

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,¹ on behalf of,
Student,*

Petitioner,

Date Issued: September 19, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

Case No:

Respondent.

Hearing Dates: September 5-6, 2013

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a sixteen (16) year old _____ who was an 11th grade student at School A for the 2012-2013 school year. The student's individualized education program (IEP) at issue lists Specific Learning Disability (SLD) as _____ primary disability and provided for _____ to receive 23.5 hours per week of specialized instruction outside of the general education environment, two (2) hours per week of speech-language therapy outside of the general education environment, thirty (30) minutes per day of occupational therapy outside of the general education environment and one (1) hour per week of behavioral support services outside of the general education environment.

On June 26, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent _____ (MAPCS), alleging that MAPCS denied the student a free appropriate public education (FAPE) by failing to fully implement the student's March 13, 2012 IEP during the 2012-2013 school year by failing to provide _____ with 23.5 hours of specialized instruction per week and/or all of _____ related services; and by failing to provide the student with an appropriate IEP following the May 21, 2013 meeting by reducing the student's related services, failing to include updated and/or accurate present levels of performance information or baseline data and failing to include an appropriate transition plan. As relief for the alleged denials of FAPE, the Petitioner requested, *inter alia*, an independent educational evaluation; an independent vocational evaluation; a justification for removal to be submitted to

the Office of the State Superintendent for Education (OSSE) and follow through with requirements needed to procure a change of placement/location for the student; for the student's IEP to be revised to include two (2) hours of speech-language therapy, one (1) hour of behavioral supports, thirty (30) minutes of occupational therapy, 23.5 hours of specialized instruction, extended school year (ESY) and a revised transition plan that increases hours of instruction for implementation of the postsecondary and independent living goals, adds goals to assist the student in preparing for standardized admissions tests, identifying community resources, completing applications and functional academic skills; and compensatory education.

On July 8, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that during the student's August 20, 2012 IEP Team meeting, the occupational therapist proposed that the student no longer required direct services and that the student would benefit from consultative services; on August 20, 2012, the IEP Team agreed to change the student's occupational therapy services from direct services to consultative services; on August 20, 2012, the speech-language pathologist proposed that the student's speech-language services be reduced to 30 minutes per week; the parent was not in agreement that the student's speech-language services be reduced to 30 minutes per week; as a compromise, the student's IEP Team changed the student's speech-language services to one hour per week; the August 20, 2012 IEP was sent to the parent and the parent's attorney in draft form; if MAPCS failed to finalize the August 20, 2012 IEP, it was a procedural error which did not result in harm to the student; MAPCS proceeded with implementing the August 20, 2012 IEP after the draft was sent to the parent and the parent's attorney; on December 20, 2012, the student's IEP was amended to reduce speech-language services to 30 minutes per week and occupational therapy from direct services to consultative services; MAPCS provided related services to the student in accordance with IEPs; if there was a service missed, there was not a material failure to implement the student's IEP; to the extent any services were missed, the missed services did not result in harm to the student; the student progressed throughout the 2012-2013 school year; the student received specialized instruction outside of the general education environment for all of core academic subject areas; the amount of specialized instruction on the student's IEP was provided to the student; if there was a difference in the amount of specialized instruction provided and the amount of specialized instruction on the student's IEP, the difference is negligible; it was the intent of the student's IEP Team for the student to receive specialized instruction for core academic subject areas; the student's IEP Team never agreed for the student for the student to be in a self-contained class for lunch and physical education; the student is successful in general education electives; the amount of related services on the student's May 21, 2013 IEP is reasonably calculated to provide the student with educational benefit; the student's May 21, 2013 transition plan is appropriate; and the baseline and present levels of performance on the student's May 21, 2013 IEP are appropriate for the student.

On July 17, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on July 27, 2013, following the conclusion of the 30-day resolution period, and originally ended on September 9, 2013.

On August 2, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on August 2, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

Based on the discussion of the dates for the Due Process Hearing during the prehearing conference, on August 2, 2013, the parties filed a Joint Motion to Continue to continue the 45-day timeline for ten (10) calendar days. On August 8, 2013, the Hearing Officer granted the motion and issued an Interim Order on Continuance Motion, extending the 45-day timeline by ten (10) calendar days. Therefore, the Hearing Officer Determination (HOD) is due on September 19, 2013.

On August 28, 2013, Petitioner filed Disclosures including thirty-one (31) exhibits and four (4) witnesses.² On August 28, 2013, Respondent filed Disclosures including thirty-three (33) exhibits and eight (8) witnesses.

The due process hearing commenced at approximately 9:03 a.m. on September 5, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-2, 6, 8, 10-16, 18-27 and 29-31 were admitted without objection. Respondent's Exhibits 1-4 and 7-33 were admitted without objection. Petitioner's Exhibit 3 was withdrawn by Petitioner. Petitioner's Exhibit 4 was admitted, over Respondent's objection because the notes from the student's March 5, 2012 IEP Team meeting were determined to be relevant. Petitioner's Exhibit 5 was admitted, over Respondent's objection, because the parent's notes typed by the parent's attorney were relevant however the fact that the Respondent did not have an opportunity to cross examine the parent's attorney regarding the accuracy of the notes would be taken into consideration when attributing weight to the notes. Petitioner's Exhibit 7 was not admitted because communication from the parent's attorney to the Respondent's attorney requesting information regarding the qualifications of the student's teachers was found to be irrelevant. Petitioner's Exhibit 9 was admitted, over Respondent's objection, because the parent's notes typed by the parent's attorney were relevant however the fact that the Respondent did not have an opportunity to cross examine the parent's attorney regarding the accuracy of the notes would be taken into consideration when attributing weight to the notes. Petitioner's Exhibit 17 was not admitted because notes from a meeting more than one year prior to the claims made by the Petitioner and taken at a meeting when the student attended another local educational agency (LEA) were found to be irrelevant. Petitioner's Exhibit 28 was admitted, over Respondent's objection, as a statement of the Petitioner's requested relief, not for the truth of the explanation contained within the Compensatory Education Proposal. Respondent's Exhibits 5 and 6, documents regarding a prior compensatory education award, were not admitted because the exhibits were found to be irrelevant.

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

The hearing concluded at approximately 12:48 p.m. on September 6, 2013, following closing statements by both parties.

Jurisdiction

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

ISSUES

The issues to be determined are as follows:

1. Whether MAPCS failed to implement the student's March 13, 2012 IEP during the 2012-2013 school year, specifically by failing to provide 23.5 hours per week of specialized instruction outside of the general education environment, two (2) hours per week of speech-language therapy, one (1) hour per week of behavioral support services and thirty (30) minutes per week of occupational therapy from August 27, 2012 through May 21, 2013, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether MAPCS denied the student a FAPE by failing to develop an appropriate IEP for the student on May 21, 2013, specifically by failing to include appropriate baseline data, accurate present levels of performance, two (2) hours per week of speech-language therapy and 30 minutes per week of direct occupational therapy?
3. Whether MAPCS failed to develop an appropriate transition plan for the student on May 21, 2013, specifically by failing to provide one hour per month of career exploration instruction outside of the general education environment; one hour per month of postsecondary advisement outside of the general education environment; three hours per week of employment support outside of the general education environment; goals related to preparing for standardized admissions tests, identifying community resources at the postsecondary level, completing applications, functional academic skills and independent living?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is 16 years of age and entitled to a secondary transition plan. (Stipulated Fact)
3. School A begins at 9:00 a.m. (Respondent's Exhibit 28; Advocate's Testimony)

4. School A ends at 4:14 p.m. on Mondays, Tuesdays and Thursdays; at 12:59 pm. on Wednesdays; and at 3:40 p.m. on Fridays. (Respondent's Exhibit 28; Advocate's Testimony)
5. School A has "A" weeks and "B" weeks, during which students' schedules are altered. (Parent's Testimony; Advocate's Testimony)
6. School A has "word walls" to assist students with vocabulary. (School A Speech Language Pathologist's Testimony)
7. On May 25, 2011, the student was in the low average range in written language. (Petitioner's Exhibits 1 and 2; Respondent's Exhibits 3, 9, 14 and 16)
8. By March 13, 2012, the student had mastered all of OT goals. (Occupational Therapist's Testimony)
9. On March 13, 2012, the student demonstrated age appropriate motor skills, had appropriate range of motion and strength to carry out the requirements in school environment, demonstrated good fine motor skills to manipulate materials in educational setting and was able to produce age appropriate written work in a timely manner. (Respondent's Exhibit 2; Occupational Therapist's Testimony)
10. The student's emotional/social/behavioral goals on March 13, 2012 IEP address self-advocacy, developing a positive self-image and using effective coping strategies. (Petitioner's Exhibit 2; Respondent's Exhibit 3)
11. The student's March 13, 2012 IEP prescribes 23.5 hours per week of specialized instruction outside of the general education environment. (Petitioner's Exhibit 2; Respondent's Exhibit 3)
12. While the service delivery page of the student's March 13, 2012 IEP indicated that the student was to receive 30 minutes per day of occupational therapy outside of the general education environment, the student's IEP did not determine that 30 minutes per day of occupational therapy was necessary for the student. (Petitioner's Exhibits 2 and 4; Respondent's 2 and 3; Advocate's Testimony; Occupational Therapist's Testimony)
13. The student's March 13, 2012 IEP prescribed one hour per week of behavioral support services outside of the general education environment. (Petitioner's Exhibit 2; Respondent's Exhibit 3)
14. A speech-language assessment of the student was completed on March 15, 2012. (Petitioner's Exhibits 5, 15 and 20; Petitioner's Exhibits 4, 8 and 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
15. The March 15, 2012 Speech/Language Evaluation summarized that the student had low average communication skills; had strengths in the areas of fluency, voice, articulation, Meaning from Context, Nonliteral Language and Pragmatic Judgment; and had weaknesses in the areas of Synonyms, Grammatical Judgment, receptive one-word vocabulary, and expressive one-word vocabulary skills. (Petitioner's Exhibits 5, 15 and 20; Petitioner's Exhibits 4, 8 and 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
16. The March 15, 2012 Speech/Language Evaluation recommended that the student be discontinued from speech and language therapy and offered strategies for the student to improve vocabulary skills. (Petitioner's Exhibits 5, 15 and 20; Petitioner's

- Exhibits 4, 8 and 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
17. In July 2012, the student received an occupational therapy evaluation. (Petitioner's Exhibits 14 and 5; Respondent's Exhibits 7 and 8; Occupational Therapist's Testimony)
 18. On the Beery Developmental Test of Visual Motor Integration (VMI) in the July 2012 OT evaluation, the student scored a below average score as compared to nondisabled peers. (Petitioner's Exhibits 14 and 5; Respondent's Exhibits 7 and 8; Occupational Therapist's Testimony)
 19. During the July 2012 OT evaluation, the student was able to reproduce simple pre-handwriting strokes, basic triangle and other age-appropriate intersecting shapes and lines, and two dimensional figures. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 20. In July 2012, the student was able to accurately process information such as letters and numbers presented to and copy them on paper. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 21. On the Beery Developmental Test for Visual Perception in the July 2012 OT evaluation, the student scored in the average range. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 22. On the Beery Developmental Test of Motor Coordination in the July 2012 OT evaluation, the student scored in the average range. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 23. On the Motor-Free Visual Perception Test-3rd Edition (MVPT-3) in the July 2012 OT evaluation, the student scored in the low average range. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 24. During the July 2012 OT evaluation, the student had difficulty maintaining attention and questioned when the test would conclude. (Petitioner's Exhibit 14; Respondent's Exhibit 7)
 25. In July 2012, the student required prompting to complete written assignments, overall handwriting was legible and neat and the student worked best with one-on-one assistance. (Petitioner's Exhibits 14 and 5; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 26. In July 2012, the student's range of motion, muscle strength and tone were within normal limits. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 27. In July 2012, the student was able to maintain the necessary functional and symmetrical sitting posture and demonstrated functional gross motor skills which allow to access school environment independently and safely. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 28. In July 2012, the student did not present with any deficits in the areas of general strength, fine and gross motor coordination and sitting posture. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
 29. In July 2012, the student was able to visually track and maintain eye contact and demonstrated appropriate ability to interpret and process environmental surroundings. (Petitioner's Exhibit 14; Respondent's Exhibit 7)

30. In July 2012, the student did not under or over respond to the lights, the color of the room, the texture of the paper, pencil or tabletop. (Petitioner's Exhibit 14; Respondent's Exhibit 7)
31. In July 2012, the student did not appear to have difficulty with processing auditory information. (Petitioner's Exhibit 14; Respondent's Exhibit 7)
32. In July 2012, the student was able to follow multi-step directives. (Petitioner's Exhibit 14; Respondent's Exhibit 7)
33. In July 2012, the student required cueing to use left hand as a stabilizer however demonstrated age-appropriate letter formation, spacing, sizing and adequate writing pressure. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
34. In July 2012, the student was able to copy text from a near point model legibly and within a reasonable amount of time. (Petitioner's Exhibit 14; Respondent's Exhibit 7; Occupational Therapist's Testimony)
35. An IEP Team meeting was held for the student on August 20, 2012 to review the March 15, 2012 Speech/Language Evaluation and July 2012 Occupational Therapy Evaluation for the student and to update the student's IEP. (Petitioner's Exhibit 5; Respondent's Exhibits 8, 9 and 10; Parent's Testimony; Occupational Therapist's Testimony; School A Speech Language Pathologist's Testimony)
36. On August 20, 2012, the student's IEP Team determined that the student's OT services would be temporarily changed from direct services to consultative services. (Petitioner's Exhibit 5; Respondent's Exhibit 8; Occupational Therapist's Testimony)
37. On August 20, 2012, the speech-language pathologist recommended that the student's speech-language services be discontinued based on the results of the speech-language assessment which indicated that while the student's receptive and expressive vocabulary were below average, language abilities were average and therefore the student did not present as a student with a speech-language disorder or impairment. (Petitioner's Exhibit 5; Respondent's Exhibits 8 and 9; Parent's Testimony; School A Speech Language Pathologist's Testimony)
38. On August 20, 2012, the parent disagreed with the recommendation to discontinue the student's speech-language services and requested an independent educational evaluation (IEE) for speech-language. (Petitioner's Exhibit 5; Respondent's Exhibits 8, 9, 10 and 11; Parent's Testimony; School A Speech Language Pathologist's Testimony)
39. On August 20, 2012, the student's IEP Team did not alter the two hours per week of speech-language services prescribed on the student's March 13, 2012 IEP. (Petitioner's Exhibit 5; Respondent's Exhibits 8, 9 and 10; Parent's Testimony)
40. The School A Speech-Language Pathologist believed that the student's IEP was changed on August 20, 2012 to prescribe one hour per week of speech-language services. (School A Speech Language Pathologist's Testimony)
41. For the week of August 27, 2012, the student was absent during scheduled speech-language session. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
42. For the week of September 3, 2012, the student received 90 minutes of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
43. For the week of September 10, 2012, the student received one hour of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)

44. On September 12, 2012, the student received 45 minutes of individual behavioral support services. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
45. On September 14, 2012, the student scored a grade level equivalency of 5.8 on the Performance Series Reading Test. (Petitioner's Exhibit 23; Respondent's Exhibit 27)
46. For the week of September 17, 2012, the student was absent because of a loss in family and an injury to foot. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
47. The September 23, 2012 Speech and Language Evaluation Report summarized that the student's fluency, articulation and hearing appeared to be within the normal limits; that the student's pragmatic language skills were appropriate for turn-taking, eye contact, requesting and informing; that the student had below average expressive and receptive vocabulary skills; that the student had below average scores on all areas measured by the CELF-4; that the student presents with deficits in short term memory, working memory, vocabulary and overall expressive and receptive language skills. (Petitioner's Exhibit 20; Respondent's Exhibit 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
48. The September 23, 2012 Speech and Language Evaluation Report recommended that the student continue to receive speech-language services for 60 minutes weekly. (Petitioner's Exhibit 20; Respondent's Exhibit 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
49. The September 23, 2012 speech-language assessment was conducted in the student's home. (Petitioner's Exhibit 20; Respondent's Exhibit 12)
50. For the week of September 24, 2012, the student received two hours of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
51. On September 27, 2012, the student completed the Math Performance Series assessment in mathematics. (Petitioner's Exhibit 24; Respondent's Exhibit 27)
52. On September 27, 2012, the student's overall math performance was at the 4.2 grade level. (Petitioner's Exhibit 24; Respondent's Exhibit 27)
53. During the month of October 2012, the student received one hour per week of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
54. For the week of November 5, 2012, the student received one hour of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
55. For the week of November 12, 2012, the student received 90 minutes of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
56. For the week of November 19, 2012, which included the Thanksgiving Break, the student did not receive speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
57. For the week of November 26, 2012, the student received one hour of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
58. The student was absent on December 5 and 6, 2012. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
59. For the week of December 10, 2012, the student received 90 minutes of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
60. For the week of December 17, 2012, the student received one hour of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
61. The student's IEP Team met on December 17, 2012 IEP to review the independent September 23, 2012 Speech and Language Evaluation Report, to review the student's

- progress and to discuss compensatory education pursuant to an August 2012 Settlement Agreement. (Petitioner's Exhibit 8; Respondent's Exhibits 13, 14 and 15; Parent's Testimony; Advocate's Testimony; School A Speech Language Pathologist's Testimony)
62. Following the review of the independent September 23, 2012 Speech and Language Evaluation Report on December 17, 2012, the speech-language pathologist recommended that the student's speech-language services be reduced to 30 minutes per week. (Petitioner's Exhibit 8; Respondent's Exhibits 13, 14 and 15; Parent's Testimony; Advocate's Testimony; School A Speech Language Pathologist's Testimony)
 63. On December 17, 2012, the parent did not agree that the student's speech-language services should be reduced below one hour per week. (Petitioner's Exhibit 8; Respondent's Exhibits 13, 14 and 15; Parent's Testimony; Advocate's Testimony; School A Speech Language Pathologist's Testimony)
 64. On December 17, 2012, the School A speech-language pathologist noted that the September 23, 2012 Speech and Language Evaluation Report contained some discrepancies, specifically in the student's Peabody Picture Vocabulary Test (PPVT) scores; noted that the student's functioning within the school environment was not consistent with the assessment results; and noted that the student's speech and language score were commensurate with cognitive ability. (Petitioner's Exhibit 8; Respondent's Exhibit 13; School A Speech Language Pathologist's Testimony)
 65. The student's December 20, 2012 Amended IEP prescribed 30 minutes per week of direct speech-language services and one hour per month of consultative speech-language services. (Respondent's Exhibits 13, 14 and 15; School A Speech Language Pathologist's Testimony)
 66. On December 20, 2012, MAPCS forwarded a copy of the student's Amended IEP to the parent's advocate highlighting the change in speech-language services to 30 minutes per week and including one hour per month of speech-language consultation "as a compromise." (Respondent's Exhibits 13, 14 and 15; School A Speech Language Pathologist's Testimony)
 67. The parent did not respond to MAPCS regarding the December 20, 2012 Amended IEP. (Advocate's Testimony)
 68. The December 20, 2012 IEP was an amendment to the student's March 13, 2012 IEP. (Respondent's Exhibits 14 and 15)
 69. For the month of January 2013, the student received one hour per week of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
 70. For the week of February 4, 2013, the student was absent during scheduled speech-language session. For the remaining weeks of February 2013, the student received one hour per week of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
 71. For the 20 school weeks between October 2, 2012 and February 26, 2013, the student received group counseling for 45 minutes per week for 15 weeks. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
 72. In February 2013, the student completed a life skills assessment, an employment/career interest assessment and an informal questionnaire. (Petitioner's Exhibit 13; Respondent's Exhibit 26; Transition Specialist's Testimony)

73. In March 2013, one of MAPCS' counselors collaborated with the student's dedicated aide and formed the strategy to have the student decide when to receive counseling and the duration of the counseling sessions as well as help the student to understand that making improvement towards social/emotional goals would support goal of participating in general education classes. (Counselor's Testimony)
74. The strategy was successful and the student began participating in counseling services with the second counselor. (Petitioner's Exhibit 27; Respondent's Exhibit 24; Counselor's Testimony)
75. In March 2013, the student received one-on-one counseling for three weeks, for one hour one week and 30 minutes the other two weeks. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
76. In March 2013, the student received group counseling for three weeks, two sessions of which were 45 minutes and one session of which was 55 minutes. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
77. With the exception of one 45 minute session on September 12, 2012, one MAPCS counselor did not begin to provide behavioral support services until the week of March 7, 2013. (Petitioner's Exhibit 27; Respondent's Exhibit 24; Counselor's Testimony)
78. For the month of March 2013, the student received speech-language services for one hour per week with the exception of the week of March 11, 2013 when the student received 90 minutes of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
79. In April 2013, the student received three counseling sessions, one for 20 minutes and two for 45 minutes. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
80. In April 2013, the student received one hour of speech-language services for two weeks and 90 minutes of speech-language services in another week. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
81. From October 2, 2012 through April 23, 2013, the student attended counseling sessions with one of MAPCS' counselors. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
82. For the week of May 6, 2013, the student received 90 minutes of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
83. For the weeks of May 13 and May 20, 2013, the student received one hour per week of speech-language services. (Petitioner's Exhibit 26; Respondent's Exhibit 23)
84. In May 2013, the student received one counseling session for 45 minutes. (Petitioner's Exhibit 27; Respondent's Exhibit 24)
85. The student's May 21, 2013 IEP indicated that the student was functioning at the 4th grade level in mathematics, that the student was able to add and subtract math problems, use a calculator to accurately solve positive and negative numbers, had difficulty with retaining formulas and with solving word problems. (Petitioner's Exhibit 2; Respondent's Exhibit 16)
86. The present level of performance on the student May 21, 2013 IEP included supports which would benefit the student in mathematics. (Petitioner's Exhibit 2; Respondent's Exhibit 16)
87. The student's grades, classroom assessments and school records were reviewed to determine present level of performance and baseline data in mathematics for the

- student's May 21, 2013 IEP. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Teacher's Testimony; Special Education Coordinator's Testimony)
88. On May 21, 2013 the student was functioning at a 5th grade level in reading; was able to decode and read books in themes of interest; demonstrated the ability to answer comprehension questions, draw conclusions and make inferences; utilized context clues to define unfamiliar words; was improving ability to recall facts and identify the main idea of a passage; and needed to improve organizational skills. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Parent's Testimony; Teacher's Testimony)
 89. The student's grades, classroom assessments and school records were reviewed to determine present level of performance and baseline data in reading for May 21, 2013 IEP. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Teacher's Testimony; Special Education Coordinator's Testimony)
 90. On May 21, 2013, the parent questioned the student's reading level and requested that MAPCS conduct a Woodcock Johnson assessment of the student. (Petitioner's Exhibit 9; Respondent's Exhibit 19)
 91. On May 21, 2013, the student was able to construct a complete sentence; able to construct a complete paragraph with a graphic organizer; continued to need to improve ability to compose multi-paragraph writing responses; needed to improve ability to spell words accurately; and needed improvement in ability to revise and proof read written assignments. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Teacher's Testimony)
 92. On May 21, 2013, the student was functioning within OT age expectations. (Occupational Therapist's Testimony)
 93. In May 2013, the Transition Specialist worked collaboratively with the student to develop the student's May 21, 2013 transition plan. (Transition Specialist's Testimony)
 94. The student's May 21, 2013 transition plan includes the results of transition assessments related to training, education, employment, and independent living skills; measureable goals in postsecondary education and training, employment and independent living; and transition services, including courses of student, needed to assist the student. (Petitioner's Exhibit 2; Respondent's Exhibit 16)
 95. The student's May 21, 2013 transition services include 30 minutes per month of postsecondary advisement, 30 minutes per month of career exploration, 30 minutes per month of interviewing skills and 30 minutes per month of banking and budgeting skills. (Petitioner's Exhibit 2; Respondent's Exhibit 16)
 96. The student's May 21, 2013 IEP contains the goal of participating in standardized tests. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Transition Specialist's Testimony)
 97. The student's May 21, 2013 IEP contains goals for functional academic skills. (Petitioner's Exhibit 2; Respondent's Exhibit 16)
 98. The student's May 21, 2013 IEP contains independent living skills goals. (Petitioner's Exhibit 2; Respondent's Exhibit 16; Transition Specialist's Testimony)
 99. During the student's final two counseling sessions in June 2013, the student stated that "felt that was gaining more independence" and that the progress

- made over the 2012-2013 school year “made feel very good about herself.” (Petitioner’s Exhibit 27; Respondent’s Exhibit 24; Teacher’s Testimony)
100. The student began the 2012-2013 school year quiet, withdrawn and shy however during the 2012-2013 school year became a “social butterfly,” consistently practiced self-advocacy, had a group of friends which included nondisabled peers. (Petitioner’s Exhibit 27; Respondent’s Exhibit 24; Counselor’s Testimony; Special Education Coordinator’s Testimony; Transition Specialist’s Testimony; School A Speech Language Pathologist’s Testimony; Occupational Therapist’s Testimony; Teacher’s Testimony)
101. At the beginning of the 2012-2013 school year, the student was initially placed in a program for lower level reading however the student indicated that the program was too easy and requested that be placed in the Reading 180 program. (Teacher’s Testimony)
102. During the 2012-2013 school year, the student was reassessed in reading and scored high enough to be placed in Reading 180. (Teacher’s Testimony)
103. During the 2012-2013 school year, the student received specialized instruction outside of the general education environment in math, English, history and science. (Petitioner’s Exhibit 9; Respondent’s Exhibits 28 and 29; Parent’s Testimony; Special Education Coordinator’s Testimony; Teacher’s Testimony)
104. During the 2012-2013 school year, the student attended general education classes, with one-on-one aide, for Future Focus, Multicultural Studies, French and music.³ (Petitioner’s Exhibit 9; Respondent’s Exhibits 28 and 29; Parent’s Testimony; Special Education Coordinator’s Testimony; Teacher’s Testimony)
105. During the 2012-2013 school year, the student received specialized instruction outside of the general education environment for five hours on Mondays, for five hours on Tuesdays, for three hours on Wednesdays, for five hours on Thursdays and for four and one half hours on Fridays for a total of 22.5 hours per week during the “A” or “B” week. (Respondent’s Exhibit 28)
106. During the 2012-2013 school year, the student adequately functioned in general education classes, with accommodations, modifications and supports. (Respondent’s Exhibit 29; Special Education Coordinator’s Testimony; Teacher’s Testimony)
107. During the 2012-2013 school year, the student was provided a dedicated aide for all classes. (Petitioner’s Exhibit 5; Respondent’s Exhibit 8; Parent’s Testimony; Advocate’s Testimony; Occupational Therapist’s Testimony; Counselor’s Testimony; School A Speech Language Pathologist’s Testimony; Teacher’s Testimony)
108. During the 2012-2013 school year, the Occupational Therapist provided consultative services for the student. (Occupational Therapist’s Testimony)
109. During the 2012-2013 school year, the student scored a 70% on a 10th grade writing assessment rubric. (Petitioner’s Exhibit 2; Respondent’s Exhibit 16; Teacher’s Testimony)
110. During the 2012-2013 school year, the student initially had a goal to write one paragraph related to a quote. Every couple of months, the goal for the number of paragraphs would increase. The student progressed to being able to watch a video and write two paragraphs. (Teacher’s Testimony)

³ The student’s Multicultural Studies and music classes were classes taught for one semester rather than year-long classes.

111. During the 2012-2013 school year, with the aid of a graphic organizer, the student was able to complete assignments and a classroom research project. (Teacher's Testimony)
112. During the 2012-2013 school year, the student required prompting for some school work however once was prompted was able to successfully complete assignments. (Teacher's Testimony; School A Speech Language Pathologist's Testimony)
113. During the 2012-2013 school year, the student assisted other students with assignments. (School A Speech Language Pathologist's Testimony)
114. During the 2012-2013 school year, the student progressed academically with the support of dedicated aide and accommodations and modifications within the school environment. (Respondent's Exhibit 29; Teacher's Testimony)
115. During the 2012-2013 school year, the occupational therapist worked directly with the student for 60 minutes per week in a life skills/organizational skills group. (Occupational Therapist's Testimony)
116. During the 2012-2013 school year, the student worked cooperatively within the life skills/organizational skills group, was engaged and was usually the first in the group to complete assignments. (Occupational Therapist's Testimony)
117. During the 2012-2013 school year, the student participated in a "transition group" which focused on resume writing, travel training, interviewing skills and self-advocacy skills. (Transition Specialist's Testimony)
118. During the 2012-2013 school year, the student participated in a verbal interview for a scholarship and received the scholarship. (Parent's Testimony; School A Speech Language Pathologist's Testimony; Teacher's Testimony)
119. During the 2012-2013 school year, the student gave explanations to support ideas and always made connections between stories and life. (Teacher's Testimony)
120. During the 2012-2013 school year, the student completed a practice Wonderlic assessment, an assessment needed for enrollment into cosmetology school. (Transition Specialist's Testimony)
121. On the practice Wonderlic assessment, the student did not score at the level needed for enrollment in cosmetology school. (Transition Specialist's Testimony)
122. During the 2012-2013 school year, the student earned the grade letter "A" in general education Future Focus class for the first three quarters and a grade letter "B" for the fourth quarter. (Respondent's Exhibit 29)
123. For the 2012-2013 school year, the student received "As" and "Bs" as final grades in all of regular education classes. (Respondent's Exhibit 29)
124. For the 2012-2013 school year, the student received "Bs" and "Cs" as final grades in core academic classes. (Respondent's Exhibit 29)
125. On August 26, 2013, the student was assessed using the Woodcock Johnson-III. (Respondent's Exhibit 30)
126. On August 26, 2013, in Broad Reading, the student scored a grade level equivalency of 4.6. (Respondent's Exhibit 30)
127. On August 26, 2013, in Broad Math, the student scored a grade level equivalency of 4.0. (Respondent's Exhibit 30)

128. On August 26, 2013, in Broad Written Language, the student scored a grade level equivalency of 3.4. (Respondent's Exhibit 30)
129. The student is well mannered and respectful and does not exhibit problematic behaviors in the school setting. (Petitioner's Exhibits 1, 2 and 27; Respondent's Exhibits 3, 14, 16 and 24; Counselor's Testimony; Teacher's Testimony)
130. The student has difficulty with grammar. (Petitioner's Exhibits 15 and 20; Respondent's Exhibits 4 and 12; School A Speech Language Pathologist's Testimony)
131. The student's primary speech-language deficit is in the area of vocabulary and has a deficit specifically as it relates to abstract vocabulary. (Petitioner's Exhibits 15 and 20; Respondent's Exhibits 4 and 12; Private Speech Language Pathologist's Testimony; School A Speech Language Pathologist's Testimony)
132. The student is able to effectively communicate with concrete vocabulary within the school environment. (Counselor's Testimony; Special Education Coordinator's Testimony; Transition Specialist's Testimony; School A Speech Language Pathologist's Testimony; Occupational Therapist's Testimony; Teacher's Testimony)
133. The student is able to answer questions asked by teachers. (Transition Specialist's Testimony; School A Speech Language Pathologist's Testimony; Occupational Therapist's Testimony; Teacher's Testimony)
134. The student understands jokes and quotes. (School A Speech Language Pathologist's Testimony; Teacher's Testimony)
135. The student is able to follow multi-step directions. (Petitioner's Exhibit 14; Respondent's Exhibit 7)
136. The student is an excellent note taker. (School A Speech Language Pathologist's Testimony)
137. The student desired to participate in general education classes. (Counselor's Testimony)
138. The student plans to attend beauty school and become a cosmetologist. (Petitioner's Exhibits 2 and 13; Respondent's Exhibits 16 and 26; Parent's Testimony; Transition Specialist's Testimony)
139. The student has learned the steps needed to achieve goal of becoming a cosmetologist, including obtaining a license and taking business management courses, has explored cosmetology schools in the area and is aware of some community support available. (Transition Specialist's Testimony)
140. The process of career exploration takes approximately four hours. (Transition Specialist's Testimony)
141. The Private Speech Language Pathologist has 45 years of experience. (Petitioner's Exhibit 31; Private Speech Language Pathologist's Testimony)
142. The School A Speech Language Pathologist has nine years of experience. (Respondent's Exhibit 31; School A Speech Language Pathologist's Testimony)
143. The School A Speech Language Pathologist provided weekly speech-language services to the student during the Summer of 2012 and during the 2012-2013 school year, observed the student throughout the 2012-2013 school year, participated in IEP Team meetings for the student and worked collaboratively with the student's teachers and dedicated aide. (Petitioner's Exhibits 2 and 8; Respondent's Exhibits 8, 13, 14, 16 and 23; School A Speech Language Pathologist's Testimony)

144. The Private Speech Language Pathologist's knowledge of the student stems from his review of the student's records. The Private Speech Language Pathologist has never met the student, has never evaluated the student, has not spoken with any of the student's service providers, has never participated in a meeting regarding the student, has never observed the student and has never spoken with student's teachers or parent. (Private Speech Language Pathologist's Testimony)
145. The Occupational Therapist worked with the student for four years, participated in the student's IEP Team meetings for four years and provided evaluations of the student. (Petitioner's Exhibits 14 and 18; Respondent's Exhibits 7, 16 and 25; Occupational Therapist's Testimony)
146. The Transition Specialist routinely provides students with assistance in completing applications and in preparing for standardized tests. (Transition Specialist's Testimony)
147. A transition plan should not overwhelm a student and additional goals can be added once a student masters the goals already included on a transition plan. (Transition Specialist's Testimony)

CONCLUSIONS OF LAW

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

Burden of Proof

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

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Issue #1

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a

student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g.*, *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the Petitioner alleged that MAPCS failed to implement the student's March 13, 2012 IEP from August 27, 2012 through May 21, 2013, specifically by failing to provide 23.5 hours per week of specialized instruction outside of the general education environment, two hours per week of speech-language therapy, one hour per week of behavioral support services and 30 minutes per week of occupational therapy. It is uncontested that the student began the 2012-2013 school year with the March 13, 2012 IEP in effect. It is also uncontested that the student's March 13, 2012 IEP prescribed 23.5 hours per week of specialized instruction outside of the general education environment, two hours per week of speech-language therapy outside of the general education environment and one hour per week of behavioral support services outside of the general education environment.

Specialized Instruction

The service delivery page of the student's March 13, 2012 IEP indicated that the student was to receive 23.5 hours per week of specialized instruction outside of the general education environment. The notes from the March 13, 2012 IEP Team meeting documented that the IEP Team determined that the student was to receive specialized instruction in a "combination" environment with a general education teacher and a special education teacher in order for the student to have access to the general education curriculum however the Parent and the Advocate testified that the student was to be in general education for only physical education and lunch.

During the 2012-2013 school year, the student received specialized instruction outside of the general education environment in math, English, history and science. The student attended general education classes, with one-on-one aide, for Future Focus, Multicultural Studies,

French and music.⁴ School A begins at 9:00 a.m. School A ends at 4:14 p.m. on Mondays, Tuesdays and Thursdays; at 12:59 pm. on Wednesdays; and at 3:40 p.m. on Fridays. According to the student's schedule included in the record, the student received specialized instruction outside of the general education environment for five hours on Mondays, for five hours on Tuesdays, for three hours on Wednesdays, for five hours on Thursdays and for four and one half hours on Fridays for a total of 22.5 hours per week. School A has "A" weeks and "B" weeks, for which students' schedules are altered. The record is clear that the School A schedule alternated on "A" weeks and "B" weeks however the record is not clear on the student's schedule for the week not included in the record. The record is also clear that the student desired to participate in general education classes and adequately functioned in general education classes, with accommodations, modifications and supports.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The record contains a copy of the student's schedule from one week of school during the 2012-2013 school year. It is not clear as to whether the schedule is from an "A" week or a "B" week. The record does not evidence of the student's schedule on the alternate week. While the record is clear that there is a difference in the class schedule for "A" weeks and "B" weeks, the Petitioner did not prove that the student received substantially different specialized instruction on an alternate week. The Advocate testified that the scheduled "switched" in the alternate week, but did not provide specific testimony of what the student's schedule was during the alternate week or clear testimony of the "switch." Therefore, the Hearing Officer is not persuaded that the student received fewer than 22.5 hours per week of specialized instruction outside of the general education environment from August 27, 2012 through May 21, 2013.

In order for there to be a material failure of MAPCS to implement the student's IEP, the Petitioner "must show more than a de minimis failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Catalan v District of Columbia*, 478 F. Supp. 2d 73 at 75 (D.D.C. 2007) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this

⁴ The student's Multicultural Studies and music classes were classes taught for one semester rather than year-long classes.

standard “have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citations omitted).

In *Johnson v. District of Columbia*, 113 LRP 34866 (August 27, 2013), the Court found that the difference between 31 and a little over 28 hours of specialized instruction did not constitute a material deviation from the requirements of the student’s IEP. In *Savoy v. District of Columbia*, 844 F. Supp. 2d 23 (D.D.C. 2012), the Court found that a difference of less than one hour per week was not material. However, in *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007), the Court found that a 50% deprivation of hours was material. In *Sumter Cty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011), the Court found that providing seven and a half to ten hours of the required fifteen hours, in combination with the school’s failure to use the teaching method specified in the IEP, was material.

In this matter, the Hearing Officer concludes that the facts more closely align with the facts in *Johnson* and *Savoy* than with those in *Van Duyn* and *Heffernan*. The deviation from the 23.5 hours of specialized instruction outside of the general education environment prescribed by the student’s IEPs was relatively slight, as MAPCS provided more than 95% per week of the specialized instruction prescribed by the student’s IEPs. That coupled with the fact that the student was provided a dedicated aide in all classes, whether outside or within the general education environment, leads the Hearing Officer to conclude that the provision of 22.5 hours per week rather than 23.5 hours per week of specialized instruction outside of the general education environment to the student during the 2012-2013 school year was not a material failure to implement the student’s IEP.

Occupational Therapy

The service delivery page of the student’s March 13, 2012 IEP also indicated that the student was to receive 30 minutes per day of occupational therapy outside of the general education environment however in the goal section of the student’s March 13, 2012 IEP indicated that the student had mastered all of OT goals and would receive OT on a consult basis for 30 minutes per month. The notes from the March 13, 2012 IEP Team meeting indicated that the student demonstrated age appropriate motor skills, had appropriate range of motion and strength to carry out the requirements in school environment, demonstrated good fine motor skills to manipulate materials in educational setting and was able to produce age appropriate written work in a timely manner. Neither party argued or suggested that the student’s March 13, 2012 IEP prescribed 30 minutes per day of OT. The Petitioner alleged that the student’s March 13, 2012 IEP included 30 minutes per week of OT.

On August 20, 2012, the student’s IEP Team met to review updated evaluations/assessments for the student and to update the student’s IEP. The LEA’s notes and the parent attorney’s notes from the August 20, 2012 IEP Team meeting differ on several key points. However both sets of notes are consistent in the agreement of all IEP Team members for the student’s OT services to be temporarily changed from direct services to consultative services.

The Hearing Officer concludes that MAPCS did not fail to implement the student’s OT services pursuant to March 13, 2012 IEP from August 27, 2012 through May 21, 2013. First, the student’s March 13, 2012 IEP is not clear as to what OT services the student was to receive.

The service delivery page indicated 30 minutes per day of direct services but the goal section indicated 30 minutes per month of consultative services. Next, the student's August 20, 2012 IEP Team agreed for the student's services to be delivered, at least temporarily, on a consultative basis. The Occupational Therapist creditably testified that provided consultative services for the student during the 2012-2013 school year. Additionally, the student was provided OT for 60 minutes per week in a small group setting. While the Service Trackers only document one consultation session, the Hearing Officer apportions more weight to the Occupational Therapist's testimony than to Services Trackers. No testimony was presented which contradicted or refuted the testimony of the Occupational Therapist. Additionally, the Occupational Therapist provided specific and supported testimony about the student, needs and progress.

Speech-Language

During the student's August 20, 2012 IEP Team meeting, the student's IEP Team reviewed the March 15, 2012 Speech/Language Evaluation for the student. While the LEA's notes and the parent attorney's notes from the August 20, 2012 IEP Team meeting differ on several key points, both sets of notes indicate that there was a recommendation that the student's speech-language services be discontinued based on the results of the speech-language assessment. However, both sets of notes also indicate that the parent disagreed with the recommendation and requested an independent speech-language assessment. There was no evidence which suggested that the two hours per week of speech-language services prescribed on the student's March 13, 2012 IEP was altered following the August 20, 2012 IEP Team meeting. Notwithstanding the failure of the student's IEP Team to decrease the student's speech-language services, the speech-language pathologist believed that the student's speech-language services were reduced to one hour per week and provided services accordingly.

The student's IEP Team reconvened on December 17, 2012 IEP to review the independent September 23, 2012 Speech and Language Evaluation Report, to review the student's progress and to discuss compensatory education pursuant to an August 2012 Settlement Agreement. Following the review of the independent September 23, 2012 Speech and Language Evaluation Report, the speech-language pathologist recommended that the student's speech-language services be reduced to 30 minutes per week. The mother stated that did not want the services to be reduced below one hour per week. On December 20, 2012, MAPCS forwarded a copy of the student's Amended IEP to the parent's advocate highlighting the change in speech-language services to 30 minutes per week and including one hour per month of speech-language consultation "as a compromise." The parent did not respond to MAPCS regarding the Amended IEP.

The Respondent argued that since the parent did not consent to the December 20, 2012 Amended IEP, the IEP was not finalized or valid. The parent also argued that since the student's May 21, 2013 IEP contained the date of March 13, 2012 as the student's "Last IEP Annual Review Meeting Date" then the December 20, 2012 IEP was not finalized. The Hearing Officer rejects these arguments. The fact that the parent did not agree with the proposed changes to the student's IEP did not invalidate the IEP. *See K.A. v. Fulton County Sch. Dist.*, 59 IDELR 248 (N.D. Ga. 2012) (while parents have a right to actively participate in the development of their child's IEP, school districts are not bound to bend to the wishes of the parent in the final IEP determination. School districts comply with the IDEA by providing parents notice of upcoming

IEP meetings and their procedural safeguards, and by ensuring that parents have an opportunity for meaningful participation in the IEP development process). Additionally, the December 20, 2012 IEP was an amendment to the student's March 13, 2012 IEP. The fact that the original IEP date appeared on the student's May 21, 2013 IEP as the "Last IEP Annual Review Meeting Date" does not negate an Amended IEP Meeting Date.

For the week of August 27, 2012, the student was absent during scheduled speech-language session. For the week of September 3, 2012, the student received 90 minutes of speech-language services. For the week of September 10, 2012, the student received one hour of speech-language services. For the week of September 17, 2012, the student was absent because of an injury to foot. For the week of September 24, 2012, the student received two hours of speech-language services. During the month of October 2012, the student received one hour per week of speech-language services. For the week of November 5, 2012, the student received one hour of speech-language services. For the week of November 12, 2012, the student received 90 minutes of speech-language services. For the week of November 19, 2012, which included the Thanksgiving Break, the student did not receive speech-language services. For the week of November 26, 2012, the student received one hour of speech-language services. For the week of December 3, 2012, the student was absent on December 5 and 6. For the week of December 10, 2012, the student received 90 minutes of speech-language services. For the week of December 17, 2012, the student received one hour of speech-language services. For the month of January 2013, the student received one hour per week of speech-language services. For the week of February 4, 2013, the student was absent during scheduled speech-language session. For the remaining weeks of February 2013, the student received one hour per week of speech-language services. For the month of March 2013, the student received speech-language services for one hour per week with the exception of the week of March 11, 2013 when the student received 90 minutes of speech-language services. In April 2013, the student received one hour of speech-language services for two weeks and 90 minutes of speech-language services in another week. For the week of May 6, 2013, the student received 90 minutes of speech-language services. For the weeks of May 13 and May 20, 2013, the student received one hour per week of speech-language services.

The Hearing Officer concludes that MAPCS failed to implement the student's speech-language services pursuant to March 13, 2012 IEP from August 27, 2012 through December 20, 2012. From August 27, 2012 through December 20, 2012, the School A Speech-Language Pathologist mistakenly believed that the student's IEP had been changed to prescribe one hour per week of speech-language services and provided services accordingly. However, although MAPCS failed to implement two hours per week of speech-language services from August 27, 2012 through December 20, 2012, MAPCS provided an average of 30 minutes per week more than the student's December 20, 2012 IEP prescribed from December 20, 2012 through May 21, 2013.

From August 27, 2012 through December 20, 2012 the student was not provided approximately 17 hours of speech-language services pursuant to March 13, 2012 IEP. From December 20, 2012 through May 21, 2013, the student was provided nine and one half hours of speech-language services in addition to the services prescribed on December 20, 2013 IEP.

Therefore, MAPCS did not provide the student a total of seven and one half hours of speech-language services during the 2012-2013 school year that should have been provided.

The Respondent argued that any failure to provide speech-language services was not a material failure to implement the student's IEP. The Respondent cited *Catalan*, 478 F. Supp. 2d at 76 (holding that failure to receive "a handful of sessions" of therapy and therapist's shortening of several other sessions was not material) to support its position. However, the Hearing Officer rejects this argument. From August 27, 2012 through December 20, 2012, MAPCS consistently failed to provide one hour per week of speech-language services as prescribed by the student's March 13, 2012 IEP. Therefore, while on a "handful of sessions" were not provided, the sessions that were provided were provided at one half of the prescribed duration. A material failure to implement a student's IEP occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child's IEP. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). Thus, the failure to implement two hours per week of speech-language services from August 27, 2012 through December 20, 2012 was a material failure to implement the student's IEP.

Behavior Support Services

The student's March 13, 2012 IEP prescribed one hour per week of behavioral support services outside of the general education environment. The student's emotional/social/behavioral goals on March 13, 2012 IEP address self-advocacy, developing a positive self-image and using effective coping strategies. It was uncontested that the student is well mannered and respectful and does not exhibit problematic behaviors in the school setting. The Counselor, Special Education Coordinator, Transition Specialist and Teacher testified that at the beginning of the 2012-2013 school year, the student was quiet, withdrawn and shy however during the 2012-2013 school year, the student became a "social butterfly," consistently practiced self-advocacy, had a group of friends which included nondisabled peers, "blossomed," and presented as a "happy" student.

During the 2012-2013 school year, the student received behavior support services from two counselors. With one counselor, with the exception of one 45 minute session on September 12, 2012, the counselor did not begin to provide behavioral support services until the week of March 7, 2013. The Counselor testified that behavioral support services were not provided to the student until March 7, 2013 because the student "avoided counseling" from September 2012 until "right before Spring Break." The Counselor explained that he was able to meet with the student informally during this time and conducted observations of the student. During this time period however the student did attend counseling sessions with another of MAPCS' counselors.

In March 2013, the counselor collaborated with the student's dedicated aide and formed the strategy to have the student decide when to receive counseling and the duration of the counseling sessions as well as help the student to understand that making improvement towards social/emotional goals would support goal of participating in general education classes. The strategy was successful and the student began participating in counseling services with the second counselor.

On September 12, 2012, the student received 45 minutes of individual behavioral support services. For the 20 school weeks between October 2, 2012 and February 26, 2013, the student received group counseling for 45 minutes per week for 15 weeks. In March 2013, the student received one-on-one counseling for three weeks, for one hour one week and 30 minutes the other two weeks. In March 2013, the student also received group counseling for three weeks, two sessions of which were 45 minutes and one session of which was 55 minutes. In April 2013, the student received three counseling sessions, one for 20 minutes and two for 45 minutes. In May 2013, the student received one counseling session for 45 minutes. During the student's final two counseling sessions in June 2013, the student stated that "felt that was gaining more independence" and that the progress made over the 2012-2013 school year "made feel very good about herself."

The Petitioner suggested that because the majority of the student's counseling sessions were held in a group format the student did not receive behavioral support services pursuant to IEP. The Hearing Officer is not persuaded by this argument. There is nothing in student's March 13, 2012 or December 20, 2012 IEPs which indicated that the student's behavioral support services must be one-on-one or individual sessions. The IEPs only indicated that the student's behavioral support services needed to be outside of the general education setting. There was no evidence presented which suggested that the behavioral support services were not provided outside of the general education setting.

The Respondent argued that MAPCS did not deny the student a FAPE by failing to provide behavioral support services because the student's behavioral support services were made available to a child in accordance with the child's IEP pursuant to 34 CFR §300.323(c)(2), however the student did not avail herself of the services. The Hearing Officer is not persuaded by this argument. While the student may have been resistant to receiving counseling with one of the MAPCS counselors, in March 2013, the counselor and the student's dedicated aide devised a strategy to encourage the student to attend. The strategy was successful and the student began attending counseling. Had the counselor acted sooner to encourage the student to attend counseling, it is likely that the student would have responded in the same manner. Additionally, the counselor had the opportunity to discuss strategies with the student's December 20, 2012 IEP Team yet did not.

A material failure to implement a student's IEP occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child's IEP. *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007). In *Catalan v District of Columbia*, 478 F. Supp. 2d 73 at 75 (D.D.C. 2007), the Court held that failure to receive "a handful of sessions" of therapy and therapist's shortening of several other sessions was not material. Here, the Hearing Officer concludes that the shortening of the student's sessions from one hour to 45 minutes per week may not have been a material failure to implement the student's IEP had 45 minutes per week been provided to the student each week. However, from August 27, 2012 through May 21, 2013, the student received behavioral support services for approximately 24 of the 36 school weeks. In other words, the student missed approximately 1/3 of counseling services. This constitutes a material failure to implement the student's behavioral support services.

The Petitioner met its burden with respect to Issue #1 as it relates to speech-language services from August 27, 2012 through December 20, 2012 and behavioral support services.

Issue #2

The Petitioner alleged that MAPCS denied the student a FAPE by failing to develop an appropriate IEP for the student on May 21, 2013, specifically by failing to include appropriate baseline data, accurate present levels of performance, two hours per week of speech-language therapy and 30 minutes per week of direct occupational therapy.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

Baseline Data and Present Levels of Performance

The student's May 21, 2013 IEP indicated that the student was functioning at the 4th grade level in mathematics, that the student was able to add and subtract math problems, use a calculator to accurately solve positive and negative numbers, had difficulty with retaining formulas and with solving word problems. The Present Level of Performance also indicated supports which would benefit the student in mathematics. The IEP states that the student's grades, classroom assessments and school records were reviewed to determine present level of performance and baseline data in mathematics. On September 27, 2012, the student completed the Math Performance Series assessment in mathematics. The assessment indicated that the student's overall math performance was at the 4.2 grade level. The student also completed the Math Performance Series assessment on May 30, 2013 however these results were not available for the student's May 21, 2013 IEP Team. The Teacher testified that the student's baseline data and present levels of performance were developed based on a variety of assessments and the student's classroom functioning. There was no evidence presented which suggested that the student was not performing at the 4th grade level in mathematics on May 21, 2013 or that the mathematics goals on the student's May 21, 2013 IEP were inappropriate for the student.

The student's May 21, 2013 IEP indicated that the student was functioning at a 5th grade level in reading; was able to decode and read books in themes of interest; demonstrated the ability to answer comprehension questions, draw conclusions and make inferences; utilized context clues to define unfamiliar words; was improving ability to recall facts and identify the main idea of a passage; and needed to improve organizational skills. The IEP states that the student's grades, classroom assessments and school records were reviewed to determine present level of performance and baseline data in reading. The Teacher testified that at the beginning of the 2012-2013 school year, the student was initially placed in a program for lower

level reading however the student indicated that the program was too easy and requested that be placed in the Reading 180 program. The student was reassessed and scored high enough to be placed in Reading 180. On September 14, 2012, the student scored a grade level equivalency of 5.8 on the Performance Series Reading Test. The Parent also testified that the student was reading on a 4th-5th grade level. The Teacher testified that the student's baseline data and present levels of performance were developed based on a variety of assessments and the student's classroom functioning. There was no evidence presented which suggested that the student was not performing at the 5th grade level in reading on May 21, 2013 or that the reading goals on the student's May 21, 2013 IEP were inappropriate for the student.

The student's May 21, 2013 IEP indicated that the student was able to function at 70% using a 10th grade writing assessment rubric; that on the May 25, 2011 WIAT-III the student was in the low average range in written language; that the student was able to construct a complete sentence; that the student was able to construct a complete paragraph with a graphic organizer; continued to need to improve ability to compose multi-paragraph writing responses; needed to improve ability to spell words accurately; and needed improvement in ability to revise and proof read written assignments. The Teacher testified that during the 2012-2013 school year, the student initially had a goal to write one paragraph related to a quote. Every couple of months, the goal for the number of paragraphs would increase. The student progressed to being able to watch a video and write two paragraphs. With the aid of a graphic organizer, the student was able to complete assignments and a classroom research project. The Teacher testified that the student's baseline data and present levels of performance were developed based on a variety of assessments and the student's classroom functioning. With the exception of the student's August 2013 Woodcock Johnson score, there was no evidence presented which suggested that the student was not performing at the level indicated on the student's May 21, 2013 IEP or that the written language goals on the student's May 21, 2013 IEP were inappropriate for the student.

There was no evidence presented which suggested that the student's present levels of performance and baseline data for the student's social/emotional/behavioral functioning were inappropriate. The student's speech-language services are discussed below.

The Petitioner argued that the present levels of performance on the student's May 21, 2013 IEP were inappropriate because they were not aligned with scores on the student's August 26, 2013 Woodcock Johnson. Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

On May 21, 2013, the parent questioned the student's reading level and requested that MAPCS conduct a Woodcock Johnson. The Woodcock Johnson was conducted on August 26, 2013. In Broad Reading, the student scored a grade level equivalency of 4.6. In Broad Math, the student scored a grade level equivalency of 4.0. In Broad Written Language, the student scored a grade level equivalency of 3.4. With the exception of written language, the scores align with the present levels of performance and baseline data on the student's May 1, 2013 IEP. In written language the score does not align with the score the student received on a 10th grade writing

rubric but does align with the totality of the narrative related to the student's present level of functioning.

A student's IEP needs to accurately reflect the results of evaluations to identify the student's needs and establish annual goals related to those needs. *See* 34 CFR 300.320(a). The Hearing Officer concludes that the baseline data and present levels of performance on the student's May 21, 2013 IEP were accurate reflections of the student's functioning on May 21, 2013 in all academic areas. Further, the goals included on the student's May 21, 2013 IEP were appropriate given the student's present level of performance.

While one measure on the student's May 21, 2013 IEP written language present level of performance indicated that the student scored a 70% on a 10th grade writing rubric, the totality of the present level of performance indicated that the student struggled writing paragraphs without the assistance of a graphic organizer and needed to improve spelling, writing multi-paragraph responses and revising written assignments. The baseline data repeated the student's score on the writing rubric but also indicated that the student was functioning at the 40% level based on work samples, tests and quizzes.

Even if the present level of performance/baseline data for written expression were inaccurate on the student's May 21, 2013 IEP, the Petitioner did not prove that this procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. *See* 34 CFR §300.513(a)(2). The Teacher testified that the goals on the student's May 21, 2013 IEP were appropriate for the student. There was no evidence presented to refute this testimony.

Speech-Language Therapy

The Petitioner alleged that MAPCS denied the student a FAPE by failing to include two hours per week of speech-language therapy in the student's May 21, 2013 IEP. The student was assessed in speech-language in March 2012. Following the review of the March 15, 2012 Speech/Language Evaluation, the parent requested an IEE. The IEE was completed on September 23, 2012.

The March 15, 2012 Speech/Language Evaluation summarized that the student had low average communication skills; had strengths in the areas of fluency, voice, articulation, Meaning from Context, Nonliteral Language and Pragmatic Judgment; and had weaknesses in the areas of Synonyms, Grammatical Judgment, receptive one-word vocabulary, and expressive one-word vocabulary skills. The March 15, 2012 assessment recommended that the student be discontinued from speech and language therapy and offered strategies for the student to improve vocabulary skills. Based on the results of the assessment, during the student's August 20, 2012 IEP Team meeting, the School A speech-language pathologist recommended that the student be removed from speech-language services. The recommendation was based on the assessment results which indicated that while the student's receptive and expressive vocabulary were below average, language abilities were average and therefore the student did not present as a student with a speech-language disorder or impairment. The parent's attorney did not agree

with removing direct speech-language services from the student's IEP and requested that the Team have further discussions upon the completion of the IEE.

The September 23, 2012 Speech and Language Evaluation Report summarized that the student's fluency, articulation and hearing appeared to be within the normal limits; that the student's pragmatic language skills were appropriate for turn-taking, eye contact, requesting and informing; that the student had below average expressive and receptive vocabulary skills; that the student had below average scores on all areas measured by the CELF-4; that the student presents with deficits in short term memory, working memory, vocabulary and overall expressive and receptive language skills. The evaluator recommended that the student continue to receive speech-language services for 60 minutes weekly. The results of the September 23, 2012 Speech and Language Evaluation Report were discussed in the student's December 17, 2012 IEP Team meeting. The School A speech-language pathologist noted that the September 23, 2012 Speech and Language Evaluation Report contained some discrepancies, specifically in the student's PPVT scores; noted that the student's functioning within the school environment was not consistent with the assessment results; and noted that the student's speech and language score were commensurate with cognitive ability.

During the December 17, 2012 IEP Team meeting, the parent stated that "did not want speech and language services reduced below one hour per week." MAPCS stated that the "Team" would provide the recommendation as to whether to reduce the student's speech-language services to 30 minutes per week or stay at one hour per week. Ultimately, the student's December 20, 2012 IEP prescribed 30 minutes per week of direct speech-language services and one hour per month of consultative speech-language services.

The record contains testimony from two speech-language pathologists. Both speech-language pathologists were qualified as experts in their field.

The Private Speech Language Pathologist testified that the student needs speech-language therapy at least three times a week for one hour or for one period per school day. The Private Speech Language Pathologist explained that speech-language is a problem that impacts the student educationally and socially. The Private Speech Language Pathologist testified that the student's receptive language deficits, especially vocabulary, creates a situation where the student is unable to learn because does not understand the vocabulary used in the school environment. Therefore, the student is unable to perform academic tasks such as making inferences and explaining the main idea of a story. The Private Speech Language Pathologist testified that if student only given 30 minutes per week, "cannot be brought up to the mild level in one year." The Private Speech-Language Pathologist stated that his recommendation was "to help correct some of [deficits in speech-language" and to "try to make up deficits in two years." While the Private Speech Language Pathologist originally testified that his recommendation was to "correct" the student's speech-language deficits, the Private Speech Language Pathologist altered his testimony to state that his recommendation was to "improve" the student's speech-language functioning so that can function appropriately in class and in social situations.

The School A Speech Language Pathologist testified that the differences in the student's speech-language assessments were the result of different assessment tools. The School A Speech Language Pathologist testified that the student has difficulty with grammar; does not have "a lot" of abstract vocabulary; is able to communicate very well in the school environment; is able to answer questions asked by teachers; understands jokes and quotes; is able to finish assignments very quickly; needs prompting for some school work but once is prompted is able to successfully complete assignments; no longer needs prompts for directions; is an excellent note taker; and was able to assist other students with assignments during the 2012-2013 school year. The School A Speech Language Pathologist explained that the student's dedicated aide knows when to prompt the student, that there are "word walls" in the student's classroom to assist with vocabulary and that is able to effectively communicate with concrete vocabulary however needs to "do more carry over" at home to learn more abstract vocabulary. The School A Speech Language Pathologist testified that the student did "extremely well" with 30 minutes of speech-language services per week to the point where the speech-language pathologist started working with the student on public speaking and comparing and contrasting information from articles. The School A Speech Language Pathologist testified that 30 minutes per week of direct speech-language services and one hour per month of consultative services is appropriate for the student.

In *S.D. v. Starr*, 60 IDELR 70, 112 LRP 57584 (D. Md. 2012), the parent's medical expert witness testified that the student could suffer serious health risks if he returned to public school. However, the court credited the testimony of teachers and related services providers who had previously worked with the boy, and who testified that they were able to respond to the child's health needs within the school setting. The medical expert had never observed the child at school and was not familiar with the school's ability to provide accommodations for the child. Likewise, in *Sebastian M. v. King Phillip Reg'l Sch. Dist.*, 685 F.3d 79 (1st Cir. 2012), the court rejected the testimony of the parent's expert witnesses, who had never spoken with the student's teachers, reviewed his schoolwork, evaluated the student or observed him at school. The court was persuaded by the testimony of the student's teachers who worked directly with him on a daily basis. "All of these educators testified that the proposed IEPs offered an appropriate combination of services designed to permit [the student] to achieve meaningful educational progress, including counseling services, occupational therapy, social skills training, and vocational training," U.S. Circuit Judge Kermit V. Lipez wrote for the three judge panel. The school district's witnesses were therefore due more deference than the expert witness on behalf of the parents.

While the Private Speech Language Pathologist's 45 years of experience far outweighs the School A Speech Language Pathologist's nine years of experience, the School A Speech Language Pathologist provided weekly speech-language services to the student during the Summer of 2012 and during the 2012-2013 school year, observed the student throughout the 2012-2013 school year, participated in IEP Team meetings for the student and worked collaboratively with the student's teachers and dedicated aide. The Private Speech Language Pathologist's only knowledge of the student is from a review of the student's records. The Private Speech Language Pathologist has never met the student, has never evaluated the student, has not spoken with any of the student's service providers, has never participated in a meeting regarding the student, has never observed the student and has never spoken with student's teachers or parent.

Additionally, the Private Speech Language Pathologist testified that the student's speech-language deficits were such that the student would not be able to make inferences or express the main idea of a story. However the student's May 21, 2013 IEP indicated that the student has demonstrated the ability to answer comprehension questions, draw conclusions and make inferences and was improving ability to identify the main idea of a passage. Further, the Private Speech Language Pathologist testified that the student's speech-language deficits impacted socially however did not recall the student's level of social functioning. The Counselor, Special Education Coordinator, Transition Specialist and Teacher testified that at the beginning of the 2012-2013 school year, the student was quiet, withdrawn and shy however during the 2012-2013 school year, the student became a "social butterfly," consistently practiced self-advocacy, had a group of friends which included nondisabled peers, "blossomed," and presented as a "happy" student. Therefore, as in *S.D. v. Starr* and *Sebastian M.*, the Hearing Officer affords more deference to the testimony and recommendations of the School A Speech Language Pathologist than the testimony and recommendations of the Private Speech Language Pathologist.

It is uncontested that the student's primary speech-language deficit is in the area of vocabulary and that the student has difficulty with grammar. Both the September 23, 2012 independent evaluation and the Private Speech Language Pathologist concluded that the student deficits impacted everyday functioning in the classroom setting. However, the Private Speech Language Pathologist testified that he has never observed the student in the classroom environment and the September 23, 2012 evaluation was conducted in the student's home. There was no evidence presented which suggested that the evaluator had ever observed the student in the classroom environment. The evaluator noted that "rapport was quickly established" which leads the Hearing Officer to believe that the date the evaluator conducted the evaluation was the first time the evaluator met or interacted with the student.

The Private Speech Language Pathologist's testimony construed an overall view that the student's deficits were so severe as to hinder the student in basic comprehension of spoken language in the school environment both with peers and with staff members. This depiction is simply not the image of the student developed throughout the record. The record indicates that academically the student received no less than the grade letter "C" throughout the 2012-2013 school year in all classes. In the student's regular education classes, the student received all "As" and "Bs" as final grades. While the parent questioned the student's grade in French, the Teacher, Counselor, School A Speech Language Pathologist and Occupational Therapist all testified related to the student's progress with the support of dedicated aide and accommodations and modifications within the school environment. In core academic classes, the student received "Bs" and "Cs" as final grades. Additionally, the student's July 17, 2012 Occupational Therapy Evaluation Report noted that student was able to follow multi-step instructions. Although the School A Speech Language Pathologist acknowledged that the student did not have "a lot" of abstract vocabulary, the student demonstrated ability to adequately communicate by participating in a verbal interview for a scholarship and receiving the scholarship and, according the student's Teacher, always gave explanations to support ideas and always made "wonderful" connections between a story and life. Socially, the

student “blossomed” during the 2012-2013 school year, became a “social butterfly” and had age-appropriate interactions with peers.

Related services are supportive services as are required to assist a child with a disability to benefit from special education. *See* 34 CFR §300.34. The Private Speech Language Pathologist’s testimony regarding the amount of speech-language services needed for the student applied the incorrect standard. “Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child’s disability.” *Klein Ind. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. August 6, 2012). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.

The Hearing Officer concludes that 30 minutes per week of direct speech-language services and one hour per month of consultative services are adequate to assist the student to benefit from special education. MAPCS did not deny the student a FAPE by failing to include two hours per week of speech-language therapy in the student’s May 21, 2013 IEP.

Occupational Therapy

The Petitioner alleged that the student’s May 21, 2013 IEP should have included 30 minutes per week of direct occupational therapy. The student received an occupational therapy evaluation in July 2012. On the Beery Developmental Test of VMI, the student scored a below average score as compared to nondisabled peers. While the student scored below average on this subtest, the student was able to reproduce simple pre-handwriting strokes, basic triangle and other age-appropriate intersecting shapes and lines, and two dimensional figures. Overall the student was able to accurately process information such as letters and numbers presented to and copy them on paper. On the Beery Developmental Test for Visual Perception, the student scored in the average range. On the Beery Developmental Test of Motor Coordination, the student scored in the average range. On the MVPT-3, the student scored in the low average range. The evaluator noted that during this test, the student had difficulty maintaining attention and questioned when the test would conclude.

During the evaluation, the student’s teacher reported that the student required prompting to complete written assignments, that overall handwriting was legible and neat and that the student worked best with one-on-one assistance. During the evaluation, the evaluator observed that the student’s range of motion, muscle strength and tone were within normal limits. The student was able to maintain the necessary functional and symmetrical sitting posture and demonstrated functional gross motor skills which allow to access school environment independently and safely. The student did not present with any deficits in the areas of general strength, fine and gross motor coordination and sitting posture. While the student exhibited signs of distractibility, the student was able to visually track and maintain eye contact and demonstrated appropriate ability to interpret and process environmental surroundings. The student did not under or over respond to the lights, the color of the room, the texture of the paper, pencil or tabletop. Additionally, the student did not appear to have difficulty with processing auditory information as evidenced by the student following multi-step directives during testing. While the student required cueing to use left hand as a stabilizer, the student demonstrated

age-appropriate letter formation, spacing, sizing and adequate writing pressure. The student was able to copy text from a near point model legibly and within a reasonable amount of time.

The student's occupational therapist worked with the student for four years, participated in the student's IEP Team meetings for four years and provided evaluations of the student. The Occupational Therapist gave expert testimony that as of May 21, 2013, the student did not require direct OT because the student was functioning within age expectations. While the student had a below average score on the Beery VMI, had average or low average scores on all other assessments and demonstrated "normal" functioning in clinical observation. During the 2012-2013 school year, the occupational therapist worked directly with the student for 60 minutes per week in a life skills/organizational skills group. The student worked cooperatively within the group, was engaged and was usually the first in the group to complete assignments. The Occupational Therapist testified that, with the assistance of dedicated aide, the student was able to produce legible work and that the student would benefit from consultative services and accommodations in the classroom. There was no evidence presented to refute the Occupational Therapist's testimony.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. Here, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that MAPCS denied the student a FAPE by failing to include 30 minutes per week of direct occupational therapy on the student's May 21, 2013 IEP.

The Petitioner failed to meet its burden with respect to Issue #2.

Issue #3

The Petitioner alleged that MAPCS failed to develop an appropriate transition plan for the student on May 21, 2013, specifically by failing to provide one hour per month of career exploration instruction outside of the general education environment; one hour per month of postsecondary advisement outside of the general education environment; three hours per week of employment support outside of the general education environment; goals related to preparing for standardized admissions tests, identifying community resources at the postsecondary level, completing applications, functional academic skills and independent living.

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

The student is 16 years old. The student plans to attend beauty school and become a cosmetologist. In order to draft a postsecondary transition plan for the student, the transition specialist administered a life skills assessment, an employment/career interest assessment and an informal questionnaire to the student. The Transition Specialist testified that worked collaboratively with the student to develop the student's May 21, 2013 transition plan. The

student's May 21, 2013 transition plan includes the results of transition assessments related to training, education, employment, and independent living skills; measureable goals in postsecondary education and training, employment and independent living; and transition services, including courses of student, needed to assist the student. The transition services include 30 minutes per month of postsecondary advisement, 30 minutes per month of career exploration, 30 minutes per month of interviewing skills and 30 minutes per month of banking and budgeting skills.

Transition services include a coordinated set of activities that promote movement from school to post-school activities and activities based on the individual child's needs, taking into account the child's preferences and interests. Transition services for children with a disability may be special education, if provided as specially designed instruction, or related services, if required to assist a child with a disability to benefit from special education. *See* 5 DCMR §E-3001.1; *see also* 34 CFR §300.43.

The Transition Specialist testified that during the 2012-2013 school year, the student participated in a "transition group" which focused on resume writing, travel training, interviewing skills and self-advocacy skills. In addition to the transition group, the student has learned the steps needed to achieve goal of becoming a cosmetologist, including obtaining a license and taking business management courses, has explored cosmetology schools in the area and is aware of some community support available. The Transition Specialist testified that the process of career exploration takes approximately four hours. The Transition Specialist also testified that students are routinely provided with assistance in completing applications and are providing assistance in preparing for standardized tests, even if a specific goal is not included on the student's transition plan.

The student has taken a practice Wonderlic assessment, an assessment needed for enrollment into cosmetology school, and did not score at the level needed for enrollment however the Transition Specialist testified that the math and reading skills included on the assessment are addressed by the student's special education teacher. The Transition Specialist believes that the student will be able to obtain the necessary score on the Wonderlic for entry into school of choice. Finally, the Transition Specialist testified that while it would be reasonable to include goals related to test preparation and researching employment opportunities on the student's transition plan, the transition plan should not overwhelm the student and additional goals will be added once the student masters the goals already included on the transition plan.

An IEP transition plan satisfies the requirements if, for example, it includes a "discussion of transition services under IDEA." *Pace v. Bogalusa City School Bd.*, 137 F.Supp.2d 711, 717 (E.D. La. 2001). Here, the student's transition plan goes far beyond including a discussion of transition services. The student's May 21, 2013 transition plan includes specific steps for the student to take, and the support needed, for the student to progress toward postsecondary goal of becoming a cosmetologist. While the goals do not contain everything the student needs to do to be ready to transition to life beyond high school, the transition plan is designed to provide the foundational steps, skills and services, within this annual IEP, to assist the student in reaching goal.

Although the Petitioner was not satisfied with DCPS' offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.

The Hearing Officer concludes that the transition plan contained in the student's May 21, 2013 IEP is appropriate for the student. It was uncontested that the student has a secure understanding of postsecondary career goal therefore one hour per month of career exploration is not necessary for the student. Additionally, the Transition Specialist testified that the process of "career exploration" takes approximately four hours, therefore 10-12 hours of career exploration appears to be excessive. There was no evidence presented which supported the Petitioner's claim that the student requires one hour per month of postsecondary advisement rather than the 30 minutes per month included in May 21, 2013 IEP. Likewise, there was no evidence presented which supported the Petitioner's claim that the student requires three hours per week of employment support. In fact, there was no evidence presented which suggested that the student has employment for which needs support.

The Petitioner argued that the student's May 21, 2013 IEP should have contained goals related to preparing for standardized tests and what the student will do if fails to be accepted into cosmetology school because the student "has absolutely no understanding of what's going to happen" and the goals "are not enough to support Even if the Petitioner is correct in the argument that the student should have had a goal on May 21, 2013 IEP to address preparation for standardized tests, the Transition Specialist testified that the Transition Specialist assists students in preparing for standardized tests whether or not the goal in on their transition plans. Additionally, the student's May 21, 2013 IEP contains the goal of participating in standardized tests. It is not unreasonable to accept the Transition Specialist's testimony that School A assists the student in preparing for the standardized tests in which the goal states that the student will participate. The Petitioner alleged that the student's May 21, 2013 IEP should have included goals related to completing applications, functional academic skills and independent living. The Hearing Officer concludes that the student May 21, 2013 IEP does include goals related to completing applications, functional academic skills and independent living. While the goals for functional academic skills are not included in the transition plan section of the IEP, they are listed in the academic goal section of the student's May 21, 2013 IEP. While the independent living skills goals are not the goals the parent desired, they do address skills the student needs in order to live independently.

The Petitioner also argued that transition services should be provided for the student outside of the general education setting because the general education setting is not reasonable given the student's deficits. The record does not support this argument. During the 2012-2013 school year, the student earned the grade letter "A" in general education Future Focus class for the first three quarters and a grade letter "B" for the fourth quarter. Additionally, the student has developed friendships with regular education peers, is able to assist other students with

assignments and desires to participate in the general education setting. Further, a goal of transition planning is to prepare the student for life beyond high school, a life which will include nondisabled peers, coworkers and associates. While the student has academic deficits, there was no evidence to support the contention that transition services need to be provided outside of the general education setting. The school environment and the community environment, as indicated on the student's May 21, 2013 IEP are appropriate environments to address transition goals while the student's academic deficits are addressed outside of the general education setting.

MAPCS did not deny the student a FAPE by failing to provide one hour per month of career exploration instruction outside of the general education environment; one hour per month of postsecondary advisement outside of the general education environment; three hours per week of employment support outside of the general education environment; goals related to preparing for standardized admissions tests, identifying community resources at the postsecondary level, completing applications, functional academic skills and independent living on the student's May 21, 2013 IEP.

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

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). In this case, the denial of FAPE is MAPCS' failure to implement speech-language services from August 27, 2012 through December 20, 2012 and behavioral support services pursuant to the student's IEPs.

As relief for these denials, the Petitioner requested 40 hours of independent speech-language services and 30 hours of independent counseling services.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. See also *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that child has been denied a FAPE, has met burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010). However, even if a denial of a FAPE is shown, “[i]t may be conceivable that no compensatory education is required for the denial of a [FAPE]...either because it would not help or because [the student] has flourished in his current placement. *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) citing *Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 44 IDELR 246 (D.D.C. 2005). See also *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (“The court agrees that there may be situations where a student who was denied a FAPE may not be entitled to an award of

compensatory education, especially if the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.”)

The Hearing Officer concluded that MAPCS failed to provide a total of 17 hours of speech-language services to the student from August 27, 2012 through December 20, 2012. However, from December 20, 2012 through May 21, 2013, the student was provided nine and one half hours of speech-language services in addition to the services prescribed on December 20, 2013 IEP. Therefore, MAPCS did not provide the student a total of seven and one half hours of speech-language services during the 2012-2013 school year that should have been provided. The School A Speech-Language Pathologist testified that the student has made “great” progress since the Summer of 2012. Additionally, the Counselor, Special Education Coordinator, Transition Specialist and Teacher testified that at the beginning of the 2012-2013 school year, the student was quiet, withdrawn and shy however during the 2012-2013 school year, the student became talkative and engaged. The School A Speech Language Pathologist has already established a rapport with the student, already knows the student’s strengths and weaknesses and is aware of the specific skills the student needs to master. Based on these factors, it is equitable and appropriate for the student to receive eight hours of speech-language services as compensatory education provided by MAPCS.

The Hearing Officer also concluded that MAPCS failed to provide the student with 12 weeks of behavioral support services during the 2012-2013 school year. However, during this time period, the student “blossomed,” learned to be a self-advocate and expressed that progress “made feel very good about herself.” It appears as if during the 2012-2013 school year the student mastered March 13, 2012 IEP goals of self-advocacy, developing a positive self-image and using effective coping strategies. Even though the student flourished, without the provided services, the Hearing Officer believes that it is equitable to provide compensatory education for MAPCS’ failure to provide counseling services for 12 weeks during the 2012-2013 school year. However, in this case, an hour-for-hour award is not necessary to provide the educational benefits that would have accrued because of the progress the student made toward social/emotional goals during the 2012-2013 school year.

ORDER

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

1. Issues #2 and #3 are **dismissed** with prejudice.
2. Beginning September 30, 2013, MAPCS shall provide the student with one (1) additional hour per week of speech-language services for eight (8) weeks. The additional speech-language services are to be completed by December 20, 2013.
3. MAPCS shall provide the student with five (5) hours of independent counseling, at a rate not to exceed the Office of the State Superintendent’s (OSSE’s) established rate for this service, to be completed by November 22, 2013.
4. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: September 19, 2013


Hearing Officer