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

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: November 23, 2012
v.	)	Hearing Officer: Virginia A. Dietrich
Integrated Design Electronic Academy Public Charter School (IDEA PCS)	)	Case No: 2012-0708 (Case No. 2012-0663 consolidated)
Respondent.	)	Hearing Dates : 11/05/12 Room: 2009 11/07/12 Room: 2006

OSSE STUDENT HEARING OFFICE 2012 NOV 23 PM 5: 16

HEARING OFFICER DETERMINATION

Background

Petitioner, the parent of [redacted], filed two separate due process complaints alleging that Integrated Design Electronic Academy Public Charter School ("IDEA PCS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA"). By Order dated 10/17/12, the first filed complaint was consolidated with the second filed complaint. All of the issues in both complaints, except for the one issue that was withdrawn at the beginning of the due process hearing, were litigated and will be addressed in this Hearing Officer Determination.

Petitioner specifically alleged that while Student attended IDEA PCS as a special education student during the 2011-2012 school year, (1) IDEA PCS failed to convene a manifestation determination review ("MDR") meeting after Student was suspended for more than 10 school days, (2) IDEA PCS failed to provide Student with an interim alternative placement or an appropriate interim alternative placement for the three days of suspension that exceeded Student's tenth day of suspension, (3) IDEA PCS failed to implement Student's 05/17/11 Individualized Education Program ("IEP") by failing to provide Student with all of his prescribed special education services and by failing to implement Student's Behavior Intervention Plan, and (4) IDEA PCS failed to develop an IEP on 06/21/12 that was appropriate

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

due to a lack of accommodations; deficits in baselines, goals, and objectives in reading, writing, mathematics, emotional/social/development, speech-language, and the transition plan; and insufficient goals, objectives and related services in Extended School Year("ESY"). For relief, Petitioner sought a determination that Student had been denied a FAPE and an array of tutoring services as compensatory education.

IDEA PCS asserted that it had not denied Student a FAPE because Student had not been suspended for more than 10 days during the 2011-2012 school year, thus obviating the need for a MDR and an interim alternative placement; that it had made Student's IEP services available to Student during the 2011-2012 school year and any missed services were due to Student's unexcused absences from school or class; and that the IEP that was developed on 06/21/12 was appropriate, agreed to by Petitioner, developed after the conclusion of the regular school year and could not possibly be deemed inappropriate with resulting harm because Student failed to attend ESY services over the summer of 2012 and Student did not attend IDEA PCS during the subsequent school year.

Parties were given an opportunity to settle the case at the outset of the due process hearing, but were unable to settle.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The first complaint, Case No. 2012-0663, was filed on 09/21/12 and contained six allegations that IDEA PCS had denied Student a FAPE. This Hearing Officer was assigned to Case No. 2012-0663 on 09/25/12. IDEA PCS timely filed a response to the complaint on 10/01/12 that addressed all of the issues in the complaint. A prehearing conference was held on 10/04/12 and a Prehearing Order was issued on 10/09/12.

Case No. 2012-0663 was placed on the expedited hearing calendar with an initial hearing date of 10/22/12, since three of the allegations were disciplinary in nature and mandated an expedited hearing, pursuant to 34 C.F.R. 300.532. The three disciplinary issues were withdrawn by Petitioner on 10/04/12; therefore, Case No. 2012-0663 was placed on the non-expedited hearing calendar with a 30-day resolution period that ended on 10/21/12, a 45-day timeline to issue the decision that began on 10/22/12 and a final decision due date of 12/05/12. The case was then scheduled for a hearing on 11/05/12. Petitioner's intent in withdrawing the disciplinary allegations and subsequently filing a second complaint that contained the disciplinary allegations was to allow the expedited hearing to take place on 11/05/12, a later and more convenient date

for Petitioner than 10/22/12, which also would have allowed the hearing to take place within 20 school days of the filing of the complaint.[2]

A second complaint was filed on 10/10/12 and assigned to the Hearing Officer on 10/16/12 as Case No. 2012-0708. A prehearing conference took place on 10/22/12 in Case No. 2012-0708 and a Prehearing Order was issued on 10/24/12. Case No. 2012-0708 contained the same three disciplinary allegations that had been withdrawn in Case No. 2012-0663, and mandated an expedited hearing within 20 school days of the filing of the complaint; i.e. no later than 11/13/12. A formal response to Case No. 2012-0708 was not filed by IDEA PCS; however, the two cases were ultimately consolidated and the Hearing Officer considered IDEA PCS' response to Case No. 2012-0708 as timely filed since IDEA PCS had timely addressed the identical disciplinary issues in its response to Case No. 2012-0663.

When Petitioner filed Case No. 2012-0708, the complaint was accompanied by a motion to consolidate the two cases. By Order dated 10/17/12, Petitioner's motion was granted and Case No. 2012-0663 was consolidated with Case No. 2012-0708 since Case No. 2012-0708 had the earlier decision due date of 11/27/12. The Prehearing Order issued on 10/24/12 in Case No. 2012-0708 contained all of the issues and requests for relief in both cases. Case No. 2012-0663 was administratively closed by Order of Administrative Closure that was issued on 10/17/12.

Petitioner waived the resolution meeting in both cases, but IDEA PCS did not. A resolution meeting did not take place in either Case No. 2012-0663 or Case No. 2012-0708.

The due process hearing was a closed hearing that was scheduled for 11/05/12 and took place on that day, but was unable to be concluded on that day. Petitioner was represented by Nicholas Ostrem, Esq., and IDEA PCS was represented by John Cafferky, Esq. and Robert Falconi, Esq. Petitioner participated for most of the hearing in person; she was excused early for personal reasons. Parties agreed to reconvene on 11/07/12 and the hearing concluded on that day. The final decision in Case No. 2012-0708 was due no later than 10 school days from the conclusion of the hearing; i.e., 11/27/12. See 34 C.F.R. 300.532.

Petitioner presented three witnesses: Petitioner; educational advocate who qualified as an expert in the development of IEPs for students with disabilities ("advocate"); and an expert in compensatory education ("compensatory education expert").

Respondent presented five witnesses: Special education coordinator at IDEA PCS during the first half of the 2011-2012 school year ("First Half-Year SEC"); speech-language pathologist ("SLP"); special education teacher at IDEA PCS ("special education teacher"); special education and English teacher at IDEA PCS ("English teacher"); and special education coordinator at IDEA PCS during the second half of the 2011-2012 school year ("Second Half-Year SEC").

Petitioner's disclosures dated 10/31/12, containing a witness list and Exhibits P-1 through P-38, were admitted into evidence without objection.[3]

---

[2] 34 C.F.R. 300.532(c) mandates that the hearing take place within 20 school days of the filing of the complaint.
[3] Parties agreed to extend the disclosure deadline from 10/29/12 to 10/31/12 due to unexpected Student Hearing Office and government closures on 10/29/12 and 10/30/12 resulting from Hurricane Sandy.

Respondent's disclosures dated 10/31/12, containing a witness list and Exhibits R-1 through R-31, were admitted into evidence without objection. At the due process hearing, Respondent's Exhibit R-25-AA was added as an amplifying exhibit to Exhibit R-25-A, without objection.

Parties stipulated to the following facts:

(1) Student attended IDEA PCS during the 2011-2012 school year, but did not attend IDEA PCS during the 2012-2013 school year.

(2) For the 2011-2012 school year, IDEA PCS' regular term ended on 06/15/12 and the Extended School Year ("ESY") term ran from 06/25/12 through 08/10/12.

The four issues to be determined in this Hearing Officer Determination are as follows:[4]

Issue #1 – Whether IDEA PCS denied Student a FAPE by failing to convene a manifestation determination review ("MDR") meeting; specifically, on or about February 29, 2012, Student was suspended for three days following previous suspensions that totaled 10 days during the 2011-2012 school year, and IDEA PCS failed to convene a MDR.

Issue #2 – Whether IDEA PCS denied Student a FAPE by failing to provide Student with an interim alternative placement or an appropriate interim alternative placement when Student was suspended on or about February 29, 2012 after Student had already been suspended for 10 days during the 2011-2012 school year.[5]

Issue #3 – Whether IDEA PCS denied Student a FAPE by failing to implement Student's 05/17/11 IEP during the 2011-2012 school year; specifically, IDEA PCS (a) failed to provide Student with any specialized instruction outside of general education in English, (b) failed to provide Student with all of the specialized instruction outside of general education in math and all of the specialized instruction outside of general education in science, that was required by the IEP, (c) failed to provide Student with any of the specialized instruction outside of general education in social studies that was required by the IEP, (d) failed to provide Student with all of the counseling services that was required by the IEP, (e) failed to provide Student with all of the speech-language services that was required by the IEP, and (f) failed to implement Student's Behavior Intervention Plan ("BIP").[6]

Issue #4 – Whether IDEA PCS denied Student a FAPE by failing to develop an appropriate IEP on 06/21/12; specifically, the IEP contained (a) inappropriate baselines in math;

---

[4] The issue of whether IDEA PCS denied Student a FAPE by failing to provide complete access to Student's records was withdrawn without prejudice by Petitioner at the due process hearing. Respondent did not object to a dismissal without prejudice; therefore, the issue was dismissed without prejudice. Specifically, Petitioner had alleged that she had requested Student's school records in writing on 01/03/12, 02/08/12, and 05/08/12, and made an oral request for records on 05/18/12, but Petitioner had not received all of Student's records. This issue was raised in Case No. 2012-0663.

[5] This issue consolidated Issues #2 and #3 of the second complaint filed on 10/10/12.

[6] The entire issue was raised in Case No. 2012-0663 and consolidated into Case No. 2012-0708.

(b) inappropriate goals, objectives, and/or baselines in reading; (c) inappropriate goals, objectives, and/or baselines in written expression, (d) inappropriate baselines in speech-language; (e) inappropriate goals, objectives, and baselines in emotional/social/behavioral development; (f) insufficient accommodations; (g) insufficient goals and objectives and related services in Extended School Year ("ESY"), and (h) inappropriate goals and objectives, baselines, and transition services, in the post-secondary transition plan.[7]

For relief, Petitioner requested a finding of a denial of a FAPE on the issues presented and the following compensatory education: 60 hours of independent tutoring in reading and written language by a provider chosen by Petitioner; 75 hours of independent tutoring in math by a provider chosen by Petitioner; 55 hours of independent counseling/mentoring by a provider chosen by Petitioner; 12 hours of independent tutoring in speech-language pathology by a provider chosen by Petitioner; a new laptop computer (Apple or PC) of Petitioner's choosing with Microsoft Office Student Suite; and a gift card to Best Buy to purchase appropriate software and accessories.[8]

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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. Student is a [redacted] resident of the District of Columbia who attended IDEA PCS during the 2011-2012 school year where he received special education services as a 10th grade student.[9]

#2. On 05/17/11, an IEP was developed that served as the basis for the provision of special education services for Student during the 2011-2012 school year. The IEP prescribed the following services: 13 hours/week of specialized instruction outside of general education in the core subjects of English, mathematics, science and social studies; 5 hours/week of specialized instruction inside of general education; 3.5 hours/week of specialized instruction outside of general education in reading; 5.5 hours/week of specialized instruction outside of general education in mathematics; 1.5 hours/week of behavioral support services outside of general education; and .75 hours/week of speech-language pathology services outside of general education. The IEP contained specific goals in the areas of mathematics, reading, written expression, speech-language, and emotional/social/behavioral development.[10]

#3. During the 2011-2012 school year, only one of the written behavior referrals that Student received resulted in a suspension. The other behavior referrals resulted in Saturday school or lunch detention as a consequence for inappropriate behavior in school. The incident

[7] The entire issue was raised in Case No. 2012-0663 and consolidated into Case No. 2012-0708.
[8] The request for relief was identical in Case No. 2012-0663 and Case No. 2012-0708.
[9] R-15, Stipulation #1.
[10] R-15.

that led to a suspension occurred 30 minutes prior to the end of the school day on 01/24/12, and Student was suspended for the following five school days.[11] Student's reprimands for possession of a cell-phone in school[12] did not result in Student being suspended, either formally or de facto.[13] During the 2011-2012 school year, Student was not suspended from school for more than ten days.[14]

#4. During the 2011-2012 school year, Petitioner drove Student to school on a regular basis; however, Student still had many unexcused absences from school and class.[15] As a result of Student's voluntary and unexcused absences, Student missed the opportunity to be provided with the specialized instruction and related services that were offered by IDEA PCS. IDEA PCS was not required to make up the services that Student missed as a result of unexcused absences.[16]

#5. Student's absences from school contributed to his failing grades.[17] Student began the 2011-2012 school year at IDEA PCS with fairly good attendance and fairly good grades.[18] During the first advisory, Student had all passing grades except for an "F" in English, and during the 2nd advisory, Student had all passing grades except for an "F" in Spanish.[19] However, by the end of the third advisory and commensurate with Student's declining attendance, Student's grades declined to an "F" in Spanish, Geometry and Principles of Technology. By the end of the 4th advisory, Student had received a total of five grades of "F," in Spanish, Geometry, Health and Physical Education, Earth Science and Principles of Technology and it was during the 4th advisory that Student missed the most school. Petitioner opted to keep Student out of school for safety reasons for about two and a half weeks in May 2012, and after that, Student attended school intermittently until the school year ended on 06/5/12.[20] Student's grades reflected that Student received educational benefit from the instruction provided when he was present to receive the instruction.[21]

#6. When Student was present in school and in the classroom during the first semester of the 2011-2012 school year, IDEA PCS provided Student with all of the specialized instruction outside of general education that was required by Student's IEP in the core subject areas of science, math, English and reading, every day that school was in session.[22] Specialized instruction was provided by a highly qualified special education teacher in a self-contained classroom;[23] this delivery of specialized instruction in core subjects fulfilled the setting requirement of the 05/17/11 IEP, i.e., that it be provided outside of general education.

---

[11] P-19 through P-25, F-26-6, First Half-Year SEC, special education teacher.
[12] Petitioner.
[13] Second Half-Year SEC.
[14] First Half-Year SEC, Second Half-Year SEC.
[15] Petitioner, Second Half-Year SEC, R-25, R-25, R-25-AA.
[16] First Half-Year SEC.
[17] Petitioner, special education teacher, English teacher, First Half-Year SEC, Second Half-Year SEC.
[18] Special education teacher, First Half-Year SEC, Second Half-Year SEC, R-10-6.
[19] R-10-6.
[20] Petitioner, special education teacher, Second Half-Year SEC, R-25-AA.
[21] Second Half-Year SEC.
[22] Special education teacher, English teacher.
[23] Special education teacher.

#7. When the 05/17/11 IEP was developed, each core subject class lasted 70 minutes and the number of class hours of specialized instruction specified in the IEP was based on 70-minute class periods. At the beginning of the second semester of the 2011-2012 school year which occurred in late January 2012, IDEA PCS reduced all class periods to 50 minutes, in response to a mandate by the Public School Charter Board to equalize all class periods so that students could receive Carnegie credits in elective subjects as well as core subjects. The overall reduction in time per class resulted in a reduction in the amount of class time that Student received specialized instruction in all of his core subjects; for example, during the first semester, Student received 5.5 hours/week of specialized instruction in mathematics whereas Student received only 4.5 hours/week of specialized instruction in mathematics during the second semester.[24] Despite the reduction in class time per course, special education students were able to receive Carnegie credits in all subjects.[25] For the second semester of the 2011-2012 school year, IDEA PCS offered Student specialized instruction outside of general education in science, math, English and reading, in conformity with the IEP to the maximum extent allowed by the Public Charter School Board, an entity that regulated IDEA PCS in its provision of special education services.

#8. From September 2011 until the end of the 2011-2012 school year, speech-language pathology services were made available to Student by IDEA PCS on the dates and times Student was pre-scheduled to receive the services except for once when the speech-language pathologist was unavailable and three times when Student was unavailable due to school wide testing.[26] If Student was absent or unavailable because he wasn't in school or in his assigned class and couldn't be located in one of the common areas of the school, he did not receive speech-language services.[27] When Student was present in school and in the classroom, IDEA PCS provided Student with his IEP requirements of .75 hours/week of speech-language services in a self-contained special education classroom. On 14 documented occasions when Student received weekly speech-language pathology services, Student received 60 minutes/week of services although the IEP specified only .75 hours/week.[28] The extra 3.5 hours of speech-language services compensated for the four 45 minute sessions missed by Student due to the unavailability of the speech-language pathologist and Student's unavailability while testing. The numbers of hours of speech-language services and the setting in which the services were provided fulfilled the IEP service hours and the IEP setting requirement that Student receive .75 hours/week of speech-language services outside of general education.[29]

#9. The 05/17/11 IEP did not mandate that Student take a class in social studies for the 2011-2012 school year; rather, the 05/17/11 IEP simply mandated that specialized instruction should be provided in all of the core subjects that Student was taking.[30] Student's 05/17/11 IEP did not contain any goals in social studies and Student's 2011-2012 class schedule did not include a social studies class;[31] therefore, IDEA PCS was not required to provide Student with specialized education in social studies during the 2011-2012 school year.

---

[24] Special education teacher, Second Half-Year SEC.
[25] Special education teacher.
[26] SLP, R-20, R-20-A.
[27] SLP, R-20.
[28] SLP, R-20, R-20-A.
[29] SLP, First Half-Year SEC.
[30] Special education teacher, Second Half-Year SEC, R-15-7.
[31] R-9, R-15.

#10. Student received all of the counseling services required by his IEP outside of general education during the 2011-2012 school year when he was present to receive the services.[32] Although the available service tracker records do not indicate that Student received behavioral support services from 10/11/11 through 02/12/12, the service tracker records are not the complete record of the services that Student received because the school had difficulty with getting the behavioral support services provider to input the service tracker records into the database.[33]

#11. At the time the 05/17/11 IEP was written, a Behavior Intervention Plan was being implemented during the 2010-2011 school year and the 05/17/11 IEP required that implementation of the Behavior Intervention Plan be tracked daily.[34] The targeted areas for the behavior intervention plan included staying on task, responding appropriately to adults and peers, completing short timed assignments, setting attainable goals, seeking assistance when needed and modeling appropriate behaviors. During the 2011-2012 school year, the behaviors that the Behavior Intervention Plan was designed to address had been curtailed. Although Student incurred minor behavior infractions, the infractions were consistent with the behaviors of other students and did not rise to a level that warranted implementation of the Behavior Intervention Plan. Therefore, it was not necessary for IDEA PCS to implement Student's Behavior Intervention Plan during the 2011-2012 school year.[35]

#12. The IEP team that included IDEA PCS staff, Petitioner and Petitioner's Attorney, met on 05/15/12 and drafted an IEP. At the end of the IEP meeting, Petitioner's Attorney requested changes to the IEP that included itemizing goals, updating the baseline data and revising the transition plan. There was no disagreement among members of the team about the objectives. IDEA PCS revised the IEP as requested by Petitioner's Attorney and sent the revised IEP to Petitioner's Attorney three times, beginning on 05/22/12, requesting a confirmation of the sufficiency and appropriateness of the revised IEP. When Petitioner's Attorney failed to respond to the e-mails from the SEC Second Half-Year in writing or by telephone, IDEA PCS finalized the IEP on 06/21/12.[36] All of the goals, objectives and baselines in all parts of the 06/21/12 IEP were sufficient, appropriate and based on the data provided by Student's teachers and the services providers who worked with Student every day. If Student met the IEP goals, it would allow him to benefit educationally.[37]

#13. The regular school year ended on 06/15/12. Extended School Year ("ESY") services began on 06/25/12 and ended on 08/10/12.[38] The IEP that was finalized on 06/21/12 prescribed ESY services from 06/25/12 through 08/10/12 that consisted of specialized instruction outside of general education for 8 hours/week, with goals in the academic areas of mathematics and reading.[39] Even though IDEA PCS offered ESY services to Student as part of his special

---

[32] First Half-Year SEC, Second Half-Year SEC, R-22.
[33] First Half-Year SEC.
[34] R-15-7.
[35] Special education teacher, First Half-Year SEC, Second Half-Year SEC.
[36] Second Half-Year SEC, R-19-7.
[37] Special education teacher, Second Half-Year SEC.
[38] Stipulation #2.
[39] R-18-12.

education services for the 2011-2012 academic year, Student did not attend because Petitioner opted not to send Student to ESY so that Student could work even though it was possible for Student to work a summer job and still attend summer school.[40]

#14. The 06/21/12 IEP did not contain a graphic organizer as an accommodation. A request for a graphic organizer was not made by any IDEA PCS staff, Petitioner or Petitioner's Attorney at the IEP meeting on 05/15/12[41] nor was the need for Student to have a graphic organizer indicated in Student's most recent psycho-educational evaluation.[42]

#15. During the summer of 2012, Student received a scholarship to a private school and has been attending the private school since the beginning of the 2012-2013 school year with the IEP that was finalized by IDEA PCS on 06/21/12. The IEP is currently being used by the private school to provide Student with special education services and Petitioner is satisfied with the services that the private school is providing in accordance with the 06/21/12 IEP.[43]

Discussion/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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

To comply with the overall purpose of the IDEA, all local education agencies (LEA) in the District of Columbia must ensure that all children with disabilities, ages three to twenty-two, who are residents or wards of the District of Columbia, have available to them a FAPE and that the rights of these children and their parents are protected. 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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

[40] Special education teacher.
[41] Second Half-Year SEC.
[42] R-5.
[43] Stipulation #1, Petitioner.

process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether IDEA PCS denied Student a FAPE by failing to convene a manifestation determination review ("MDR") meeting; specifically, on or about February 29, 2012, Student was suspended for three days following previous suspensions that totaled 10 days during the 2011-2012 school year, and IDEA PCS failed to convene a MDR.

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the Local Education Agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine, (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the LEA's failure to implement the IEP. If the relevant members of the IEP Team determine that either condition exists, the conduct must be determined to be a manifestation of the child's disability and certain procedural rights attach. 34 C.F.R. 300.530(e).

For purposes of removals of a child with a disability from the child's current educational placement for disciplinary reasons under the IDEA, a change of placement occurs if the removal is for more than 10 consecutive school days or the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than 10 school days in a school year. 34 C.F.R. 300.536.

Petitioner failed to meet her burden of proof that Student had been suspended for more than 10 days during the 2011-2012 school year.

The credible and consistent testimony among Petitioner, First Half-Year SEC, Second Half-Year SEC, and the special education teacher was that Student was suspended for five days as the result of an incident that occurred on 01/24/12.

Petitioner's testimony that Student was suspended on three occasions other than the 01/24/12 incident, for having or using his cell-phone in school was vague, unconvincing and lacking in credibility; Petitioner couldn't remember the dates of the suspensions, she generalized that every cell-phone infraction automatically resulted in a mandatory three day suspension, and Petitioner indicated that she had never received a suspension letter for the cell-phone incidents although she did receive a letter of suspension for the incident that occurred on 01/24/12.

The behavior incident referrals in the record,[44] other than the 01/24/12 behavior incident referral, clearly indicated that suspension was not the action taken by the school in response to Student's inappropriate behaviors. Although it was likely that Student incurred several reprimands for illegal use or possession of a cell-phone in school, as testified to by Petitioner, it was not likely that Student was suspended for these infractions. The testimony of the Second Half-Year SEC was more credible that possession of a cell-phone was not an infraction that

[44] R-26.

resulted in suspension. Furthermore, none of the written behavior incident referrals documented a cell-phone infraction.

Whether an in-school suspension counts as a day of suspension depends on the unique circumstances of each case. Under the IDEA, an in-school suspension is not considered a part of the days of suspension addressed in 34 C.F.R. 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. See Federal Register Comments, Vol. 71, No. 156, Rules and Regulations p. 46715.

There was no evidence in the record that when Student received Saturday school or detention during his lunch period, Student was denied the opportunity to participate in the general education curriculum or that he failed to receive the services in his IEP or that he was denied the opportunity to participate with nondisabled children to the extent he would have otherwise. Even more unconvincing in terms of Petitioner meeting her burden of proof on this issue was Petitioner's attempt to establish that Student had been suspended for more than 10 days based on a review of his attendance record for classes, suggesting quite unconvincingly that the "U" for unexcused absence was really a "S" for suspension, although not marked as such.[45]

Overall, the preponderance of evidence firmly established that Student only had been suspended from school for a total of five days during the 2011-2012 school year. As such, IDEA PCS was not required to convene a manifestation determination review meeting on behalf of Student. Petitioner failed to meet her burden of proof on this issue.

The second issue to be determined is whether IDEA PCS denied Student a FAPE by failing to provide Student with an interim alternative placement or an appropriate interim alternative placement when Student was suspended on or about February 29, 2012 after Student had already been suspended for 10 days during the 2011-2012 school year.

School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement). 34 C.F.R. 300.530(b).

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must ensure that a child continues to receive educational services that enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. 300.530(c), 300.530(d)(1).

[45] See R-25-AA, testimony of Petitioner.

As previously determined herein, Petitioner failed to establish by a preponderance of the evidence that Student had been suspended for more than 10 days during the 2011-2012 school year. Therefore, IDEA PCS was not required to provide Student with an interim alternative placement during the 2011-2012 school year. Petitioner failed to meet her burden of proof on this issue.

The third issue to be determined is whether IDEA PCS denied Student a FAPE by failing to implement Student's 05/17/11 IEP during the 2011-2012 school year; specifically, IDEA PCS (a) failed to provide Student with any specialized instruction outside of general education in English, (b) failed to provide Student with all of the specialized instruction outside of general education in math and all of the specialized instruction outside of general education in science, that was required by the IEP, (c) failed to provide Student with any of the specialized instruction outside of general education in social studies that was required by the IEP, (d) failed to provide Student with all of the counseling services that was required by the IEP, (e) failed to provide Student with all of the speech-language services that was required by the IEP, and (f) failed to implement Student's Behavior Intervention Plan ("BIP").

As soon as possible after the development of the IEP, IDEA PCS must ensure that special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Petitioner failed to meet her burden of proof on the totality of this issue. The testimony provided by IDEA PCS' witnesses supported IDEA PCS' position that IDEA PCS had fully implemented Student's 05/17/11 IEP, and their testimony was given the greatest evidentiary weight. Petitioner offered no testimonial proof on this issue.

During the first half of the 2011-2012 school year, class periods in the core subjects lasted for 70 minutes and Student received the amount of specialized instruction in all subject areas that was required by his IEP. However, during the second half of the 2011-2012 school year, class periods in core subjects were reduced to 50 minutes/class per the mandate of the Public Charter School Board, so that it became functionally impossible for IDEA PCS to comply with providing the total amount of specialized instruction required by the IEP. To the extent that it was legally able to do so, IDEA PCS provided Student with the amount of specialized instruction that was required by Student's IEP. Student's IEP should have been amended to reflect the difference in the amount of services hours of specialized instruction resulting from the mandate of the Public Charter School Board, but it was not.

It is well established that not every failure to provide services according to a student's IEP amounts to an IDEA violation, but a material failure to implement an IEP violates the IDEA. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. A showing of educational harm is not required for a material failure. *See Department of Education, State of Hawaii v. R.F. by Pauline F.,* 57 IDELR 197 (2011), *Catalan et al., v. District of Columbia,* 478 F Supp 2d 73 (2007), 47 IDELR 223.

The Hearing Officer concludes that IDEA PCS' failure to provide Student with all of the prescribed specialized instruction that was required by the IEP during the second half of the 2011-2012 school year was not a material failure to implement the IEP because the reduction in service hours was a school wide reduction in service hours applicable to all students so that students could earn Carnegie credits in elective courses as well as core courses, per the explicit mandate of the Public Charter School Board. And, in spite of the reduced class time periods and resulting decrease in the amount of IEP service hours received, Student still was capable of earning Carnegie credits. There was no demonstrated harm to Student by the reduction in specialized instruction service hours; there was no loss of educational benefit to Student or impediment to him receiving a FAPE. Moreover, Student missed so much school during the second semester due to his own volition that it would have been impossible to ascertain any measureable negative impact from the reduction in specialized instruction service hours. Student was not denied a FAPE as a result of reduced amounts of specialized instruction that was provided during the second semester of the 2011-2012 school year resulting from the school wide policy of shorter class periods.

The testimony of the English teacher was clear, credible and uncontroverted that when Student was present in school and in class, Student was provided with all of the specialized instruction in English and reading that was required by the IEP. The English teacher provided specialized instruction in the self-contained classroom of the special education teacher and this setting qualified as an outside of general education setting. The special education teacher credibly corroborated the testimony of the English teacher. As determined herein, IDEA PCS was not responsible for making up services to Student when he had unexcused absences. Petitioner offered no evidence to the contrary. Petitioner failed to meet her burden of proof that IDEA PCS failed to provide Student with any specialized instruction outside of general education in English and reading.

The testimony of the special education teacher was clear, credible and uncontroverted that she provided all of the specialized instruction to Student that was required by Student's IEP in math and science in the self-contained classroom, when Student was available to receive services. Petitioner offered no evidence to the contrary. Petitioner failed to meet her burden of proof that IDEA PCS failed to provide Student with all of the specialized instruction outside of general education in science and math that was required by the IEP.

As determined herein, IDEA PCS was not required to provide Student with any specialized instruction in social studies because Student did not take a social studies class during the 2011-2012 school year and Student's IEP did not contain any IEP goals in social studies. Petitioner failed to meet her burden of proof that IDEA PCS was required to and failed to provide Student with specialized instruction in social studies during the 2011-2012 school year.

Petitioner, with the burden of proof, failed to show by a preponderance of the evidence that Student did not receive all of the behavioral support services that were required by his IEP. The testimony of the First Half-Year SEC and the Second-Half Year SEC was credible that Student received the behavioral support services required by the IEP when he was in school and available to receive services. The testimony of the First Half-Year SEC was given more weight than the service tracker records that were admitted into evidence. According to the credible

testimony of the First Half-year SEC, the service tracker records did not accurately reflect the services that were actually provided because of problems with data entry by the service provider. Petitioner offered no stronger proof to the contrary.

Petitioner also failed to prove by a preponderance of the evidence that IDEA PCS failed to provide Student with all of the speech-language services required by the IEP. Student received speech-language services when he was in school and available to receive services. On four occasions, speech-language services were not provided to Student due to the unavailability of the speech-language pathologist and due to Student's unavailability during school-wide testing; however, when Student was present for speech-language services, he received more than the .75 hours/week prescribed by the IEP. The extra instruction made up for the four occasions when Student failed to receive services. The Hearing Officer determines that Student received all of the speech-language services required by his IEP.

Although a Behavior Intervention Plan was included as part of Student's 05/17/11 IEP, the record was clear, and the testimony of the First Half-Year SEC, Second Half-Year SEC and the special education teacher was credible and uncontroverted that Student's behavior during the 2011-2012 school year did not warrant implementation of a Behavior Intervention Plan. The behaviors that the Behavior Intervention Plan was designed to address had all been curtailed during the previous school year; therefore, implementation of the Behavior Intervention Plan was not necessary. Petitioner offered no proof to the contrary or that IDEA PCS' failure to implement the Behavior Intervention Plan during the 2011-2012 school year resulted in the denial of an educational benefit or the loss of a right to a FAPE. The Hearing Officer concludes that Student was not denied a FAPE by IDEA PCS' failure to implement Student's Behavior Intervention Plan during the 2011-2012 school year.

The fourth issue to be determined is whether IDEA PCS denied Student a FAPE by failing to develop an appropriate IEP on 06/21/12; specifically, the IEP contained (a) inappropriate baselines in math; (b) inappropriate goals, objectives, and/or baselines in reading; (c) inappropriate goals, objectives, and/or baselines in written expression, (d) inappropriate baselines in speech-language; (e) inappropriate goals, objectives, and baselines in emotional/social/behavioral development; (f) insufficient accommodations; (g) insufficient goals and objectives and related services in Extended School Year, and (h) inappropriate goals and objectives, baselines, and transition services, in the post-secondary transition plan.

An IEP is a written statement for each child with a disability that must include a statement of the child's present levels of academic achievement and functional performance; a statement of measureable annual goals, including academic and functional goals designed to meet the child' needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a). Additionally, for any student who has reached the age of 16, the IEP must include appropriate measureable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services (including course of study) needed to assist the child in reaching those goals. 34 C.F.R. 300.320(b).

In determining whether an IEP is appropriate and whether the school system has fulfilled its obligations to provide a student with a FAPE, the proper inquiry is twofold: (1) whether the State has complied with the IDEA's procedural requirements in developing and implementing the IEP and (2) whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. *See Board of Educ. v. Rowley,* 458 U.S. 176, 206, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).

Petitioner failed to meet her burden of proof that any of the goals, objectives or baselines in any part of the IEP that was drafted on 05/15/12 and finalized on 06/21/12 was inappropriate. At the IEP meeting on 05/15/12, Petitioner's Attorney voiced concerns and requested changes to the baselines, goals and transition plan in the draft IEP. The requested changes were promptly made by the Second Half-Year SEC and thrice sent to Petitioner's Attorney for review and/or approval. As a result of Petitioner's Attorney's failure to respond to correspondence and a telephone call from the Second Half-Year SEC about the draft IEP, IDEA PCS finalized the IEP on 06/21/12. The direct testimony of the SEC was very strong and credible on these points and her testimony held up under cross-examination.

Petitioner presented evidence to the contrary; i.e., (1) written meeting notes of Petitioner's Attorney who attended the 05/15/12 IEP meeting, (2) subsequent e-mail correspondence from Petitioner's Attorney to the Second Half-Year SEC about revisions to the 05/15/12 draft IEP, and (3) the testimony of the advocate.

The Second Half-Year SEC testified quite credibly that she never received any of the e-mail correspondence from Petitioner's Attorney, despite doubling back into the e-mail database to make sure that she had not overlooked receipt of the e-mail correspondence. The meeting notes and e-mail correspondence of Petitioner's Attorney were not given any weight because Petitioner's Attorney chose to litigate the case rather than appear as a witness; therefore, he could not testify and be cross-examined by the opposing party. District of Columbia Bar Rules of Professional Conduct Rule 3.7 prohibits an attorney from acting as an advocate in a trial in which the lawyer is likely to be a necessary witness, except whether the testimony relates to an uncontested issue. In this case, the issue was contested. Moreover, the meeting notes and e-mail correspondence were given no weight because they were made in anticipation of litigation; there was credible testimony by the Second Half-Year SEC that Petitioner's Attorney made comments at the 05/15/12 IEP meeting about suing IDEA PCS in the past and insinuating that a lawsuit might be forthcoming if the requested changes to the IEP were not made.

The main evidence presented on this issue by Petitioner was the testimony of the advocate, who qualified without objection as an expert in the development of IEPs for students with disabilities. The advocate's testimony was totally unreliable, unconvincing, incredulous and given no weight. The advocate's testimony that the baselines, goals and objectives in the IEP were inappropriate and not designed to provide Student with educational benefit, was based on pure speculation. The advocate had no personal knowledge of the Student, had never met Student or talked with Student's service providers at IDEA PCS, had never observed Student in class, had never attended an IEP meeting, and had never provided input into the development of any of the IEP goals or objectives.

The advocate's testimony that the objectives, baselines and goals in the 06/21/12 IEP were insufficient to provide educational benefit because Student's academic test scores were below two standard deviations, was without merit. The advocate admitted that standard deviation scores varied among testing instruments, that she did not know which testing instrument was used to obtain the scores reported in the baselines of the IEP, and that she was uncertain whether in fact Student's testing scores were actually below two standard deviations. As such, her expert opinions and conclusions were meaningless. The advocate's testimony on all aspects of the inappropriateness of Student's IEP were conjectures, based on broad generalizations, and not specific to Student. The advocate admitted that she had no expertise whatsoever in the area of speech-language, yet she opined about the inappropriateness of the speech-language goals in the IEP. These baseless conjectures totally destroyed the advocate's credibility on all aspects of her testimony.

Petitioner also failed to meet her burden of proof that the IEP was inappropriate and not designed to provide educational benefit because it failed to include a graphic organizer as an accommodation. The testimony of the Second Half-Year SEC was totally credible that no request for a graphic organizer was made by any member of the IEP Team at the meeting on 05/15/12. The only evidence in the record to the contrary was the meeting notes of Petitioner's Attorney, which as discussed above, was given no weight in the determination of this issue. There wasn't any evidence in the record that Student even needed a graphic organizer. Petitioner failed to prove that IDEA PCS had committed a procedural violation of the IDEA and that Student was denied a FAPE as a result.

"A procedural violation does not, standing alone, establish a failure to provide a FAPE. An IDEA claim is only viable if those procedural violations affected the student's substantive rights. In the absence of a showing that the child's education was substantively affected, no relief may be awarded. " *See Lesesne v. Dist. Of Columbia,* 447 F.3d 828, 834 (D.C. Cir. 2006).

The ability of the 06/21/12 IEP to confer educational benefit could not be measured through its implementation. The school year ended at IDEA PCS on 06/15/12. Although Student's IEP required ESY services, Petitioner opted not to send Student to school during the summer of 2012. Petitioner opted to let Student work instead. Student did not return to IDEA PCS for the 2012-2013 school year. Even if the IEP was hypothetically inappropriate and not designed to confer educational benefit, which it wasn't, there could be no measureable harm to Student because the school never had the opportunity to implement the IEP.

ORDER

Petitioner failed to meet her burden on proof on all of the issues presented in the complaint. The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

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 U.S.C. §1415(i).

Date: November 23, 2012

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)
Petitioner's Attorney: Nicholas Ostrem, Esq. (electronically)
IDEA PCS' Attorneys: John Cafferky, Esq., Robert Falconi, Esq. (electronically)
SHO (electronically)