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

OSSE
Student Hearing Office
July 16, 2013

STUDENT, a minor, by and through
her Parent[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

SHO Case No:
Erin H. Leff, Hearing Officer

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On May 23, 2013, Petitioner,[2] on behalf of Student ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[3] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a timely Response to Parent's Administrative Due Process Complaint Notice (HO 6) on May 30, 2013.

The instant Complaint includes, among other matters, an alleged failure to hold required manifestation determination meetings. Pursuant to 34 C.F.R. § 300.532(c) such cases are to be

[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Petitioner is Student's aunt and guardian
[3] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

held on an expedited basis. The due process hearing was required to be held within 20 school days of the filing of the complaint, or no later than July 2, 2013. The hearing officer determination ("HOD") must be issued within 10 school days of the hearing, or no later than July 17, 2013. Id. A resolution meeting in an expedited matter is to be held within 7 days of receiving notice of the complaint. In the instant matter the resolution meeting was held within the mandated timeline on May 28, 2013. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 5. Following the Prehearing Conference held on June 5, 2013, I issued a Prehearing Conference Order on June 9, 2013. HO 8.

At all times relevant to these proceedings Petitioner was represented by Roberta Gambale, Esq., and Justin Douds, Assistant Attorney General, represented DCPS.[4] By agreement of the parties, the hearing was scheduled for June 21 and 24, 2013. The hearing was held as scheduled in Room 2003 of Student Hearing Office. The HOD is due on July 15, 2013.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUES

The issues[5] are whether the student has been denied a FAPE due to DCPS' failure to:

1) Identify Student as having an emotional disability from the spring of 2011 through the spring of 2013, until the development of the April 8, 2013 individualized education program ("IEP");

[4] A different AAG initially was designated to represent DCPS. Mr. replaced that AAG within a few days of the filing of the Complaint.

[5] The parties agreed during the prehearing conference that the expedited and non-expedited issues in the instant matter would not be bifurcated for hearing. All issues were heard on an expedited basis.

2) Provide Student sufficient behavioral supports from May 23, 2011 through the filing of this Complaint including the IEPs developed on November 2, 2011, September 17, 2012, March 8, 2013 and April 8, 2013;[6]

3) Provide student a comprehensive re-evaluation during the triennial re-evaluation process in July 2011 by not assessing Student's social-emotional functioning;

4) Develop and/or provide appropriate IEPs and/or placements on or about November 2, 2011, September 17, 2012, March 8, 2013 and April 8, 2013. The IEPs did not provide needed behavioral supports or sufficient instructional supports in all academic areas. The LRE in these IEPs is not the full time, out of general education placement student requires to address her social-emotional and academic issues. The April 8, 2013 IEP also does not provide needed speech-language services or direct occupational therapy services;

5) Provide Student counseling services required by her IEP from March 8, 2013 the date of the filing of the Complaint, May 23, 2013;

6) Provide Student an appropriate transition plan or goals in any IEP from September 17, 2012 forward. The entire plan does not meet IDEA requirements;

7) Hold a manifestation review meeting following Student's expulsion from Paul PCS in 2012.Student was without a placement for 2.5 weeks before she was provided an alternative setting. A functional behavioral assessment ("FBA") was not completed and a behavioral intervention plan ("BIP") was not developed or updated; and

8) Hold a manifestation review meeting following Student's constructive expulsion from IAES in 2012. Student was without a placement for two weeks. A functional behavioral assessment was not completed and behavioral intervention plan was not developed or updated

RELIEF REQUESTED

Petitioner requested:

1) Placement at a full time, non-public school;
2) Independent vocational/ transition assessment, speech-language assessment and occupational therapy assessment;

[6] There is some confusion as to the date of IEPs in the record and identified in the Complaint. The Complaint repeatedly refers to an IEP with the March 8, 2013 date. That is the date an IEP meeting was held. However, there is no IEP dated March 8, 2013 in the record. Subsequent to the March 8, 2013 IEP meeting, two IEPs were developed. One of these IEPs, entered into the record by Petitioner, is dated March 26, 2013. The other IEP, entered into the record by Respondent, is dated April 8, 2013. These two IEPs are very similar but not identical. Each IEP also has inherent, but different, procedural issues. I explain the conflicts and concerns with these IEPs throughout this HOD and my process for reconciling the evidence which I believe is the responsibility of the hearing officer as trier of fact. *See, for example, Prahl v. Prahl*, 627 N.W. 2d 698 (Minn. Ct of App. 2001)

3) Review and revision, if appropriate, of the student's IEP after the assessments are received and reviewed. The revision of the IEP is to include a revision of the student's BIP ; and
4) Compensatory education.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1 Individualized Education Program dated March 26, 2013;
P-2 Individualized Education Program dated September 17, 2012;
P-3 Individualized Education Program dated November 02, 2011;
P-4 Individualized Education Program March 3, 2010;
P-5 Comprehensive Psycho-educational Evaluation dated August 8 and 15, 2012;
P-6 Psychosocial Summary dated October 10, 2012;
P-7 Functional Behavioral Assessment dated February 27, 2013;
P-8 Review of Independent Educational Evaluation dated February 27, 2013;
P-9 Data Evaluation Review dated July 25, 2011;
P-10 Psycho-educational Evaluation dated March 7, 2008;
P-11 Electronic Correspondence to Roberta Gambale from Educational Advocate dated May 10, 2013;
P-12 Electronic Correspondence to DC SEC from Educational Advocate dated April 26, 2013;
P-13 Electronic Correspondence to Educational Advocate from Roberta Gambale dated April 17, 2013;
P-14 Electronic Correspondence to DC SEC from Educational Advocate dated April 16, 2013;
P-15 Electronic Correspondence to Educational Advocate from Roberta Gambale dated April 8, 2013;
P-16 Electronic Correspondence to DC SEC from Roberta Gambale dated March 27, 2013;
P-17 Electronic Correspondence to Roberta Gambale from DC SEC dated March 26, 2013;
P-18 Electronic Correspondence to DC SEC from Roberta Gambale dated March 20, 2013;
P-19 Electronic Correspondence to DC SEC from Roberta Gambale dated March 20, 2013;
P-20 Electronic Correspondence to Roberta Gambale from DC SEC dated March 11, 2013;
P-21 Electronic Correspondence to Roberta Gambale from DC SEC dated March 8, 2013;
P-22 Evaluation Request dated March 4, 2013;
P-23 Records Request dated March 28, 2013;

P-24 Discipline Details dated September 9, 2012;
P-25 Parent Rating-Short Form dated February 27, 2013;
P-26 Notice of Final Disciplinary Action dated January 22, 2013;
P-27 Report to Parent on Student Progress dated January 25, 2013;
P-28 Report to Parent on Student Progress dated February 28, 2013;
P-29 Report to Parent on Student Progress dated March 29, 2013;
P-30 DC CAS scores Grade 8 dated April 17, 2012;
P-31 Report to Parent on Student Progress March 30, 2012;
P-32 Report to Parent on Student Progress June 14, 2012;
P-33 Student Schedule dated June 15, 2012;
P-34 Attendance Summary dated August 15, 2011to June 15, 2012;
P-35 Advisory 2 Progress Report dated December 5, 2011;
P-36 Term Grades dated November 18, 2011;
P-37 Advisory 2 Report Card dated January 20, 2012;
P-38 Advisory 1 Progress Report dated September 25, 2011;
P-39 Advisory 1 Report Card dated October 28, 2011;
P-40 Interim Results English Language Arts undated;
P-41 Interim Results Mathematics undated;
P-42 Advisory 4 Progress Report dated May 12, 2010;
P-43 Compensatory Educational Proposal dated May 12, 2013;
P-44 Curriculum Vitae for Educational Advocate;
P-45 Curriculum Vitae for Transition Specialist;
P-46 Electronic Correspondence to DC SEC from Roberta Gambale dated March 5, 2013;
P-47 Electronic Correspondence to DC SEC from Roberta Gambale dated March 5, 2013;
P-48 Electronic Correspondence to DC SEC from Roberta Gambale dated May 22, 2013;
P-49 Electronic Correspondence to DC SEC from Roberta Gambale dated May 23, 2013;
P-50 Official Notice of Investigation Results dated May 7, 2013;
P-51 CAASS Discipline dated May 13, 2013;
P-52 Student Incident Report dated August 27, 2012 to February 26, 2013;
P-53 Electronic Correspondence to DC Staff from Roberta Gambale dated May 30, 2013;
P-54 Student Report Card 2012-2013 and
P-55 Safety Contract dated March 25, 2013.

Exhibits admitted on behalf of Respondent are:

R 01	Report Card	06/15/2011
R 02	Parental Consent for Re-evaluation	07/01/2011
R 03	Summer School Report Card	08/05/2011
R 04	IEP	11/02/2011
R 05	SLD Disability Worksheet	11/02/2011
R 06	Eligibility Worksheet	11/02/2011

R 07	IEP Meeting Notes	11/02/2011
R 08	Report Card	01/20/2012
R 09	Notice of Infraction	02/07/2012
R 10	Letter Home Regarding Infraction	02/07/2012
R 11	Student Withdrawal Form	02/13/2012
R 12	Brigance Level I Transition Assessments	09/17/2012
R 13	IEP	09/17/2012
R 14	IEE Review Checklist	02/27/2013
R 15	Independent Comprehensive Psychological	08/15/2012
R 16	Independent Social History	10/02/2012
R 17	DCPS Review of Independent Psychological	02/27/2013
R 18	Functional Behavioral Assessment	02/27/2013
R 19	Eligibility Report	03/08/2013
R 20	PWN—Identification	03/08/2013
R 21	MD Disability Worksheet	03/08/2013
R 22	Parental Consent for Re-evaluation	03/08/2013
R 23	IEP Meeting Notes	03/08/2013
R 24	Student Progress Report	03/29/2013
R 25	IEP	04/08/2013
R 26	Behavior Intervention Plan	04/17/2013
R 27	Behavioral Counseling Service Tracker	05/09/2013
R 28	Life-Centered Career Education Knowledge Battery Assessment	05/07/2013
R 29	IEP Meeting Notes	05/10/2013
R 30	Transcript/Letter of Understanding	05/13/2013
R 31	Student Incident Report	05/01/2013
R 32	Admission Withdraw History	05/09/2013
R 33	CV—Dr. School Psychologist	05/13/2013
R 34	Emails Confirming RSM	05/10/2013
R 35	RSM Documents	05/13/2013
R 36	Behavioral Counseling Service Tracker	06/06/2013
R 37	Report Card	06/12/2013
R 38	Notes and Incident Report	06/17/2013
R 39	RSM Notes	05/30/2013
R 40	IEE Authorization Letter	05/30/2013

Exhibits admitted by the Hearing Officer are:[7]

1	Administrative Due Process Complaint Notice filed May 23, 2013
2	Notice of Hearing Officer Appointment of May 24, 2013
3	Prehearing Conference Scheduling Letter (expedited) of May 24, 2013
4	Prehearing Notice dated May 28, 2013
5	Resolution Period Disposition Form for meeting held May 28, 2013

[7] Emails forwarding the following documents to opposing counsel and the hearing officer are filed with the document unless otherwise noted.

6 District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice dated May 30, 2013
7 Resolution Period Disposition Form dated May 30, 2013
8 Prehearing Conference Order dated June 9, 2013
9 Miscellaneous emails
- May 28, 2013 re change in DCPS counsel
- Chain of May 24-28 2013 re scheduling prehearing conference
- 6/5/13 chain re delay in start of PHC
- Chain of 6/12/13 – 6/17/13 re additional time for hearing[8]
- 2 Chains of 6/20 and 6/21/13 re Word list of parties' exhibits
- 6/24/13 Respondent's case citation from closing

10 List of Proposed Hearing Officer Exhibits filed June 12 , 2013

B. Testimony

Petitioner testified and presented the following witnesses:[9]

- Educational Advocate
- Admissions Director, Non-public School

DCPS presented the following witnesses:

- Special Education Coordinator PCS ("PCS SEC")
- Special Education Coordinator, Attending School ("DC SEC")
- Social Worker, Attending School

FINDINGS OF FACT

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

[8] This email and subsequent emails in this list were added to the list of hearing officer exhibits after it was mailed to the parties. The parties were informed at hearing that additional emails/filings after the date of the List of Proposed Hearing Officer Exhibits would be included as part of the hearing officer exhibits.

[9] Petitioner called an additional witness. She testified by telephone. However, in the midst of her direct testimony she revealed that the documents she thought were Respondent's disclosures were not. She did not have a copy of Respondent's disclosures available. My Prehearing Conference Order of June 9, 2013 requires that any witness testifying by telephone have the disclosures available to him/her. I granted Petitioner's counsel request that she be allowed the opportunity to contact her office so that someone in the office could email the disclosures to the witness during her testimony. Petitioner's counsel's office made two attempts to forward the documents and was unable to forward the appropriate documents. Respondent's counsel stated his need to have the exhibits available for cross-examination. As a result of Petitioner's counsel's failure to comply with my Prehearing Conference Order and inability to correct the error, I struck Petitioner's witness testimony in its entirety noting that the failure to comply with my Order in addition to being a failure to comply, resulted in Respondent's inability to cross-examine the witness. Petitioner's Counsel had had the ability to confirm the witness' receipt of the disclosures in advance of the hearing and had not done so. Petitioner's counsel noted her exception to my striking the witness' testimony for the record.

1. Student is years old. Following the death of her mother on February 25, 2011, Student began living with her aunt/guardian, Petitioner herein, and her aunt/guardian's family. Petitioner obtained legal custody on March 17, 2011. Student had to change schools because of the move to Petitioner's house. Petitioner enrolled her in PCS for the last advisory of the 2010-2011 school year, Student's 7th grade year. Prior to that Student had attended DCPS Middle School. Student returned to PCS in the 2011-2012 school year. P 9; Testimony of Petitioner;

2. Student's IEP of February 25, 2011[10] classified her as having a specific learning disability. The IEP required Student receive 60 minutes per day, each, of special instruction in reading and mathematics outside the general education environment and 30 minutes per day of written expression outside the general education environment. She also was to receive 30 minutes of occupational therapy consultation per month. P4; Testimony of PCS SEC

3. PCS does not provide instruction outside the general education environment. Petitioner was informed PCS was an all inclusion school when she enrolled Student. The IEP was not revised to reflect Student's receipt of special instruction in the general education environment until the 2011-2012 school year. During the 2010-2011 school year at PCS Student took 6 classes. She was in an inclusion class for English 7 and Math 7. Each was co-taught by a general education teacher and a special education teacher. Student had two intervention classes that provided intervention/remedial instruction in math and in reading. She also had two general education classes, science and social studies. Student passed five of the six classes based on her 4th advisory grades with two Bs and three Cs. She failed Social Studies and was required to take the class again in summer school. Student earned a B in social studies during summer school, and her behavior, which had been somewhat problematic since her enrollment in PCS, improved. R 1; R 3; Testimony of PCS SEC

[10] This is the IEP with which Student entered PCS.

4. DCPS completed a data evaluation review of Student in July 2011. As part of the data evaluation the Woodcock Johnson test of academic achievement was administered. Student earned scores well below grade level expectation. All of her scores were at the second or third grade level except math calculation which was at the fifth grade level. Student was tested again on the Woodcock Johnson in August 2012. Her scaled scores had fallen in all areas for which comparable data are available other than in applied problems and writing fluency. Her scores, on this second administration of the test, were all at the tenth percentile or lower, and many scores were below the first percentile. P 5; P 9; Testimony of Educational Advocate.

5. Student had behavior issues while at PCS. She often did not attend class and would roam the halls. She also exhibited more significant behavior issues such as inappropriate touching and disruptive behavior. Petitioner received many telephone calls regarding Student's behavior. Some of these calls were routine calls made to all parents, with the intent of keeping parents informed regarding students' progress. Sometimes these calls, for all students including the instant Student, reported good behavior, and sometimes they reported bad behavior. Petitioner often went to PCS, even when not asked to do so, to discuss Student's progress and adjustment. Student appeared to be adjusting to PCS. Student received in-school suspensions while at PCS. P 31; Testimony of Petitioner; Testimony of PCS SEC.

6. An IEP annual review meeting was held at PCS on November 2, 2011. The November 2, 2011 IEP requires Student receive 15 hours of special instruction inside the general education environment each week. It includes goals in mathematics, reading and written expression. The IEP also include 30 minutes of occupational therapy consultative services per month. There is no LRE statement or explanation of the full time inclusive placement in the IEP. PCS is a full inclusion school. P 3; R 7; Testimony of PCS SEC

7. At the November 2, 2011 IEP meeting, the team noted Student was due for a triennial reevaluation. The triennial was completed and an Evaluation Summary Report issued December 5, 2013. The triennial did not include a social emotional assessment because Student was not receiving behavior support. R 6; R 7; Testimony of PCS SEC.

8. On February 7, 2012 Student and other PCS students were found in the bathroom with marihuana. Student was immediately suspended. PCS issued a notification that Student was being recommended for expulsion. The notification describes the process a parent is to follow to request a hearing. PCS did not confirm that Petitioner received the notification. When Petitioner picked Student up on February 7, 2012, PCS staff told her PCS had to determine what rules to follow for the proposed drug related expulsion, and PCS would follow up with Petitioner in 24 hours. This did not occur. Student was not allowed to return to PCS. Petitioner withdrew Student from PCS six days later on February 13, 2012. PCS took no further action regarding the proposed expulsion. R 9; R 10; R 11; Testimony of Petitioner; Testimony of PCS SEC;

9. Petitioner attempted to enroll Student in Neighborhood MS following her withdrawal of Student from PCS. Staff at Neighborhood MS informed Petitioner that Student was on suspension and had to attend IAES.[11] Neighborhood MS indicated it would enroll Student after she completed the required time at Student enrolled at IAES on March 6, 2012 and withdrew on April 30, 2012. She enrolled in Neighborhood MS on May 1, 2012. However, Student did not begin attending Neighborhood MS for approximately one week after the enrollment paperwork was completed because Neighborhood MS required Student meet with the principal and special education coordinator before she began attending classes, R 32; Testimony of Petitioner; Testimony of PCS SEC.

[11] IAES is a school for special education students who are on long term suspension or expulsion.

10. Student entered Attending School on August 27, 2012, the beginning of the 2012-2013 school year. An IEP meeting was held on September 17, 2012. The staff at Attending School recognized Student's skill levels were very low and thought she needed instruction outside the general education environment to help her pull up her skills. The September 17, 2012 IEP required Student receive 60 minutes per day of special instruction each in reading and mathematics outside the general education environment and 30 minutes per day of written expression outside the general education environment. She also was to receive 30 minute of occupational therapy consultation per month. The IEP includes a transition plan with goals in the areas of post-secondary education and training and employment. There also is a section on participation in extracurricular activities and community participation. There are no goals in the area of independent living skills. Student's input for this plan was obtained through the administration of the Brigance Level 1 Transition Assessment. Petitioner did not request a full time special education placement during this meeting. Counseling was not included in the IEP because Student was still adjusting to high school and had only been there about two weeks when the IEP was revised. In her first semester at Attending School, Student earned a B-, a C+ , a C and two Ds. P 2; R 12; R 37; Testimony of Petitioner; Testimony of DC SEC.

11. Before the end of September 2012, Student had a behavior episode, and Petitioner took her to Children's Hospital ("Children's") for evaluation. Following this evaluation, Student spent three weeks at the Psychiatric Institute of Washington after which she returned to Attending School. R 8; Testimony of Petitioner; Testimony of DC SEC.

12. Student was assessed by independent evaluators. The independent evaluations were a comprehensive psycho-educational evaluation completed by Children's in August 2012 and a psycho-social evaluation completed by Hillcrest Children and Family Service in October 2012.

The reports of these assessments were provided to Attending School in January 2013. Following review of these assessments at an IEP meeting held March 8, 2013. P 5; P 6: Testimony of Educational Advocate; Testimony of Petitioner.

13. Student requires intensive special education services in a structured learning environment with a high degree of support and positive feedback. She requires a special education placement with a low student-teacher ratio that is designed to address both her learning disabilities and her social/emotional/behavioral difficulties. P 5; Testimony of Educational Advocate; Testimony of Petitioner.

14. Attending School includes counseling as a related service on a student's IEP if s/he exhibits aggression, destruction of property or the use of profanity.[12] Student's behavior deteriorated after winter break. P 31; An eligibility redetermination meeting was scheduled for March 8, 2013 after Petitioner provided Attending School copies of the independent evaluations. Petitioner had told Attending School about the evaluations in the fall of 2012 but had not provided them, despite Attending School's requests, until February. A Functional Behavioral Assessment was completed after receipt of the independent evaluations. P 7; R 18; R 25; Testimony of DC SEC

15. At the MDT meeting held on March 8, 2013 the MDT reviewed the independent evaluations and a functional behavioral assessment completed by DCPS in February 2013. During this meeting Petitioner requested Student's IEP be changed to a full-time IEP and her placement be changed to a therapeutic environment. Petitioner also requested a Behavior Intervention Plan, a safety plan and an increase in behavior support to 1 hour of counseling per

[12] Student exhibited aggression on more than one instance at Attending School. She also exhibited other significant behaviors at Attending School and/or PCS including inappropriate touching, inciting other students and one possible suicide threat.

week. Following this meeting a new IEP was developed.[13] The new IEP changed Student's classification to Multiple Disabilities including Specific Learning Disability and Emotional Disability. It includes 18 hours per week of special instruction outside the general education environment and 5 hours of special instruction per week inside the general education environment. In addition Student is to receive 30 minutes per week of behavior support services and 30 minutes of occupational therapy consultation per month. Student was successful in elective classes so the team did not include these hours in the special instruction hours Student was to receive. The transition plan included with this IEP indicates Student is interested in becoming a lawyer. Transition goals include identifying colleges and completing job applications. Student's input to this plan was obtained through the Brigance. Petitioner was not in agreement with this IEP and notified DCPS through her counsel's email of March 27, 2013. P 1; P 16; R 12; R 23; R.25 Testimony of Educational Advocate; Testimony of DC SEC.

16. Social Worker at Attending School was willing and able to provide services to Student. Student was placed on Social Workers caseload in April 2013. Social Worker made multiple efforts to provide service to Student. However, she only provided service one time. Student only received one session because Student would refuse to attend, say she did not know the time she was supposed to attend and/or state she would be there for the session and not appear. One session was not provided because Social Worker was unavailable. R 36; Testimony of Social Worker

[13] Petitioner provided a draft IEP dated March 26, 2013 and Respondent provided an IEP dated April 8, 2013. The April 8, 2013 IEP does not include Petitioner's signature. While substantially similar, there are some differences between these IEPs. However, both IEPs include the same number of service hours. The discrepancy in dates may have resulted from a failure to finalize the IEP at the March meeting. The intent was to allow the social worker complete a BIP before finalizing the IEP. I note Petitioner references the April 8, 2013 in Issue 1 of the instant Complaint so I rely on it in the instant HOD, unless otherwise noted, as the IEP reflecting Student's program and services as agreed following the March 8, 2013 meeting.

17. Student's outside social worker developed a safety plan with her. P 55; Testimony of DC SEC.

18. An MDT meeting was held in May 2013 to review the results of occupational therapy, speech/language and transition assessments. A BIP also was reviewed. Student was not found eligible for speech/language or occupational therapy services. R 29; Testimony of Educational Advocate.

19. Student passed all of her second semester classes. She has earned 8 of the 24 Carnegie Units needed for graduation. R 30; R 37; Testimony of DC SEC.

20. Attending School has a full time program for students with emotional disabilities. The program will have three classrooms in the 2013-2014 school year. Each classroom will have a teacher, aide and a behavior specialist. The student teacher ratio will be 10 to 3. In addition the program has an assigned social worker who only works with the students in that program. Students in this program earn high school diplomas. Testimony of DC SEC.

21. Petitioner's compensatory education plan ("the plan") was developed by Educational Advocate. The plan repeats the allegations in the Complaint. The plan is intended to address the time from the commencement of the 2011-2012 school year through the filing of the Complaint. The plan also is intended to address regression on the Woodcock Johnson between July 2011 and August 2012. The plan states Student did not successfully complete 8th grade and was socially promoted and her behavior has continued to escalate impeding her academic progress. Further, the plan indicates Student has not met the goals on her IEP nor provided transition services. It proposes an independent transition assessment, intensive summer tutoring for 6 hours/day for 7 weeks, therapeutic transition services and placement in a nonpublic therapeutic school program

for the 2013-2014 school year. The plan is intended to prepare Student to move to the proposed therapeutic placement for the 2013-2014 school year. P 43; Testimony of Educational Advocate.

22. Non-public School is a full time, non-public, therapeutic day school providing academic and vocational services to special education students from ages 5 through 21. The therapeutic day school has a little more than 80 students in the high school (upper school) program. There is a 3-1 student- adult ratio. Each class has a lead teacher and a teaching assistant. Student would be assigned to a class that has 6 other students in it. Other adults also may be in the classroom. All lead teachers hold certifications in special education and/or the content area they teach. All students are on behavior management plans. The school provides ramp up classes to assist students who need remedial work in academic skills. Hallways are closely monitored. A staff of eight psychologists, one social worker and two art therapists provide individual and group therapy and crisis management services. A psychiatrist is available for medicine management if needed. The school is approved by the Office of the State Superintendent of Education in the District of Columbia. Students attending Non-public School from the District of Columbia on the diploma track, if successful, receive a diploma from DCPS. Non-public School is able to provide Student a full time, out of general education program as required by his IEP. Approximately 7% to 12% of high school students leave the school and return to a less restrictive environment before graduation. Student has visited the school and has been accepted. Testimony of Non-public Admissions Director

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Petitioner provided

extensive testimony and exhibited great concern for Student's well-being. Petitioner also clearly expressed her support and interest in providing Student the environment Student needs to develop personally and academically.

It was clear that Petitioner is overwhelmed by the responsibility attendant with having become Student's guardian. Student is a child with many needs, and she has developed few of the skills necessary to reach the goals she expresses and her guardian supports. Petitioner has made extraordinary efforts on Student's behalf. That said, it is also clear that Petitioner's emotional stress related to helping her niece affected her testimony. While it was obvious that Petitioner made every effort to answer questions and provide information the emotional nature of the situation resulted, on some occasions, in her emotions over-running her reason. While I do not discount her testimony and give credence to it in some areas, I also found her emotions to have distorted her perceptions in others. For example, Social Worker was an especially credible witness. Her testimony was clear and straight forward. She acknowledged the difficulty she had in providing service to Student, and she explained her efforts in that regard. Yet Petitioner, perhaps in frustration, testified that Social Worker had not made efforts to assist Student and had stated she had no time for her. This blaming of Social Worker, rather than being an intentional mischaracterization, was, I believe the effect of Petitioner's need for help with Student and her frustration at being prevented from accessing the help, in this instance by student herself. There were other instances where Petitioner's understandably difficult position overwhelmed her and colored her testimony. I, therefore, carefully weighed Petitioner's testimony, when there were contradictions in evidence, against the documents and others' testimony before reaching my conclusions as to the facts in this matter.

Issues

1) Failure to identify Student as having an emotional disability from the spring of 2011 through the spring of 2013, until the development of the April 8, 2013 IEP.

Under the IDEA all children with disabilities who are in need of special education and related services must be identified. 34 C.F.R. § 300.111. The IDEA defines a child with a disability as a child evaluated in accordance with IDEA requirements as having one of thirteen specified disabilities, including among others, specific learning disabilities, emotional disability and intellectual disability. *See*, 34 C.F.R. § 300.8.

In the instant matter, Student was found eligible for services under IDEA as a student with specific learning disabilities. There is no disagreement regarding Student's learning disabilities. Yet Petitioner argues DCPS did not provide Student a FAPE because Student was not identified as having an emotional disability and specific learning disabilities which presumably would result in Student being found to have multiple disabilities, *See*, 34 C.F.R. § 300.8(c)(7). The change in classification to multiple disabilities (emotional disability and specific learning disability) was determined at the March 8, 2013 IEP meeting, and it is included in the April 8, 2013 IEP.[14]

While every special education student must be included in one of the thirteen classification categories, the categories themselves do not control the services provided to the student¸ and it is the programs and services in the IEP that define the student's FAPE. The classification categories are statistical warehouses used for various statistical and research purposes. A FAPE, in contrast, is an individualized determination based on the needs of the particular student and identified in his/her IEP. Students with identical classifications may receive entirely different services, and students with different classifications may receive identical services based on their identified needs. It is the needs of the child that determine

[14] *See* FN 13, *Supra*.

FAPE, not the label under which the student receives services. The IDEA regulations, moreover, state that nothing requires a child be classified by his/her disability as long as the child with an eligible disability who needs special education and related services is regarded as a child with a disability under IDEA. *See,* 34 C.F.R. § 300.111(d). Student had been found eligible for services prior to her emotional disability being recognized and had an IEP. Therefore, she was regarded as a child with a disability under IDEA, and was receiving services.

I note, however, that it is somewhat concerning that DCPS did not identify Student's emotional disability prior to April 2013. There was ample evidence to suggest assessment of Student in this area was appropriate. Her mother died. She began to live with her aunt. She changed schools multiple times in a two year period. She avoided classes and intimidated other students. She also threatened suicide and was psychiatrically hospitalized for several weeks. However, while the classification of emotional disability may have clearly applied to Student had she been timely assessed in this area, the failure to so classify her was not, on its own, a denial of FAPE. DCPS could have provided the necessary programs and services to address her social emotional needs without such a classification.

I, therefore, find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to identify her as a student with an emotional disability from the spring of 2011 through the spring of 2013, until the development of the April 8, 2013 IEP.

2) Failure to provide Student sufficient behavioral supports from May 23, 2011 through the filing of this Complaint including the IEPs developed on November 2, 2011, September 17, 2012, March 8, 2013 and April 8, 2013.[15]

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

[15] *See*, FN. 13, *Supra*.

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. See also, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). See also, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id*. An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before

them. *Id*. In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

For a student whose behavior impedes his/her learning or that of others, the IEP team is to consider positive behavioral interventions and supports as well as other strategies to address the behavior. 34 C.F.R. § 300.324(a)(2)(i). Moreover, as Student was subject to discipline resulting in a change of placement following a February 7, 2012 incident at PCS,[16] she should have had a Behavior Intervention Plan ("BIP") based on a current Functional Behavior Assessment ("FBA"). 34 C.F.R. § 300.530(d)(ii) & (f)(1)(i). Moreover, while the FBA/BIP process is mandated under specific circumstances related to discipline, it is applicable to other situations as well. IDEA provides the floor beneath which a district may not fall in terms of the actions to be taken to address the needs of an eligible student with a disability; it does not provide a ceiling. A district may choose to do more than is required.

According to the Office of Special Education Programs ("OSEP") a functional behavioral assessment is "a systematic process for describing problem behavior, and identifying the environmental factors and surrounding events associated with problem behavior." OSEP Smart Start Functional Behavioral Assessment. It is the basis for developing a behavior intervention plan for a student whose behavior interferes with his/her ability to access his/her education. It is the foundation for the interventions and strategies a team is to consider in developing such a student's IEP. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. "The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008).

[16] See discussion *Infra* under I. 7.

In the matter before me, Petitioner has established Student has a history of behavioral difficulties in school, at least as far back as her enrollment in PCS in March 2011. While Petitioner argues these behavioral concerns extend back even further, there is little support for this position,[17] nor is such evidence necessary for my determination here. Subsequent to Student's enrollment in PCS, four IEPs were developed. Neither the November 2, 2011 nor the September 17, 2012 IEPs include behavior support services of any kind. The evidence does not establish the need for behavior support services on the November 2, 2011 IEP. While Petitioner was extremely concerned about Student's behavior from the beginning of her enrollment in PCS, the school itself appears to have been more sanguine regarding Student. The school and Petitioner appear to have held different views of behavior and its acceptability.[18] Moreover, Student was earning passing grades and exhibiting social/emotional growth and increased maturity while at PCS. In contrast, during her initial weeks at Attending School, while Student did appear to be adjusting to the school, Student came with a history of significant social/emotional/behavioral concern.[19] Attending School recognized her need for more intensive academic intervention and held an IEP meeting to revise her IEP. However, attending school did not recognize Student's need for behavior support services. While Student did enter Attending School with a history of behavioral concerns these concerns were not sufficient, according to

[17] The record includes an independent psycho-educational report from March 7, 2008 which suggests some possible anxiety related to school but does not establish any serious emotional disability as suggested by Petitioner. The Data Evaluation Review completed by DCPS in July 2011 also does not support a finding of serious emotional disability. I note, however, that the report entered into evidence is incomplete, ending in the middle of a sentence. It also is important to recognize that Student's PCS enrollment closely followed the death of her mother requiring, Student move to a new house, new community and new school.

[18] Student also appears to have had some significant adjustment/behavioral issues in Petitioner's home. These home based behaviors, however, are not a basis for providing services in an IEP and Student has received community based social work services.

[19] See discussion, Infra. At pp. 29-30.

Attending School, to necessitate behavioral support at the time of the September 2012 meeting.[20] I disagree. Attending School did have sufficient information to include behavioral services in Student's IEP at the time of the September 12, 2012 meeting. Moreover, there was sufficient information to request an evaluation in this area. Based on Student's history of loss and her continuing and perhaps ever increasing dysfunctional behaviors such an evaluation is likely to have resulted in some behavioral interventions.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide sufficient behavioral supports from May 23, 2011 through the IEP developed on November 2, 2011. I further find DCPS denied Student a FAPE by failing to provide sufficient social/emotional supports in the September 17, 2012 IEP.

In September 2012 Student told another student she was going to commit suicide. Petitioner took Student to Children's' Hospital for assessment and then hospitalized her at the Psychiatric Institute of Washington for three weeks. While Petitioner did not share the records from these interventions, DCPS was aware they occurred. Yet no IEP meeting was held upon Student's return to school. In January 2013, Petitioner provided attending school with copies of assessments performed in August and October of 2012. DCPS completed an FBA on February 27, 2013 and a BIP on April 17, 2013 following receipt of these assessments. Thirty minutes of weekly counseling (behavior support) was added to Student's IEPs developed after the March 8, 2013 MDT meeting where the independent assessments were reviewed.

IDEA defines an emotional disability as a condition in which the student exhibits, over a long period of time and to a marked degree, among other characteristics, an inability to build or

[20] As noted above, I do think good practice should have resulted in assessment of Student's social/emotional/behavioral needs at this time. While I accept the team's judgment that they did not have sufficient information at the date of this meeting to provide services, I do think they had sufficient information to request an evaluation in this area.

maintain satisfactory interpersonal relationships or inappropriate types of behavior under normal circumstances. While I have found that Student's behavioral issues at PCS and prior to her entry to Attending School were sufficient in themselves to require adding behavioral support services to Student's IEP, a three week psychiatric hospitalization following a threat to kill herself, should have raised the need for such services.[21] It is unconscionable that no meeting was held upon Student's return to school and that DCPS waited until February to initiate the process that resulted in the addition of counseling services to Student's IEP. Clearly Student's behavior was impacting her learning. She had received multiple suspensions and she had threatened to kill herself. She was missing education due to behavioral issues, such as class cutting, roaming the halls and inciting others, requiring intervention. While it is clear Petitioner contributed to this delay in the social/emotional/behavioral assessment by failing to provide DCPS the independent assessments, this delay in receipt of the independent assessments alone should not have prevented DCPS from initiating a meeting to address Student's obvious social/emotional/behavioral needs

The school social worker at the March 2013 meeting determined Student should receive 30 minutes of counseling per week and these services were added to the Student's April 8, IEP.[22] I accept the Social Worker's judgment as to the appropriate amount of service for Student at the point in time the meeting occurred and the IEP was developed. Social Worker has many years of experience working with high school students and clearly was committed to addressing student need in general and the instant Student's needs in particular.[23] The March 2013 and April 8, 2013 IEPs, therefore, address Student's behavioral needs. However, Student's needs were apparent for

[21] Respondent noted that Student was hospitalized at Petitioner's initiation. The hospital kept Student hospitalized for three full weeks thus supporting Petitioner's decision and suggesting the seriousness of Student's needs.
[22] Counseling services also appear on the March 26, 2013 IEP introduced by Petitioner.
[23] See discussion Infra under I. 5.

months before they were addressed. At least from the date of the September 17, 2012 IEP until the development of the April 8, 2013 IEP, Student required behavioral support that DCPS neither recognized nor addressed.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide her sufficient behavioral supports from September 17, 2012 until the development of the April 8, 2013 IEP.

3) Failure to provide student a comprehensive re-evaluation during the triennial re-evaluation process in July 2011 by not assessing Student's social-emotional functioning.

The IDEA requires a local education agency, here DCPS, to ensure that a reevaluation of each child with a disability is conducted at least once every three years, unless the parent and public agency agree one is not necessary. 34 C.F.R. § 300.303(b). A public agency also must ensure that a reevaluation occurs if the child's educational or related service needs warrant a reevaluation or if the child's parent requests a reevaluation. 34 C.F.R. § 300.303(a). A reevaluation may occur not more than once a year unless the parent and public agency agree otherwise. 34 C.F.R. § 300.303(b). A reevaluation is to be conducted in accordance with regulations establishing the requirements for evaluation and reevaluation. 34 C.F.R. §§ 300.304 through 300.311. *Id*. These regulations require, among other standards, that the student be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

Here, for reasons similar to those in the discussion, *Supra*, regarding DCPS' failure to include behavior support services in Student's IEPs in the 2011- 2012 school year, Petitioner has not established that there was a basis for DCPS to assess Student's social/emotional functioning in July 2011. The evidence does not support a basis for suspecting Student had the need for a social/emotional assessment in July 2011. Student had been through a traumatic experience in

February of that year when her mother died. However, she was living with her aunt, enrolled in a new school and appeared to be adjusting. While it is true that Student exhibited some signs of emotional distress and some inappropriate behavior, these incidents did not appear to be impacting her education. She was earning passing grades in most subjects. In making this finding, I recognize that her aunt/guardian was concerned about Student's social/emotional needs from the beginning of her enrollment in PCS. I also recognize that Petitioner's expectations of Student's behavior were not synchronous with the school's expectations, nor, perhaps, with Student's previous experience. Additionally, while it is clear Petitioner shared her concerns about Student's behavior with PCS, there is no showing that she asked for social/emotional assessment in July 2011. Petitioner's concern alone, without a specific request for a social/ emotional assessment does not establish a need for such testing.

I, therefore, find by a preponderance of the evidence that Petitioner has not met her burden of proof as to DCPS' failure to provide student a comprehensive re-evaluation during the triennial re-evaluation process in July 2011 by not assessing Student's social-emotional functioning.

4) Failure to develop and/or provide appropriate IEPs and/or placements on or about November 2, 2011, September 17, 2012, March 8, 2013 and April 8, 2013. The IEPs did not provide needed behavioral supports or sufficient instructional supports in all academic areas. The LRE in these IEPs is not the full time, out of general education placement student requires to address her social-emotional and academic issues. The April 8, 2013 IEP also does not provide needed speech-language services or direct occupational therapy services

November 2, 2011 IEP

The November 2, 2011 IEP requires Student receive 15 hours of special instruction inside the general education environment each week. It includes goals in mathematics, reading and written expression. The IEP also include 30 minutes of occupational therapy consultative

services per month. The IEP does not include behavior supports. Student had behavioral issues while at PCS. She wandered the halls and would not attend classes. She received in-school suspension. Petitioner was called, outside the routine calls to all parents, regarding Student's behavior more than once. As noted above, IDEA requires the IEP team is to consider interventions and strategies to address behavior when a student's behavior impedes the student's learning or that of other students, 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. While at PCS Student exhibited many such behaviors, and while her behavior showed some improvement over time, PCS did not consider supports that might have addressed her behavior, allowed her greater access to her education and perhaps even prevented the behavior resulting in her expulsion. It is not possible to know how far effective supports could have gone in helping student had they occurred. It is possible, however, to determine that she received no support under this IEP.[24]

Student entered PCS with an IEP requiring that she receive instruction outside the general education environment. The February 25, 2011 IEP required Student receive 60 minutes per day of special instruction in reading and mathematics outside the general education environment and 30 minutes per day of written expression outside the general education environment. When Petitioner enrolled Student at PCS she was informed the school did not provide services outside the general education environment, and, despite Student's academic needs, Petitioner chose to continue Student's placement at PCS - both at initial enrollment and months later in November 2011. While it is true that the IEP team is to develop an IEP that meets the needs of a student and then determine the placement in which it is to occur, Petitioner provided no evidence

[24] I distinguish here between the social/emotional assessments addressed under the prior issue and the development and implementation of behavioral supports such as might be found in a behavior intervention plan. While it is not clear, and Petitioner has not shown the need for a social/emotional assessment as of this time, Student's class skipping and hall roaming could have and should have been addressed through a behavior intervention plan based on a functional behavioral assessment.

demonstrating that the November 2, 2011 IEP team was aware or should have been aware of Petitioner's current view that Student requires a fulltime placement outside of the general education environment. They were aware, however, that Student had entered PCS with an IEP requiring 12.5 (5 x 2.5 hours per day) hours of instruction outside the general education environment each week. She did not receive this instruction. Moreover, when the IEP was revised in November 2011 all 15 hours of instruction were to be provided inside the general education environment. While this is an increase of 2.5 hours of special instruction per week, it is not clear that this array of services was designed to address Student's needs rather than the configuration of PCS. There is no explanation of the basis for the redesign of the IEP to an inclusion IEP stated in the IEP, and it is clear that PCS could not provide Student education in any other manner. However, Petitioner did not ask for a separate full time IEP. She was aware that PCS was an inclusion school and chose to enroll and maintain Student's enrollment in that school. To now argue that the Student should have had a fulltime out of general education placement is based on a retrospective view of Student's experience at PCS not on her apparent needs at the time she enrolled in PCS and nor when her IEP was revised. There is no evidence suggesting Student required a full time placement when she enrolled or in November 2011, and there is no suggestion Petitioner considered such a placement at that time. To take current knowledge and concern and attribute it retroactively is bootstrapping and cannot be the basis for a determination in Petitioner's favor in this regard.

I therefore conclude by a preponderance of the evidence that Student was denied a FAPE by the failure to include needed behavioral supports on Student's November 2, 2011 IEP and by the failure to provide Student needed academic support in classes provide outside the general education environment. I further conclude Student was not denied a FAPE by the failure to

provide Student a full time separate special education placement under the November 2, 2011 IEP.

September 17, 2012 IEP

Within weeks of enrolling in Attending School, the staff recognized Student's needs for more educational supports than she could receive in the general education setting. An IEP meeting was held, therefore, on September 17, 2012. Student's program was reviewed and revised in an effort to address Student's very low skill levels. The full time inclusion program provided by her IEP when she entered Attending School was changed to include instruction outside the general education environment. The team thought this program would help Student pull up her skills. The September 17, 2012 IEP required Student receive 60 minutes per day of special instruction each in reading and mathematics outside the general education environment and 30 minutes per day of written expression outside the general education environment. She also was to receive 30 minute of occupational therapy consultation per month. This amount of out of general education instruction restored the configuration of services Student had received prior to her enrollment in PCS. The September 17, 2012 IEP includes a transition plan with goals in the areas of post-secondary education and training and employment. There also is a section on participation in extracurricular activities and community participation. There are no goals in the area of independent living skills. Student's provided input to the development of this transition plan.

The staff at Attending School recognized and quickly acted upon Student's need for more intensive instruction than that provided in general education classes, and for that they should be commended. Within only a couple of weeks of enrollment Student's need was identified, an IEP meeting was held and her IEP revised to reflect these needs. This revised IEP was intended to

provide Student the instructional supports she required. The staff had no basis for determining Student required a full time out of general education IEP during this September IEP meeting. Student had received passing grades in most of her subjects in the prior year two years, and she had done so in an inclusive environment. By moving Student to a more restrictive program including 2.5 hours of instruction daily outside the general education environment it is clear Attending School revised Student's IEP in an effort to address her academic needs.

Petitioner argues that this IEP did not address Student's behavioral/social/emotional needs, and with this I agree. Student's behavior at PCS and neighborhood MS demonstrated a need for intervention. Yet no efforts were made to address these needs on Student's IEP. When Attending School staff, showing appropriate concern for Student's academic progress called an IEP meeting in September 2012, it would have been appropriate to also address Student's social/emotional/behavioral needs. In the two years preceding the date of this meeting, Student's mother had died; she had been expelled from PCS; she had moved schools four times; she roamed the halls when in school; she made inappropriate comments to other students and staff; she had been involved in one altercation where she pulled out another student's hair, and she had inappropriately touched another student. One or two of these incidents should have raised the specter of the need for social/emotional/behavioral intervention. All of them together should have been seen as an unquestionable reflection of such a need, but Student was not assessed in this area, and her IEP was not revised to include goals in this area.[25]

I therefore conclude by a preponderance of the evidence that DCPS denied Student a FAPE by failing to develop an IEP on September 17, 2012 that provided Student needed

[25] I recognize that Student had received the independent psycho-educational evaluation at this point. Petitioner could have facilitated the process by providing the report to DCPS at the time of this meeting but did not do so. However, Petitioner's failure to provide this information does not in any way relieve DCPS of the acting on the information they did have available.

behavioral supports. I further conclude DCPS did not deny Student a FAPE by failing to provide her a full time out of general education placement. The evidence did not support such a placement at this date.

March 8, 2013 IEP
April 8, 2013 IEP[26]

The IEP developed following the March 8, 2013 IEP meeting includes 18 hours per week of special instruction outside the general education environment and 5 hours of special instruction per week inside the general education environment. In addition Student is to receive 30 minutes per week of behavior support services and 30 minutes of occupational therapy consultation per month. This program is not sufficient to address Student's academic and social/emotional/behavioral needs. The independent psycho-educational preformed in August 2012 and used for the Data Review of February 17, 2013, which was reviewed at the march 8, 2013 meeting, clearly states the need for Student to be placed in a full time separate program. The data review did not dispute this need. The rationale for the least restrictive environment stated on the IEP following the March 8, 2013 meeting indicates a need to provide Student a "different setting with a lower student to teacher ratio" for her to achieve success. This statement in juxtaposition to the psycho-educational indicates a need for a full-time, separate special education setting. I note Student's needs for speech language services and occupational therapy were not discussed at the March 8, 2013 meeting. These areas of concern were at the May 10, 2013 MDT meeting, and, as such, there is no basis for finding these services should have been included on Student's IEP resulting from the March 8, 2013 meeting.

[26] As noted in FN 13, two IEPs were entered into evidence dated subsequent to the March 8, 2013 IEP meeting. One, entered by Petitioner, is dated March 26, 2013. It is a draft IEP. The other IEP, entered by Respondent is dated April 8, 2013. It does not include Petitioner's signature. The IEPs are substantially similar although not identical. They include the same number of service hours. There is no IEP dated March 8, 2013. I discuss the March 26 and April 8 IEPs in this section as these are the IEPs in evidence and these are the IEPs discussed during testimony. Where the differences between these IEPs are relevant to the discussion I identify the specifics in the discussion.

I, therefore conclude the IEP developed as a result of the March 8, 2013 IEP meeting does not provide Student a FAPE in that it is not a full time, out of general education placement. Because Student requires a fulltime placement the hours of instructional support and/or behavioral support are insufficient. There is no basis for finding speech-language and occupational therapy services should have been included on this IEP.

5) Failure to provide Student counseling services required by her IEP from March 8, 2013 the date of the filing of the Complaint, May 23, 2013

As noted above an IEP memorializes the IEP team's FAPE determination for a particular student. In the instant matter the team determined Social Worker's proposed 30 minutes of behavior support services each week would address Student's educationally related need for services to address her social/emotional needs. This requirement was included on Student's IEPs developed following the March 8, 2013 meeting. Petitioner contends Student did not receive these services, and she is correct. However, the failure to provide these services to Student does not constitute a denial of FAPE.

Social Worker testified convincingly that she made on-going and repeated efforts to provide the required counseling services to Student. Student, however, did not cooperate with these efforts. Social Worker was able to engage Student in a counseling session only one time. Student refused to attend service sessions, stated she did not know the time she was supposed to attend service sessions and stated she would attend and not appear. Social Worker indicated that resistance to services is not necessarily unusual for a high school student and that she took opportunities to overcome that resistance. She approached Student when she saw her in the hall and began building a relationship on which the services could be based. This culminated in the one service delivery session for which Student appeared at the end of the school year.

Petitioner suggested that Social Worker did not want Student on her caseload and had stated she had no time for her. There is no evidence supporting this statement, and it directly conflicts with Social Worker's credible testimony regarding her concern for Student and her willingness to provide her the required service. While it is true Social Worker was not available for one service session, this cannot be evidence of a lack of effort to deliver the IEP required service. It is likely Petitioner misunderstood or misinterpreted Social Worker's statements regarding her caseload and responsibilities. The failure to provide required counseling services under the circumstances described here cannot be attributed to DCPS. Rather, the failure to provide these services is directly attributable to Student's lack of cooperation with the provision of such services.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide Student counseling services required by her IEP from March 8, 2013 through the date of the filing of the Complaint, May 23, 2013

6) Failure to provide Student an appropriate transition plan or goals in any IEP from September 17, 2012 forward. The entire plan does not meet IDEA requirements[27]

Under IDEA, transition services are a coordinated set of activities for a student with a disability, "that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities. . ." 34 C.F.R. § 300.43(a)(1). Transition services are to be "based on the individual child's needs, taking into account the child's strengths, preferences and interests." 34 C.F.R. § 300.43(a)(2). They are to include instruction, related services, community experiences, the development of employment and other post-secondary

[27] There was little testimony on transition during the hearing as Petitioner's main witness' testimony, in this area, was stricken when Respondent was unable to proceed with cross examination. *See* FN 9, *Supra*. My conclusion as to the instant issue is based on the documentary evidence.

adult living objectives and, if appropriate, the acquisition of daily living skills and provision of a functional vocational evaluation. *Id.* Transition services are to be included in a student's IEP beginning not later than the first IEP to be in effect when a student with a disability turns 16. Such services may be included in a student's IEP at a younger age if the IEP team determines it is appropriate. 34 C.F.R. § 300.320(b). The transition services in the IEP must include

> (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
>
> (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. § 300.320(b). These services are to be updated annually. *Id.*

Student's September 17, 2012 IEP includes a transition plan with goals in the areas of postsecondary education and training as well as in employment. It also includes a section addressing participation in extracurricular activities and the community. Student's input for this plan was obtained through the administration of the Brigance Level 1 Transition Assessment. Student's March 26, 2013 IEP and April 8, 2013 IEP include a transition plan identical to that found in the September 17, 2012 IEP.

Petitioner suggests these plans are not appropriate because they do not comply with the IDEA. I disagree. These plans were designed to address the needs of a student in her first year of high school. They focus on beginning transition skills such as identifying colleges and filling out job applications. Educational Advocate testified the plan did not address Student's needs because, for example, it focused on Student attending a two year college and Student is interested in becoming a lawyer. I find this does not support a finding that the transition plan is inappropriate. A student can attend a two year college, transfer to a four year college and attend

law school if s/he is able to gain admittance. The skills of learning how to identify colleges and complete job applications are functional skills that can be used in multiple situations. Moreover, Educational Advocate's ability to suggest goal areas that could be included in the transition plan that were not, does not invalidate the plan. The transition plan, like the rest of the IEP, is revised annually. New or additional goals can be added as appropriate. The transition plan was developed with Student in-put and addresses needs relevant to Student in three of the four identified areas.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide Student an appropriate transition plan or goals in any IEP from September 17, 2012 forward

Discipline

IDEA requires that a manifestation determination[28] be made anytime a student with a disability has a change in placement as a result of a disciplinary action. 34 C.F.R. § 300.530. A change of placement occurs in two circumstances. First, a change of placement occurs when a student is removed from his/her educational setting for more than 10 consecutive school days. 34 C.F.R. § 300.536(a). Secondly, a change of placement occurs when there is a series of removals that constitutes a pattern because the student has been removed for more than 10 cumulative school days in a school year, and the behavior at issue is substantially similar to that in previous incidents. In the second instance (cumulative removals of more than 10 days in a school year) the change of placement determination also must consider the length of each removal, the total

[28] A manifestation determination addresses the relationship of the student's behavior to his/her disability. At the manifestation determination meeting a team, including the parent, the local education agency (DCPS) and the relevant members of the IEP team, decides whether the behavior resulting in the suspension was a manifestation of the student's disability. If the behavior was caused by or had a direct and substantial relationship to the student's disability or the behavior was the direct result of the failure to implement the student's IEP, it is deemed a manifestation of the student's disability. 34 C.F.R. § 300.530(e). This meeting is to be held within 10 school days of the suspension constituting a change of placement. *Id.*

amount of time the student has been removed and the proximity of the removals to each other. *Id*. If it is determined that the student's behavior was a manifestation of his/her disability, the student is to be returned to the setting from which s/he was removed. 34 C.F.R. § 300.530(f). In addition, the IEP team must conduct a functional behavioral assessment and implement a behavior intervention plan for the student. *Id.* If the student has an existent BIP at the time of the suspension, that BIP is to be reviewed and revised, as needed, to address the behavior resulting in the suspension. *Id.* Even if manifestation is found the student may still be suspended if the behavior involved illegal drugs, weapons or inflicting serious bodily injury. 34 C.F.R. § 300.530(g). An FBA and a BIP also are to be provided if no manifestation is found to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d).

A student receiving services under IDEA must continue to receive educational services after any removal of more than 10 consecutive or cumulative days of suspension in a school year. 34 C.F.R. § 300.530(d). The services may be provided in an interim alternative educational setting. *Id.*

7) Failure to hold a manifestation review meeting following Student's expulsion from Paul PCS in 2012. Student was without a placement for 2.5 weeks before she was provided an alternative setting. An FBA was not completed and a BIP was not developed or updated.

On February 7, 2012 Student and other PCS students were found in the bathroom with marijuana. Student was immediately suspended, and PCS issued a notification, the same day, that Student was being recommended for expulsion. Student was not allowed to return to PCS. PCS made no further contact with Petitioner, and she withdrew Student from PCS six days later on February 13, 2012. PCS took no further action regarding the proposed expulsion. When Petitioner subsequently attempted to enroll Student in Neighborhood MS, she was told Student was to attend IAES because Student was on suspension. Student attended IAES from March 6,

2013 through the end of April. No manifestations determination meeting was held. No FBA was developed or reviewed. No BIP was developed.

DCPS argued that there was no expulsion from PCS, and this may be true. However, it is clear that Student was removed from her educational placement for more than 10 days due to behavior involving drugs. Whether this was an expulsion or a suspension, and despite Petitioner's withdrawing Student from PCS, there was a disciplinary removal, and DCPS must still comply with IDEA discipline requirements. It is clear that DCPS did not do so. PCS sent Petitioner a letter stating Student was being proposed for expulsion. Neighborhood MS instructed Petitioner to take Student to the IAES because she was on suspension, and Student attended the IAES. Requiring Student attend the IAES establishes she was on suspension. Yet, while Student attended the IAES, Respondent did not hold a manifestation determination meeting, provide an FBA or develop a BIP as required.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to hold a manifestation determination meeting, develop an FBA or BIP following Student's suspension from PCS.

As a result of the proposed expulsion, Student was without a placement from February 7, 2013, the date of the incident at PCS, until she enrolled in the IAES on March 6, 2013. DCPS sent Petitioner notification of the proposed expulsion and then took no further action. DCPS did not attempt to schedule a manifestation review meeting nor notify Petitioner that Student should enroll in the IAES. While the withdrawal from PCS may have complicated the timeline, DCPS failed to take any of the IDEA required actions including failing to inform Petitioner where Student should enroll. No effort was made to ensure Student attended IAES after her suspension. Thus no effort was made to ensure Student continued to receive educational services as required

by IDEA. DCPS argument, that no suspension occurred, is not persuasive under these facts. DCPS is the responsible LEA for Student, and no action occurred. At a minimum DCPS had a responsibility to determine where Student was attending school following her suspension, and no such effort was made. Therefore, I will attribute the lack of all required educational services in this time period to DCPS as there is no suggestion DCPS ever intended to act to assure Student received the educational services to which she was entitled.

I, therefore, find DCPS denied Student a FAPE by failing to provide Student required educational services between February 7, 2013 and March 6, 2013.

8) Failure to hold a manifestation review meeting following Student's constructive expulsion from IAES in 2012. Student was without a placement for two weeks. A functional behavioral assessment was not completed and behavioral intervention plan was not developed or updated

Student enrolled in IAES on March 6, 2012 and withdrew on April 30, 2012. Student left IAES because her disciplinary removal time had expired. Student then enrolled in Neighborhood MS on May 1, 2012. However, Student did not begin attending Neighborhood MS for approximately one week after the enrollment paperwork was completed because Neighborhood MS required Student meet with the principal and special education coordinator before she began attending class. This failure to allow Student to begin attending classes does not constitute a constructive expulsion. Petitioner did testify that the special education coordinator at Neighborhood MS was not in the school fulltime. She noted that the interview with the special education coordinator took place on a Thursday.[29] However, she did not provide the date for that interview nor the interview with the principal. I further note that Petitioner had withdrawn Student from PCS prior to her attending IAES. Once Student's time in the interim alternative educational setting was complete, Petitioner had to enroll her in a new school. The delay in

[29] I take judicial notice that May 3, 2012 was a Thursday.

Student's entrance into Neighborhood MS cannot be deemed a constructive expulsion under these circumstances.[30]

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to hold a manifestation review meeting following Student's exit from IAES in 2012.

Placement

Petitioner's request is that Student be placed at Non-public School, a separate full time special education non-public school. There is no question that Non-public School is able to provide Student the program memorialized in her IEP, and there is no question that this program can provide for student's needs. However, Attending School has a separate, full time program for students with emotional disabilities. The program will have three classrooms in the 2013-2014 school year. Each classroom will have a teacher, aide and a behavior specialist. The student teacher ratio will be 10 to 3. In addition the program has an assigned social worker who only works with the students in that program. Students in this program earn high school diplomas. In many ways the program at Attending School is similar to the program at Non-public School. Each has a 3-1 student- adult ratio. Each class, in both Attending School's program and in Non-public School's program, has a lead teacher and a teaching assistant. Teachers in each program hold certifications in special education and/or the content area they teach. They are not all dually certified. At Attending School there is a behavior management specialist assigned to each classroom, and a social worker is assigned to the program to work only with the student's in this program. Non-public School has more therapists assigned to the program as a whole but it also

[30] I recognize that it was a school action that kept Student out of school after she left It was not however an action resulting from a disciplinary event and therefore cannot be recognized as a basis for invoking special education disciplinary protections and rights.

has more students. Students in the Attending School Program and students at Non-public School are able to earn high school diplomas. The programs are quite similar in design.

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

- the nature and severity of the student's disability;
- the student's specialized educational needs;
- the link between these needs and the services offered by the private school;
- the placement cost;[31]and
- the extent to which the placement is the least restrictive environment.

Id. at 12.

In the instant matter it is clear Student has significant needs requiring education in a separate, special education environment designed to address the needs of students with emotional disabilities as well as specific learning disabilities. Non-public School is able to meet these needs. However, the program offered for students with emotional disabilities by Attending School provides a similar program in a less restrictive environment in that it is located in a general education high school. It also is able to meet Student's needs and provide her a FAPE. Significantly, Attending School's program less restrictive environment is one of the factors relevant to determining the appropriateness of a proposed placement. Least restrictive environment is a cornerstone of the IDEA. I note the small class size and high teacher student ratio in each program allows for individualization of teaching to address student needs.

[31] The OSSE approves private schools and sets the allowable costs for attendance for DCPS students. I, therefore, do not discuss this factor in the instant analysis of the proposed placement.

I, therefore, conclude, by a preponderance of the evidence that Non-public School is not the appropriate placement for Student. The appropriate placement for Student is in the separate, program for students with emotional disabilities located in Attending School.

Compensatory Education

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia,* 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) *citing G.ex. RG v Fort Bragg Dependent Schools,* 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid* at 524.

In the instant matter it is difficult to construe the proposed compensatory education plan as a plan designed to provide the educational benefit that likely would have accrued from special education services the school district should have provided. While Educational Advocate stated this was the intent of the plan, her specific identification of the purpose of the plan was to provide Student what she needed in the future. That is, the plan was to help her prepare for placement in a separate full time special education environment. Educational Advocate did recognize an additional purpose of addressing Student's regression on the Woodcock Johnson, but she did not provide explanations as to how the requested services either by type of service or length of time provided would meet this goal. The plan appeared to be a reflection of a program that was available rather than a plan designed to address the specific educational harms to

Student. I, therefore, decline to implement the plan as written while recognizing Student's qualification for compensatory services.

CONCLUSIONS OF LAW

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

1. DCPS did not deny Student a FAPE by failing to identify her as a student with an emotional disability from the spring of 2011 through the spring of 2013, until the development of the April 8, 2013 IEP

2. DCPS did not deny Student a FAPE by failing to provide sufficient behavioral supports from May 23, 2011 through the IEP developed on November 2, 2011.

3. DCPS denied Student a FAPE by failing to provide sufficient social/emotional supports on the September 17, 2012 IEP.

4. DCPS denied Student a FAPE by failing to provide her sufficient behavioral supports from September 17, 2012 until the development of the April 8, 2013 IEP.

5. Petitioner did not met her burden of proof as to DCPS' failure to provide student a comprehensive re-evaluation during the triennial re-evaluation process in July 2011 by not assessing Student's social-emotional functioning.

6. DCPS denied Student a FAPE by failing to include needed behavioral supports on Student's November 2, 2011 IEP and by failing to provide Student needed academic support in classes provided outside the general education environment.

7. Petitioner did not meet her burden of proof as to DCPS' failure to provide Student a full time separate special education placement under the November 2, 2011 IEP.

8. DCPS denied Student a FAPE by failing to develop an IEP on September 17, 2012 that provided Student needed behavioral supports.

9. DCPS did not deny Student a FAPE by failing to provide her a full time out of general education placement on the September 17, 2012 IEP.

10. DCPS denied Student a FAPE because the IEP developed as a result of the March 8, 2013 IEP meeting does not provide Student a FAPE in that it is not a full-time out of special education placement. Because Student requires a full-time placement the hours of instructional support and/or behavioral support are insufficient.

11. Petitioner did not meet her burden of proof as to the Student's need for speech/language therapy or occupational therapy to be included on the IEP developed following the March 8, 2013 MDT meeting.

12. DCPS did not deny Student a FAPE by failing to provide Student counseling services required by her IEP from March 8, 2013 through the date of the filing of the Complaint, May 23, 2013

13. DCPS did not deny Student a FAPE by failing to provide Student an appropriate transition plan or goals in any IEP from September 17, 2012 forward

14. DCPS denied Student a FAPE by failing to hold a manifestation determination meeting, develop an FBA or BIP following Student's suspension from PCS.

15. DCPS denied Student a FAPE by failing to provide Student required educational services between February 7, 2013 and March 6, 2013 following her suspension from PCS.

16. DCPS did not deny Student a FAPE by failing to hold a manifestation review meeting following Student's exit from IAES in 2012.

17. Non-public School is not an appropriate placement for Student. The appropriate placement for Student is in the separate, program for students with emotional disabilities located in Attending School.

ORDER

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

1. Student is to be placed in the full-time separate program for students with emotional disabilities at Attending School for the 2013-2014 school year.

2. Within 30 days of the date of this Hearing Officer Determination, the MDT, including Petitioner, Student, and Petitioner's advisors, if she so chooses, is to meet and develop an IEP for the full-time separate program for students with emotional disabilities at Attending School. Student's IEP is to be revised to reflect all hours in the school day being provided in this program or in agreed upon related services.

3. Student is to receive tutoring in reading, writing and mathematics throughout the 2013-2014 school year for 5 hours each week to compensate for the failure to provide Student

needed services outside the general education environment while Student was enrolled in PCS. The tutoring is to be provided by an independent provider of Petitioner's choosing. The provider is to meet the qualifications for a tutoring established by DCPS and/or the Office of the State Superintendent of Education. These tutoring services are to be coordinated with Student's educational program to the extent the independent tutor deems appropriate.

4. .As compensation for the failure to provide Student appropriate behavior support under the November 2011 and September 2012 IEPs, Student is to receive 1 hour of counseling weekly throughout the 2013-2014 school year, in addition to the hours of counseling and behavior support provided through the full time program for students with emotional disabilities. This counseling is to address Student's school related issues, including but not limited to, grief, aggression and inappropriate adult and peer interactions. These services are also intended to address DCPS' failure to develop a Functional Behavior Assessment and Behavior Intervention Plan following Student's suspension from PCS.

5. In addition, Petitioner is to receive 2 hours of parent counseling and training per month throughout the 2013-2014 school year, from a therapist of her choosing, to assist her in understanding Student's needs and to assist her in developing the skills necessary to support the implementation of Student's IEP.

IT IS SO ORDERED:

July 15, 2013
Date

Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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