goals and objectives on her August 29, 2011, October 5, 2011 and December 13, 2011 IEPs were inappropriate, this violation would not have constituted a denial of FAPE. The student made excellent progress during the 2011-2012 school year, both academically and behaviorally, concluded the year with grade letter A's and B's and won awards for her school performance.

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

Issue #5

Pursuant to 34 CFR §300.116(b)(2), the child's placement must be based on the child's IEP. Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988). "Educational placement," as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board,* 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board,* 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board,* 372 F.3d 674, 676 (4th Cir. 2004)).

Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs).

Moreover, the IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32,

43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). Children with disabilities are only to be removed from regular education classes "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 CFR §300.114(a)(2). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999).

The student has a history of placements in highly restrictive settings. From 2006 through 2010, the student was placed in a residential treatment facility outside of the District of Columbia. For the 2010-2011 school year, the student attended a private special education school in the District of Columbia metro area, which provided school and residential services for the student. For the 2011-2012 school year, the student was placed in a public special education day program managed by the DCPS Office of Special Education. From 2010-2012, the student's level of restrictiveness decreased from an out-of-state private residential treatment center to a public special education day program within the District of Columbia. With the exception of two courses during the 2009-2010 school year, the student performed at an average or above average level for all academic classes in the various educational placements. There was no evidence presented which suggested that the student is unable to appropriately interact with nondisabled peers or that the student will not receive benefit from interaction with nondisabled peers.

The student's full scale IQ is in the low average range. In January 2010, the student was functioning on a at the 5.3 grade level equivalent in math calculation, 3.4 grade level equivalent in math fluency, 5.4 grade level equivalent in math applied problems and 5.6 grade level equivalent in quantitative concepts. The student enjoys math and feels confident in her math abilities. She is able to use a scientific calculator and is most successful with differentiated and small group instruction in math. In January 2010, the student's overall reading grade equivalence was 2.9. The student needs occasional intervention to assist her in progressing with reading and to check for the student's understanding of assignments that need to be read. The student performs best when someone reads to her. In January 2010, the student's overall score in writing skill was at a 4.5 grade equivalence. While writing is a weakness for the student, she enjoys poetry. The student needs differentiated instruction and frequent intervention in writing instruction. The student does not exhibit significant behavior challenges in the educational environment. She participates meaningfully in behavior support services. While the student has significant absences, she notifies the school of her whereabouts and brings documentation of medical appointments when requested.

The student has a history of ADHD, depressive disorder and behavioral and academic difficulties. While the student's general verbal comprehension abilities are in the low average range; general perceptual reasoning abilities are in the average range; ability to sustain attention, concentrate and exert mental control is in the low average range; and ability in processing simple or routine visual material is in the low range, her recall and memory for visual details and special location are in the extremely low range. The student's neuropsychological impairments have a direct effect on her ability to perform academically. The evaluator of the student's May 15, 2012 neuropsychological evaluation, the Psychologist and the student's IEP Team recommended instruction for the student with multiple presentation formats and in a small class environment.

During the summer of 2010, the student worked at a local university in the maintenance department. She worked directly with two other people and performed well in the work environment. The student likes to work with her hands and is motivated to graduate with a full high school diploma.

The student is a rising 12th grade student and needs five (5) credits to fulfill requirements for graduation. The record contains information for four (4) of the five (5) courses the student needs to graduate. These courses are: English III, English IV, history (unspecified) and Spanish II. The record contains evidence that the student requires a small class size and one-on-one instructional opportunities in order to be successful. The student testified that she struggled with her English and Spanish classes during the 2011-2012 school year but would ask the Special Education Teacher for individual assistance with English when she struggled and would download the English-to-Spanish or Spanish-to-English translator when she struggled with Spanish. She acknowledged her difficulty in adapting to change and her struggle with asking for help in an environment with a large group of students. At School B, the student was educated in a group of six (6) or seven (7) students but was in a room with 36 to 42 other students. The student also testified that the educational environment in which she is placed is not of great importance to her because her focus in on graduation.

The student's May 29, 2012 IEP prescribes four (4) hours per week of specialized instruction outside of the general education environment, fifteen (15) hours per week of specialized instruction within the general education environment and four (4) hours per month of behavioral support services outside of the general education environment. These services are essentially identical to the services prescribed in the student's August 29, 2011, October 5, 2011 and December 13, 2011 IEPs.[3] The student was successful with the special education services prescribed in her August 29, 2011, October 5, 2011 and December 13, 2011 IEPs. These services were delivered in a setting where the student was a part of a small group and had the opportunity to receive one-on-one assistance. While the student's past success is not determinative of the appropriateness of a current placement, in this case, a small class size or opportunities for one-on-one assistance is necessary for the student to receive educational benefit.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. DCPS has proposed School A as the student's placement and location of services for the 2012-2013 school year. School A is a public school

[3] The student's August 29, 2011 IEP prescribes four (4) hours per week of specialized instruction outside of the outside of the general education environment, sixteen (16) hours per week of specialized instruction within the general education environment and sixty (60) minutes per week of behavioral support services outside of the general education environment. The student's October 5, 2011 IEP prescribes four (4) hours per week of specialized instruction outside of the outside of the general education environment, fifteen (15) hours per week of specialized instruction within the general education environment and sixty (60) minutes per week of behavioral support services outside of the general education environment. The student's December 13, 2011 IEP prescribes four (4) hours per week of specialized instruction outside of the general education environment, fifteen (15) hours per week of specialized instruction within the general education environment and four (4) hours per month of behavioral support services outside of the general education environment.

which offers inclusion, resource and self-contained special education classes. DCPS' proposal is for the student to be in inclusion classes for English III and IV, a self-contained history class and a regular education Spanish class. The student is also enrolled in a special education "Learning Lab" where she is able to get assistance in any academic area from a special education teacher and a transition class which focuses on the transition to college and preparations for college applications. The student would have access to a computer in all classes although instruction would not be given on the computer. The student's English classes have approximately 27 students enrolled with a special education and a general education teacher. The student's history class has 12 to 15 students enrolled and the student's Spanish II class has less than 15 students. The student would receive behavioral support services from the school social worker. The School A SEC conceded that she does not have experience in working with students with auditory and visual processing or memory deficits.

While it is clear that School A is an overall appropriate placement in that it is able to implement the specialized instruction and behavioral support services on the student's IEP, it is not clear that School A is an appropriate placement in that it is able to meet all of the student's unique needs. Specifically, the student testified that she is not comfortable asking for assistance in a large group setting. Although the student's proposed English classes have a fairly low student-teacher ratio, the class sizes are relatively large. Further, according to the student's most recent educational evaluation, the student is reading at a 2.9 grade level. While an inclusion class provides special education support, the student is significantly below grade level functioning in reading and may not ask for the required assistance during her English classes. Additionally, School A does not have experience in working with students with visual and auditory processing deficits and low memory functioning.

DCPS must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 CFR §300.115(a). The continuum must make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 CFR §300.115(b)(2). Here, the Hearing Officer concludes that the overall placement in School A is appropriate for the student and is the least restrictive environment for the student however the placement is inappropriate in that it lacks the supplementary services to be provided in conjunction with regular class placement necessary for the student to receive educational benefit. Specifically, the placement lacks opportunities for the student to receive one-on-one assistance. This is particularly important for the student in any class with more than 15 students (i.e. the student's English classes) and the classes where the student does not have access to a special education teacher (i.e. the student's Spanish class). While the student-teacher ratio is relatively low in the proposed English classes, the class size remains large and while the student's Spanish class is small, the student does not have access to a special education teacher within the general education setting as prescribed by her IEP. Additionally, School A lacks special education staff members with knowledge of how to deliver and/or modify instruction for students with visual and auditory processing deficits and low memory functioning.

The Petitioner met its burden with respect to Issue #5.

Issues #6 and #7

The IDEA's procedural safeguards help ensure that parents are able to participate fully in decisions affecting their child's education. *See Rowley,* 458 U.S. at 183 n.6; *see also Holland v. District of Columbia,* 71 F.3d 417, 421 (D.C. Cir. 1995). The IDEA "guarantees parents of disabled children the opportunity to participate in the evaluation and placement process." *LeSesne ex rel. B.F. v. District of Columbia,* Civil Action No. 04-0620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005); *see also* 20 U.S.C. §§1414(f), 1415(b)(1). The applicable regulations further emphasize the importance of parental participation in IEP meetings, mandating that each public agency take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including: (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed upon time and place. 34 CFR §300.322(a). When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent under State law), all rights accorded to the parents under Part B of the IDEA transfer to the child. *See* 34 CFR §300.520(a)(ii).

The student has reached the age of majority and has not been determined to be incompetent. Therefore, DCPS had the obligation to notify the student of meetings early enough to ensure that she had an opportunity to attend and to schedule meetings at a mutually agreed upon time and place. DCPS scheduled an IEP Team meeting for the student on May 29, 2012. The Special Education Teacher spoke with the student about the date for the meeting, a Letter of Invitation was sent to the student on May 8, 2012 and the student agreed to hold the meeting on May 29, 2012. At some point following the scheduling of the May 29, 2012 IEP Team meeting, the student informed the Special Education Teacher that her grandmother would be out of town on May 29, 2012. It is uncontested that the student did not want to participate in the IEP Team meeting without the presence of her grandmother.

Prior to the May 29, 2012 meeting, the Special Education Teacher and School A program director discussed placement options with the student. The student expressed to the Special Education Teacher that she did not want to attend a STAY program, the programs offered by DCPS that are most similar to the program at School B.

On May 29, 2012, at the start of the IEP Team meeting, the student and her grandmother were not present. The Special Education Teacher called the student in order to have her participate in the meeting by telephone. The student answered the phone but refused to participate in the meeting because her grandmother was not available to join the meeting. DCPS continued with the May 29, 2012 meeting because the student's IEP needed to be finalized before School A closed in mid-June 2012 and, during the meeting, developed academic and behavioral goals for the student and determined that the student would attend her neighborhood school, specifically School A. The IEP Team discussed the schools with STAY programs as other placement options for the student but rejected those locations of service because the student specifically asked not to be placed in those programs.

The Petitioner argued that DCPS should not have held a meeting on a date that was not agreed upon by the student's grandmother. However, DCPS had no obligation to inform the

grandmother of the meeting or to secure her attendance. The student initially agreed to the May 29, 2012 IEP Team meeting date and the meeting was thusly scheduled. The Hearing Officer concludes that DCPS provided timely and adequate notice to the student of her May 29, 2012 IEP Team meeting.

Notwithstanding DCPS' timely and adequate notice to the student of the May 29, 2012 IEP Team meeting, following the scheduling of the meeting, the student made it clear to DCPS that her grandmother was not available on May 29, 2012 and that she did not want to hold the meeting on a date when her grandmother could not attend. Nonetheless, DCPS held the meeting on May 29, 2012, on a date the public agency knew the student would not participate. Although DCPS phoned the student on May 29, 2012, DCPS failed to provide the student an opportunity to participate because the student had clearly informed DCPS that she would not participate without the accompaniment of her grandmother.

Pursuant to 34 CFR§ 300.501(b), the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child. Further, 34 CFR §300.501(c) provides that each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. The public agency must use procedures in 34 CFR §300.322(a) through (b)(1) when scheduling the placement meeting. In other words, the public agency must ensure that the meeting is scheduled at a mutually agreed upon time and place. 34 CFR §300.322(a)(2).

The record is clear that although the student initially agreed to the May 29, 2012 date for the IEP Team meeting, at some point after the meeting was scheduled, the student informed the Special Education Teacher that she no longer agreed with the date for the meeting. Although DCPS attempted to find another method to ensure the participation of the student, according to 34 CFR §300.510(c)(3), specifically phoning the student on May 29, 2012, the attempt was made on a date the student made clear she would not participate. The IEP Team meeting was held because of DCPS' administrative need to have all IEP Team meetings concluded before the end of May. While DCPS held another meeting in June 2012 to review the decisions made during the May 29, 2012 meeting, the Hearing Officer concludes that DCPS failed to allow the student to participate in her May 29, 2012 IEP Team meeting.

DCPS' failure to make meaningful attempts to ensure the student's involvement in her placement decision by the IEP Team may be a denial of FAPE. *See, e.g., Drobnicki v. Poway Unified Sch. Dist.*, 358 F. App'x 788, 53 IDELR 210 (9th Cir. 2009) (unpublished) (holding that a California LEA should have attempted to schedule an IEP meeting at a mutually agreeable time and place rather than offering to allow the parent to participate by teleconference). However, 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).

A local educational agency (LEA) must keep an open mind and must give meaningful consideration to the parents' input on the child's placement. *H.B. by Penny B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008) *aff'd*, 370 F. App'x 843, 54 IDELR 73 (9th Cir. 2010). In this matter, during the May 29, 2012 IEP Team placement discussion, the IEP

Team discussed other programs that were similar to School B however did not select those programs because the student had given the input that she did not want to attend those programs.

Although the student was not present at the May 29, 2012 IEP Team meeting, the Special Education Teacher discussed matters with the student prior to the meeting and the IEP Team gave meaningful consideration to the child's input on her placement; made considerable changes to the student's IEP to reflect her current functioning and included her reports of her strengths, weaknesses and interests into her present levels of performance; and incorporated detailed information on the student's academic, functional, employment and other interests into her postsecondary transition plan. Further, as discussed in Issue #4, the present levels of performance, baseline data and goals and objectives on the student's May 29, 2012 IEP are appropriate, and as discussed in Issue #5, School A is able to implement the student's IEP and is an overall appropriate placement for the student. Therefore, the Hearing Officer finds that DCPS' failure to allow the student to participate in the May 29, 2012 IEP Team meeting did not impede the child's right to a FAPE, did not significantly impede the student's opportunity to participate in the decision-making process regarding the provision of a FAPE and did not cause a deprivation of educational benefit.

The Petitioner failed to meet its burden with respect to Issues #6 and #7.

Requested Relief

In the instant matter, Petitioner has established that the student was denied a FAPE when DCPS: (1) failed to develop an appropriate transition plan for the student based on age-appropriate transition assessments in the student's August 29, 2011, October 5, 2011 and December 13, 2011 IEPs; and (2) failed to determine a proper placement in that the offered placement lacks the supplementary services to be provided in conjunction with regular class placement necessary for the student to receive educational benefit. As a result of the failure to provide appropriate transition plans, the student was harmed in that she is not prepared to transition into a postsecondary program although she has only five (5) credits remaining before graduation. The failure to provide an appropriate placement is a prospective claim because on the dates of the hearing, the 2012-2013 had yet to begin.

As relief, the Petitioner requested compensatory education; placement in and funding for School C; transportation services, one-on-one tutoring for each day of services missed; services at the Lindamood-Bell program; an independent comprehensive psychological evaluation with clinical components, an independent speech-language evaluation and an independent FBA; all evaluations recommended by the independent evaluations; and within 10 days of the receipt of the independent evaluations, an IEP meeting to review and revise the student's IEP and discuss compensatory education.

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 v. District of Columbia*, 401 F. 3d 516 at 524, 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).

The Petitioner's requests for services at the Lindamood-Bell program, an independent comprehensive psychological evaluation with clinical components, an independent speech-language evaluation, an independent FBA and all evaluations recommended by independent evaluations are inappropriate remedies based on the denials of FAPE proved by the Petitioner. Transportation services are inappropriate based on the student's placement in her neighborhood school and no evidence in the record which suggests that the student needs transportation services.

For DCPS' failure to develop an appropriate transition plan for the student based on age-appropriate transition assessments in the student's August 29, 2011, October 5, 2011 and December 13, 2011 IEPs, compensatory education in the form of a one-on-one tutor in the student's transition class is appropriate. A one-on-one tutor will be able to provide the student individualized attention in order for the student to master the postsecondary transition goals in the student's May 29, 2012 IEP, accomplish recommendations contained within the student's August 10, 2012 Vocational Assessment and prepare for a postsecondary career in auto mechanics.

For DCPS' failure to determine a proper placement that is inclusive of the supplementary services to be provided in conjunction with regular class placement necessary for the student to receive educational benefit, modifying the offered placement is an appropriate remedy. The Petitioner presented evidence and argued that School C is an appropriate placement for the student. However, while School C offers smaller class sizes, School C does not offer Spanish or any foreign language. With only five (5) credits remaining for the student to graduate, one of those credits being a foreign language, it is inappropriate to place the student in a school that does not offer the courses needed for the student to graduate. Further, while the student has not been placed with nondisabled peers since 2006, the student has been successful in increasingly less restrictive settings over the past two years. Not allowing the student to interact with nondisabled peers at age 20, especially given the student's behavioral progress, motivation to achieve and success in a work environment, is inappropriate and contrary to the mandates of the IDEA. Therefore, the Hearing Officer concludes that School C is not an appropriate placement for the student.

## ORDER

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

1. Issues #1, #2, #4, #6 and #7 are **dismissed** with prejudice.
2. Within ten (10) school days from the date of this Order, DCPS provide a one-on-one aide/tutor for the student during the student's Transition class for one (1) hour per week until the end of the second quarterly marking period. The one-on-one aide/tutor is to assist the student in mastering the short-term goals included in her May 29, 2012

postsecondary transition plan, filling out applications for auto mechanics programs and/or other jobs of interest, conducting mock interviews with the student, accessing and reading the web sites of interest to the student recommended in the student's August 10, 2012 Vocational Evaluation and reading the sources of interest to the student listed in the student's August 10, 2012 Vocational Evaluation.

3. Within ten (10) school days from the date of this Order, DCPS provide a one-on-one aide/tutor for the student during the student's Learning Lab class for one (1) hour per week for the 2012-2013 school year. The one-on-one aide/tutor is to provide assistance for the student for any class in which the student is enrolled which has more than 15 students or does not have a special education teacher.
4. Within fifteen (15) school days from the date of this Order, DCPS identify and provide an expert to assist the School A SEC and the student's teachers in developing appropriate accommodations and modifications for the student to address her visual and auditory processing deficits and low memory functioning. The student's teachers and the SEC must consult with the expert for three (3) hours during the month of September 2012, two (2) hours during the month of November 2012 and one (1) hour during the month of January 2013.
5. Within ten (10) school days following the September 2012 consultation, DCPS must hold an IEP Team meeting to discuss any modifications and accommodations recommended by the expert and, if necessary, revise the student's IEP to include the accommodations and modifications the student needs to address her visual and auditory processing deficits and low memory functioning.
6. All other 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: August 29, 2012

Melanie Byrd Chisholm
Hearing Officer