

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

Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

OSSE
Student Hearing Office
June 24, 2013

STUDENT a minor by and through
his Parent,¹

Petitioner,
v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On April 8, 2013 parent, Petitioner herein, on behalf of the student (“Student”) filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Petitioner’s Administrative Due Process Complaint Notice (HO 4) on April 17, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). I was assigned to hear this matter on April 19, 2013.³

¹ Student has reached the age of majority and brings this action on his own behalf. Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

³ When filed this matter was assigned to a different hearing officer. Following her resignation, I was assigned.

A resolution meeting was not held until May 21, 2013. No agreement was reached.⁴ The 45 day timeline began to run on May 9, 2013, the day after the 30 day resolution period ended.

Following the Prehearing Conference held on May 10, 2013, I issued a Prehearing Conference Order on May 11, 2013. HO 8. My Hearing Officer Determination is due on June 22, 2013.

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq., and Justin Douds, Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was scheduled for May 30 and June 7, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

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

ISSUES

The issues are:

1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by failing to provide Student an appropriate individualized education program (“IEP”) at the March 16, 2012 IEP meeting. The team agreed Student required a full time IEP. The goals did not address Student’s needs. The goals were based on the common core standards rather than providing remedial instruction to address Student’s extremely low levels of achievement. This issue addresses an alleged continuing denial of FAPE from the date of the meeting through the 2012-2013 school year until a new IEP was developed;

2) Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement when the team at the March 16, 2012 meeting determined Student required a full time IEP. This issue addresses an alleged continuing denial of FAPE from the date of the meeting through the 2012-2013 school year until a new IEP was developed;

3) Whether DCPS denied Student a FAPE by failing provide Student an appropriate IEP and placement at the January 22, 2013 meeting. The team at Attending School, Student’s

⁴ The executed Resolution Period Disposition Form indicated the matter should proceed to hearing. Because the hearing in this matter had been scheduled for May 30, 2013, Petitioner did not want to attempt to schedule an earlier date.

school of attendance, was aware Student was unable to do complete the work and cannot read or write. They had an obligation to review and revise the IEP;

4) Whether DCPS denied Student a FAPE by failing to provide him a full time IEP with a placement outside the general education setting at the March 12, 2013 IEP meeting; and

5) Whether DCPS denied Student a FAPE by failing to implement Student's IEPs during the 2012-2013 school year. Student was not provided the hours outside the general education setting required by his IEPs.

RELIEF REQUESTED

Petitioner requested:

- 1) DCPS fund placement at the Nonpublic School Learning Disability program, a full time, non-public special education setting; and
- 2) DCPS provide Student compensatory education.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1	Compensatory Education Plan by Educational Advocate, Ph.D	May 21, 2013
P-2	Acceptance Letter to Nonpublic School	May 7, 2013
P-3	Student schedule and Report Cards	2012-2013 SY
P-4	Attendance Records	Aug 20, 2012 – Feb. 26, 2013
P-5	Teacher Certification Documents (NCLB)	March 2012
P-6	Correspondence between DCDLG/ JEB and DCPS	Jan 2012-April 2013
P-7	Student Work Samples from 2012-2013 SY	2012-2013 SY
P-8	Paralegal follow-up letter to March 12, 2013 MDT meeting	March 18, 2013
P-9	Educational Advocate follow-up letter to March 12, 2013 MDT meeting	March 19, 2013
P-10	Advocate & Paralegal MDT notes from March 12, 2013 MDT meeting	March 12, 2013
P-11	DCPS meeting notes from March 12, 2013 MDT meeting & DCPS Agenda	March 12, 2013
P-12	IEP from March 12, 2013 MDT meeting	March 12, 2013
P-13	Advocate & Paralegal MDT notes from March 5, 2013 MDT meeting	March 5, 2013
P-14	DCPS Agenda from March 5, 2013 MDT meeting	March 5, 2013
P-15	Undated Draft IEP provided to paralegal at March 5, 2013 MDT meeting	Undated
P-16	IEP	February 26, 2013
P-17	Advocate & Paralegal notes from meeting held January 22, 2013	January 22, 2013
P-18	DCPS sign-in sheet from meeting held January 22, 2013	January 22, 2013
P-19	Paralegal MDT notes from meeting held March 16, 2012	March 16, 2012
P-20	IEP	March 16, 2012

P-21	IEP	April 28, 2011
P-22	Hearing Officer Determination (HOD)	April 13, 2011
P-23	Individualized Education Program (IEP)	February 2, 2011
P-24	Student Work Samples from 2010-2011 SY	2010-2011 SY
P-25	Letter from Academic Support Teacher, Academic Support Teacher at PCS re: student needs	September 30, 2010
P-26	DCPS Draft Cognitive Assessment (WISC-IV)	April 23, 2013
P-27	DCPS Data Evaluation Review	March 11, 2013
P-28	DCPS Educational Evaluation	January 17, 2013
P-29	Assessment Results from Read 180 class	2012-2013 SY
P-30	Discovery Education Assessment from DCPS Middle School	March 11, 2011
P-31	Independent Comprehensive Psychological Evaluation	December 12, 2010
P-32	Independent Psycho-Educational Evaluation	February 12, 2010
P-33	DCPS Speech & Language Re-Evaluation	January 13, 2010
P-34	Resume of Educational Advocate, Ph.D.	Updated Fall 2012
P-35	promotional materials	Undated

Exhibits admitted on behalf of Respondent are:

R 01	Hearing Officer's Decision	04/13/2011
R 02	DCPS IEP Meeting Notes	04/28/2011
R 03	Prior Written Notice	04/28/2011
R 04	IEP Progress Reports	2011/12 SY
R 05	DCPS IEP Meeting Notes	03/16/2012
R 06	IEP	03/16/2012
R 07	School Change and Transportation Forms	06/18/2012
R 08	School Change and Transportation Forms	08/07/2012
R 09	DCPS Woodcock Johnson III	01/17/2013
R 10	DCPS IEP Meeting Notes	03/12/2013
R 11	Parental Consent for Evaluation	03/12/2013
R 12	DCPS WISC-IV Cognitive Assessment	04/23/2013
R 13	Teacher Summary of Student's Progress	02/25/2013
R 14	Behavioral Support Service Trackers	2012/13 SY
R 15	Attendance Report	2012/13 SY
R 16	Student Schedule Dated 5/21/13	2012/13 SY
R 17	Complete Report Cards	2012/13 SY
R 18	Transcript and Letter of Understanding	2012/13 SY
R 19	Resume School Psychologist	05/22/2013
R 20	Resume HS Special Education Teacher 05/22/2013	
R 21	RSM Notes	05/21/2013

Exhibits admitted by the Hearing Officer are:⁵

- 1 Administrative Due Process Complaint Notice filed April 8, 2013
- 2 Notice of Hearing Officer Appointment of April 19, 2013²
- 3 Order re resolution process and scheduling of April 16, 2013
- 4 District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice dated April 17, 2013
- 5 Prehearing Conference Scheduling Letter of April 19, 2013 with email extending response time attached
- 6 Prehearing Notice dated April 22, 2013
- 7 Order Correcting Record dated April 22, 2013
- 8 Prehearing Conference Order dated May 11, 2013
- 9 Miscellaneous emails
 - Chain of April 19, 2013 re hearing officer appointment and prehearing conference scheduling letter
 - Chain of April 22, 2013 regarding correcting record
 - Second chain of April 22, 2013 re correcting record
- 10 List of Proposed Hearing Officer Exhibits filed May 19, 2013
- 11 Resolution Period Disposition Form executed May 21, 2013⁶
- 12 Petitioner's written closing argument filed June 11, 2013
- 13 Respondent's written closing argument filed June 11, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

- Paralegal/Advocate, Paralegal and Educational Advocate
- Assistant Director, Assistant Director of Education, Nonpublic School
- Student
- Educational Advocate, Ph.D., testified as an expert in educational programming for students who receive special education services under IDEA

DCPS presented the following witnesses:

- MS Special Education Teacher, Special Education Teacher, DCPS Middle School
- MS Special Education Teacher, Business Education Teacher, DCPS
- HS Special Education Teacher, Special Education Teacher, Attending School
- School Psychologist, School Psychologist, DCPS, testified as an expert in the administration of the Woodcock Johnson academic test as well as interpretation of the results of the test

⁵ Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

⁶ This exhibit and those that follow were not included with the Proposed List of Hearing Officer Exhibits filed on May 19, 2013 as they were provided after that date

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:⁷

1. Student is years old. He attends Attending School. He is classified as having a specific learning disability. Attending School is primarily an inclusion school with special education teachers in most of the classes. The teachers at Attending School like Student. P 6; P 10; P 12; P 16; P 17; Testimony of Petitioner; Testimony of Student; Testimony of Paralegal/Advocate; Testimony of HS Special Education Teacher; Testimony School Psychologist.
2. Student has significant learning disabilities. He reads at a first to second grade level. He writes at a similar grade level, and he is able to perform mathematics at a fourth to fifth grade level. Student does not have a cognitive impairment. He has received reading and writing services for several years and has made little progress. His comprehension skills are noticeably better than his reading and writing skills. He is able to understand the content of grade level material. P 11;P 21; P 20; P 12; Testimony of Petitioner; Testimony of Paralegal/Advocate; Testimony of HS Special Education Teacher; Testimony of Special Education Teacher; Testimony of MS Special Education Teacher.
3. On March 16, 2012 an IEP meeting was held at DCPS Middle School, Student's school of attendance in the 2011-2012 school year when he was in eighth grade. The IEP developed at that meeting requires Student receive 20 hours of specialized instruction outside the general education environment each week. Student also was to receive 120 minutes per month of behavior support. The IEP included 4 goals in math, 3 goals in written expression and 4 goals in mathematics. The goals in each academic area are focused on building skills as well as accessing

⁷ In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. In any instance where a particular exhibit was introduced by both Petitioner and Respondent, my citation to the exhibit references only one party's exhibit number.

content. Student's needs for supplementary aids and services, accommodations and modifications are identified. P 19; P 20; R 5; Testimony of Paralegal/Advocate; Testimony of Special Education Teacher; Testimony of Petitioner.

4. At the March 16, 2012 meeting, the LEA representative agreed to recommend Student for a special education program for the 2012-2013 school year.⁸ The recommendation was for a pilot program that might possibly be located at DCPS High School. This recommendation had to be reviewed by central office. The team was to reconvene in May to discuss the results of the central office review, where Student would be attending high school in the fall and to review and revise, if appropriate, Student's IEP. Petitioner was aware that Attending School was Student's neighborhood school and he would be attending that school if the referral to the special education program was not approved by central office. P 19; R 5; Testimony of Paralegal/Advocate; Testimony of Petitioner; Testimony of Special Education Teacher.

5. Despite several efforts to follow-up on the recommendation for a special education program, Petitioner received no further information in this regard. No meeting was held in May or any other time preceding Student's entering Attending School in August 2012. Beginning in August 2012, Petitioner's representatives made numerous requests for a 30 day review after Student entered Attending School. DCPS did not schedule a meeting until January 22, 2013. At the January 22, 2013 meeting Petitioner's advisor's raised concerns about Student's placement, his continued inability to read and write and his lack of academic improvement P 6; P 17; Testimony of Paralegal/Advocate; Testimony of Petitioner.

6. During the first semester at Attending School, three of Student's four classes were taught by teachers for whom the evidence was unclear as to special education certification. These were

⁸ Not all members of the team agreed with this proposal for the 2012-2013 school year.

Algebra I, Reading Workshop⁹ and English I. During second semester, Student continued to take the same Algebra I class and the same reading workshop. Student also took earth science with a teacher for whom the issue of special education certification is unclear. These classes combined met for a total of 20 hours of instruction per week as each class at Attending School meets for 80 minutes per day.¹⁰ R 16; Testimony of Paralegal/Advocate; Testimony of HS Special Education Teacher.

7. Student's most recent IEP dated March 12, 2013 provides for 19.5 rather than 20 hours of special instruction outside the general education environment each week. He also is to receive 240 minutes of behavior intervention each month. Each academic area in this IEP has one goal. The goals on this IEP are based on common core curriculum standards as required by DCPS policy. Student's particular needs for encoding, decoding and other skills are, at best, minimally identifiable in the IEP. Student's needs for supplementary aids and service and accommodations and modifications are included, but not consistently connected to the grade level content goals. P 12.

8. Student does not have behavior issues and attends school on a regular basis. He is well liked by his teachers and sometimes takes a leadership role in class. P 4; Testimony of Petitioner; Testimony of Business Education Teacher; Testimony of HS Special Education Teacher

9. Student has made little progress in reading and writing since at least September 2010 when he attended PCS. On the MAP test reported he scored at the first grade level in reading and third grade level in math. He was unable to write two sentences that were connected and error free. PCS had provided a number of interventions including Wilson Reading, the

⁹ This class involved the Read 180 reading program. The Read 180 program is designed to build reading fluency and comprehension. It is sight word based.

¹⁰ Student's March 12, 2013 IEP was changed to 19.5 hours of special instruction outside the general education environment. The need for this change was not explained and does not appear to have been based on the Attending School schedule entered into evidence and discussed in testimony.

program, two hours per day of reading recovery instruction and additional math instruction. These interventions were not successful as reflected on the MAP test scores. PCS recommended academic intervention outside the general education setting including a reading specialist, math and reading coaches to consult with general education teachers, and small group instruction in all subject areas. P 25.

10. Student has received passing grades or better at Attending School. Course content is scaffolded to his skill level to allow Student access to grade level material. He received two Bs, a C and a C- in his first semester classes, and three Bs and a C+ in his first term, second semester classes. Grades include a participation component. Attending School also has a grading policy identified as “credit for an F.” This policy provides students are to receive a starting grade of 50%. Their earned scores on homework and tests are then added to 50%. This policy is intended to address Student self-esteem and motivation. P 7; R 17; Testimony of HS Special Education Teacher.

11. Standard scores are peer comparison scores. R 9.

12. Student was evaluated with the Woodcock-Johnson III in January 2010 and January 2013. In the three years between these two administrations Student made minimal progress and

fell further behind relative to his peers.¹¹ Student is approximately 7 years behind his grade level in most areas. Standard scores (SS in the Table in FN 11) are peer comparison scores. When compared to his peers Student on both administrations of the Woodcock Johnson had scores well below average except in calculation and applied problems which were in the average to low average range. In comparison, Student’s cognitive skills ranged from average to low average on the WISC- IV. P1; P 9; R 9; R 12; Testimony of Educational Advocate.

13. Student was evaluated using the WISC- IV, a standardized measure of several components of intellectual ability in January 2010 and April 2013. As with the Woodcock Johnson, Student lost ground on this test. In 2010, all of Student’s composite scores were in the average range except processing speed which was in the low average range. By 2013, Student’s

¹¹

Area	Grade Level earned 2010	Gap in years from grade level	Grade Level 2013	Gap in years from grade level	Increase in gap over 3 years	SS 2010	SS 2013	Increase or Decrease Within confidence levels
Letter –word recognition	2.1	4.9	2.7	6.3	1.4	58	52	Decrease
Reading Fluency	1.7	5.3	2.2	6.8	1.5	56	61	Even
Calculation	5.5	1.5	6.4	2.6	1.1	93	87	Decrease
Math fluency	2.2	4.8	2.9	6.1	1.3	66	60	Decrease
Spelling	1.7	5.3	1.9	7.1	1.8	56	47	Decrease
Passage Comprehension	1.2	5.8	1.9	7.1	1.3	40	43	Even
Applied Problems	4.7	2.3	4.7	4.3	2.0	92	82	Decrease
Writing Samples	2.0	5.0	2.0	5.1	0.1	68	75	Increase

composite scores ranged from average to borderline with most scores in the low average range. R 12; P 32.¹²

14. Student made negligible progress in Read 180 in the 2012-2013 school year. Student worked at program Level 1 the entire school year. This is equivalent to a 1.5 to 2.5 reading level. Read 180 assessment showed he made no progress in comprehension. Student improved from 0% to 12 % in vocabulary. He was able to improve from 28% to 100% in conventions. Student’s overall test score improved from 28% to 52% in the course of the year. P 29; Testimony of Educational Advocate; Testimony of HS Special Education Teacher.

15. Wilson Reading, which addresses decoding, is available at Attending School. It was not provided to Student. Testimony of HS Special Education Teacher.

16. Student continues to struggle with phonics, encoding and decoding. He cannot spell words beyond the early elementary level. He has difficulty constructing a sentence. He does not know or apply basic punctuation rules. He relies on teacher support and assistance from other students in reading and writing. His limited reading abilities affect his ability to perform mathematics. P 7; Testimony of Petitioner; Testimony of Educational Advocate; Testimony of Paralegal/Advocate; Testimony of HS Special Education Teacher.

17. Student requires reading and writing remediation. He requires a quiet environment. Student needs help with learning encoding, decoding and spelling. He also needs assistance

¹²

Scale	2010		2013	
	Standard Score	Qualitative Range	Standard Score	Qualitative Range
Verbal Reasoning	98	Average	81	Low Average
Perceptual Reasoning	98	Average	94	Average
Working Memory	91	Average	88	Low Average
Processing Speed	85	Low Average	75	Borderline
Full Scale IQ	92	Average	81	Low Average

accessing grade level curriculum. Testimony of Paralegal/Advocate; Testimony of Petitioner; Testimony of Student; Testimony of Educational Advocate; Testimony of HS Special Education Teacher.

18. Student was accepted at Nonpublic School. Nonpublic School is a separate, nonpublic school providing special education programs for students aged 5 through 21. The school has two programs, a therapeutic day school and a learning center. It is approved by the District of Columbia Office of the State Superintendent of Education. Student has been accepted to the therapeutic day school. The instruction is provided in classes with a small number of students and substantial opportunity for one on one instruction. The student adult ratio is 3 – 1. All teachers are certified. Some have content certification and some are dually certified. Starting in the 2013-2014 school year, will have a reading specialist in the therapeutic day school. A speech language therapist is assigned to each classroom. The work provided in the classroom is differentiated based on the needs of the students. Nonpublic School also provides ramp up classes to help students catch up in reading and math. These classes address students' splinter skills. P 2; Testimony of Assistant Director

19. The compensatory education plan ("plan") presented by Petitioner is founded on Petitioner's and her advisors' opinion that Student has not had an appropriate IEP or placement. It is intended to place Student in the position he would have been had he had an appropriate program and placement in the last 14 months. The plan presumes that in 14 months' time, Student should have made approximately one year's progress. The plan recommends Student receive a _____ evaluation to determine which courses will best suit his needs and 175 to 200 hours of _____ courses in reading, written language and mathematics. P 1; P 35; Testimony of Educational Advocate.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I find most testimony presented in this matter to be credible. In some instances credible witnesses had moments suggesting they were being less than candid. This lack of candor was rare, for the most part, and affected the particular witness' testimony in limited ways and, therefore, had little if any effect on my determination.

The exception to the overall credibility of the witness was that of School Psychologist who testified as an expert in in the administration of the Woodcock Johnson academic test as well as interpretation of the results of the test. Much of School Psychologist's testimony addressed the interpretation of the Woodcock Johnson, the meaning of standard scores and how these scores can be interpreted. Despite having been qualified as an expert in the interpretation of the results of the Woodcock Johnson, School Psychologist appeared less than knowledgeable when testifying. She testified that standard scores cannot be compared across time because a student would be older in the second administration of the test and thus might have answered questions at a higher level than at the earlier administration. Yet the Woodcock Johnson report provided to parents states standard scores are peer comparison scores. The Court in *Thomas v. Allen*, 614 F.Supp. 2d 1257 (Dist Ct. ND Ala. 2009) explained standard scores as follows, "Raw scores are based on the number of items answered, and are converted into a standard score corresponding to the test subject's age group, similar to an IQ measure." *Id.at* 1268. It is not conceivable, in my opinion, that School Psychologist, a school psychologist with 22 years of experience would state IQ scores cannot be compared from year to year. Yet, as IQ scores are a form of standard score, as explained by the *Thomas* Court, School Psychologist insisted throughout her testimony that standard scores could not be compared across years. *See also*,

White v. School Bd. of Henrico Cty, 549 S.E.2d 16, 36 Va. App. 137 (2001) (using decrease in standard scores as a basis for finding regression across years).

School Psychologist also testified grade equivalent and age equivalent scores are not as reliable as standard scores. By attesting to the limited statistical reliability of age and grade equivalent scores and then stating standard scores cannot be compared across years School Psychologist essentially took the unsupportable position that there is no way to measure a student's progress over time on a standardized test. Comparisons across time, she suggested, should be made by relying on more subjective measures, such as teacher assessments, grades and work products.

It is noteworthy, in this regard, that Paralegal/Advocate notes from the March 12, 2013 meeting indicated School Psychologist stated DCPS looks at standard scores. School Psychologist recognized the use of standard scores in relation to assessing a student's progress. This meeting occurred approximately one month prior to the filing of the instant due process complaint and approximately three months before the hearing. Neither School Psychologist nor Paralegal/Advocate could have known standard score interpretation would be an issue in the hearing. This lack of awareness of a future contested issue of interpretation therefore supports the credibility of the notes and the lack of credibility of School Psychologist's testimony regarding the use of standard scores. The notes' credibility is further bolstered by Paralegal/Advocate's email correspondence to the LEA representative on March 20, 2013 regarding the errors in the DCPS notes taken during that meeting, including pointing out that the DCPS notes used the term scaled score rather than standard score.

I do not understand, nor need I, the basis for School Psychologist's unbelievable testimony. I choose not to posit a guess. The lack of supportability of this testimony, however,

results in my finding School Psychologist's testimony, as a whole, to lack credibility. I have given no weight to her testimony and have not used it in reaching my determination here.

1) *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP at the March 16, 2012 IEP meeting. The team agreed Student required a full time IEP. The goals did not address Student's needs. The goals were based on the common core standards rather than providing remedial instruction to address Student's extremely low levels of achievement. This issue addresses an alleged continuing denial of FAPE from the date of the meeting through the 2012-2013 school year until a new IEP was developed*

2) *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement when the team at the March 16, 2012 meeting determined Student required a full time IEP. This issue addresses an alleged continuing denial of FAPE from the date of the meeting through the 2012-2013 school year until a new IEP was developed¹³*

IEP Goals

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

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

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to

¹³ These issues are addressed together due to the overlapping law and facts involved.

participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

In the instant matter the March 16, 2012 IEP was developed while Student was at DCPS Middle School. This IEP, therefore, was to be implemented during the end of the 2011-2012 school year when Student was an eighth grader at DCPS Middle School and at the beginning of the 2012-2013 school year when Student started high school. The March 16, 2012 IEP requires Student receive 20 hours of specialized instruction outside the general education environment each week. Student also was to receive 120 minutes per month of behavior support. The IEP included 4 goals in math, 3 goals in written expression and 4 goals in mathematics. The goals in

each academic area are focused on building skills as well as accessing content. Student's needs for supplementary aids and services, accommodations and modifications are identified. The goals on this IEP are not based on the common core curriculum. Rather they focus on Student's need for academic remediation. There was no testimony at hearing suggesting this IEP was not designed to address Student's needs. Rather, this IEP often was referred to as an example of the types of goals that should be included on an IEP designed to address Student's needs and provide him required educational benefit.

I, therefore, find by a preponderance of the evidence DCPS provided Student an appropriate IEP at the March 16, 2012 IEP meeting. The goals on this IEP are designed to provide the student educational benefit.

Placement/Full Time IEP

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). Each local education agency must have a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c).

Here, Petitioner's issue is based on the proposition that the multidisciplinary team ("MDT") determined at the March 16, 2012 IEP meeting that Student required a full-time placement outside of general education. For the reasons that follow, I find the MDT did not reach such a determination.

At the March 16, 2012 meeting Petitioner through her representatives requested a full time placement for Student outside of general education. There is no disagreement that in response to this request the special education coordinator¹⁴ agreed to recommend Student to a proposed pilot program. This program was potentially slated for DCPS High School. The recommendation for the program was to be sent to central office, and it was expected the results of the central office review of this recommendation would be received by the MDT by the end of April. A meeting was then to be scheduled in May to review Student's high school placement. Nothing further occurred. Despite Petitioner's representatives making several inquiries about the potential placement, DCPS did not respond with a placement or with the possibility of another meeting. Petitioner also did not request another meeting until after Student enrolled in Attending School at the beginning of the 2012-2013 school year.

It is clear that at the end of the March 16, 2012 meeting Student had an IEP calling for 20 hours of special instruction and some behavior support services. It is clear, by Petitioner's own testimony, that she understood Student's neighborhood school was Attending School, and Student was to attend Attending School unless Student's program and placement were changed to the program discussed by the special education coordinator. It simply is not the case that DCPS had agreed to place Student in a full time program. DCPS had agreed to *recommend* Student be placed in a planned, pilot, full time program. DCPS made no further communication

¹⁴ The entire team did not agree Student required such a placement.

about the IEP or placement, and Petitioner took no action until after student entered Attending School, the placement Petitioner testified she understood was Student's neighborhood school.

While it is clear Petitioner thought Student required a full time placement and had requested such a placement, the rest of the team did not agree. The IEP developed at the March 16, 2012 meeting was not for a full time placement. This IEP was written with parental input as required by IDEA. The placement was that agreed to by the team despite parent's disagreement. There was no promise for a full-time program.

I, therefore, find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide him a full time placement following the March 16, 2012 IEP meeting. There was no team agreement that Student required a full time IEP.

3) Whether DCPS denied Student a FAPE by failing provide Student an appropriate IEP and placement at the January 22, 2013 meeting. The team at Attending School , Student's school of attendance, was aware Student was unable to complete the work and cannot read or write. They had an obligation to review and revise the IEP

DCPS must ensure the IEP Team meets, as appropriate, to review and revise the IEP including addressing information provided by the parent. DCMR 5E -3008.1(d); See also, 34 C.F.R. 300.324(b). In the instant matter, beginning in August 2012, Petitioner's representatives requested Attending School schedule a 30 day review meeting. DCPS did not schedule this meeting until January 2013. While there is no specific time requirement for scheduling a requested IEP meeting, here Attending School delayed the meeting for approximately four months. During that time Student completed almost an entire semester of school. At the January 2013 meeting Petitioner presented documentation, notably the Woodcock Johnson test results, demonstrating Student had made little educational progress in three years. In contrast, Respondent's witnesses testified that Student was benefitting from the program at Attending

School based, it seems, primarily on his grades. His grades however, are of questionable value. The credit for an F policy makes grades earned by Student hard to understand and interpret, and the work samples from Attending School do not help clarify the situation. The grades Student received on various assignments do not appear to reflect the work within the assignment. The grade written on the assignments does not consistently reflect the 50% starting point described in the credit for an F program, and percentages are not always accurately calculated. Even the HS Special Education teacher had difficulty explaining the particular grades on particular assignments. Moreover, both the HS Special Education Teacher and Business Education Teacher identified Student's struggles with reading and writing, although Business Education Teacher was less concerned about this as he saw Student as functioning at a higher level than he actually does.¹⁵

It is difficult to understand how DCPS can contend Student was receiving educational benefit at Attending School. While it is true Student entered Attending School far behind his peers in academic skills, he did not make progress. In his weakest area, reading, Student began the school year reading at about the first or second grade level and he ended the school year reading at about the first or second grade level as assessed by the Read 180 tests. This is far less than a year's progress in years' time. It is, moreover, noteworthy that Student's cognitive ability is assessed in the average to low average range. He is a student so far behind his peers academically that it would be reasonable to assume his cognitive assessment also would be severely depressed, but it is not. While his cognitive skill levels have fallen over the last three years, he still tests, in general, in the average to low average range cognitively.¹⁶ He is a young

¹⁵ This may be attributable, at least in part, to the limited reading in Business Education Teacher's class and Student's relying on classmates for assistance in some instances.

¹⁶ There is no evidence suggesting whether Student's cognitive losses are attributable to his academic stagnation/losses or vice versa.

man with ability who is not learning at Attending School.¹⁷ I note Student's Read 180 teacher testified he needs phonics, encoding and decoding skills which are taught through Wilson Reading but not in Read 180. She also stated Wilson Reading is available at Attending School but it was not provided to Student.

It is clear that the staff at Attending School were aware Student could not read or write, and it is clear Attending School delayed holding an IEP meeting for Student after Petitioner requested one. In that time, Student accomplished little if any academic growth, despite efforts recognized by his teachers. While the January 2013 meeting was a thirty day review meeting, it is clear the participants in that meeting had sufficient information to recognize Student's lack of progress. DCPS had an obligation to review and revise the IEP. There was information suggesting Student was not making expected progress on his goals, the parent had information requiring such review and revision. 34 C.F.R. § 300.324(b). Yet, after having delayed this 30 day review meeting for an entire semester DCPS did not review the IEP at this time, nor did DCPS make an effort to schedule an IEP review meeting soon thereafter which would have shown an understanding of the need to address Student's needs as soon as possible. The IEP review meeting remained scheduled for March, at the time it needed to be scheduled to assure a regularly scheduled annual review would need to be held.

I therefore find by a preponderance of the evidence DCPS denied Student a FAPE by failing to provide him an appropriate IEP and placement at the January 13, 2013 meeting.

4) *Whether DCPS denied Student a FAPE by failing to provide him a full time IEP with a placement outside the general education setting at the March 12, 2013 IEP meeting*

As noted above each eligible student under IDEA is entitled to a FAPE. A FAPE is

¹⁷ I recognize Student has struggled at other schools and in other settings, but they are not settings in contention in the instant matter. The question before me addresses Student's current needs and Attending School's response to those needs.

A FAPE is:

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

It is axiomatic that the intent of IDEA is the development of an individualized program designed to meet the needs of the eligible student that will allow him/her to progress in the general curriculum and prepare for further education, employment and independent living. 34 C.F.R. § 300.1 and § 300.320.

In the instant matter, Student is a year old special education student in the grade. He is classified as having a specific learning disability, and of that there can be no doubt. He reads and writes at the second grade level and performs math at the fifth to sixth grade level. Cognitively, despite these significant academic deficits, he tests in the borderline to normal range. DCPS has attempted multiple interventions with him both in middle school and in high school while Student remained in inclusive environments. That is, he has been in general education schools and in classes with his non-disabled peers for some part of the school day. It is clear the efforts made have had little impact, and it is clear that the MDT had this information available to them at the March 12, 2013 IEP meeting. Student has not learned to read or write despite years of special education in inclusive environments.¹⁸

Student's March 16, 2012 IEP requires Student receive 20 hours of specialized instruction outside the general education environment each week. Student also was to receive 120 minutes per month of behavior support. The IEP included 4 goals in math, 3 goals in written

¹⁸ For example, as far back as September 2010, Student's academic support teacher/case manager at PCS indicated Student required academic interventions outside the general education setting including a reading specialist, math and reading coaches to assist content teaches and intense small group instruction in all subjects.

expression and 4 goals in mathematics. The goals in each academic area are focused on building skills as well as accessing content. Students' needs for supplementary aids and services, accommodations and modifications are identified. This is the IEP with which he entered Attending School. The March 12, 2013 IEP provides for 19.5 rather than 20 hours of special instruction outside the general education environment each week. He also is to receive 240 minutes of behavior intervention each month. Each academic area has one goal. The goals on this IEP are based on common core curriculum standards as required by DCPS policy. Student's particular needs for encoding, decoding and other skills are, at best, minimally identifiable in the IEP. Student's needs for supplementary aids and service and accommodations and modifications are included, but not consistently connected to the grade level content goal.

When the 2013 IEP was developed the MDT at Attending School had known Student for almost one full academic year. The MDT also had two sets of Woodcock Johnson scores as well as an independent comprehensive psychological evaluation. In addition the team had available the results of three Read 180 R-skills Tests showing minimal progress in the course of the 2012-2013 school year. Contrasting information was provided by teacher reports and grades while at Attending School which appear to show Student doing well in all his classes, and it appears it is this contrasting information that the team used to develop Student's IEP.

I cannot agree with this team decision. By discounting or ignoring the standardized testing and relying on teacher reports and grades, the team chose, in my view, to overemphasize Student's strengths, which should be recognized but not exclusively, and ignore his significant needs. It is clear that the Attending School staff who know the Student like him and respect his willingness to work hard and meet his academic responsibilities to the best of his ability. It is also clear they appreciate his good citizenship in school including his appropriate behavior and

his leadership qualities. There is no doubt Student is an active and positive influence in many ways. There also is no doubt that he is not learning. The longer he stays in school the further behind, relative to his peers, he falls. His skills are not developing. He is not being prepared for future schooling, employment or independent living, as is the purpose of IDEA.

34 C.F.R. § 300.1. He cannot read nor write in any meaningful way. It is unlikely he could obtain employment because he cannot read ads for positions, fill out an application or write a resume on his own with second grade reading and writing skills. His business teacher testified, for example, that Student received assistance in developing a resume in his class. He also is not being prepared for future education as he has no way to gain access to the content of courses on his own. Without education and employment, independent living is unlikely. Student must learn to read and write or he must learn alternatives for accessing and providing information. Neither is occurring.

It is in this contest, the MDT wrote an IEP that requires Student to achieve core curriculum based goals¹⁹ with limited identification of the extensive supplementary aids and services accommodations and supports he requires. Moreover there is only one goal in each subject area (reading, written language and mathematics). While Student has the ability to learn the content identified in these goals, he lacks the skills to do so. Special education should assure that a student be supported in accessing the content, and the IEP should make clear how that is done. That did not occur in this case.

Further, it is clear, despite DCPS' protestations to the contrary, that Student has not benefitted from placements in general education schools with a combination of general education and pull out classes. He has been in such programs for years, and he continues to read and write

¹⁹ The DCPS policy that requires Student's IEP to include these core curriculum based goals appears to fly in the face of the IDEA requirement that a student's IEP address his/her individual needs. If all students have core curriculum based goals, it appears there is no individualization.

at an early elementary level. He had had numerous intervention programs in this context and Student has not made any substantial progress. It is undoubtedly frustrating to Student to have had so little success in reading and writing, as noted in many reports, and he is to be recognized for his continuing efforts in these areas. Student says he is not learning at Attending School. He is able to assess his progress. He should be listened to. Repeating mistakes over and over has been deemed, in other contexts, a sign of insanity. In this context, it appears to be a simple denial of Student's intense needs combined with a desire to help a likeable struggling student who requires more than Respondent is able to provide.

DCPS argues, citing *Tice v. Botetourt County*, 908 F.2d 1200 (4th Cir. 1990), that a hearing officer should not disturb an IEP due to disagreement with the content. The 4th Circuit stated there must be deference to educators' decisions as long as the IEP provides the basic floor of opportunity. The instant IEP does not provide this floor. It provides less meaningful goals and slightly less special education instruction outside the general education environment than the previous IEP, an IEP under which Student made little if any progress. The continued efforts to educate Student in the general education environment have not succeeded. They have not provided him a floor of opportunity. They have not provided him the educational benefit required by *Rowley*. Petitioner has clearly shown Student is not in the appropriate placement. He requires a separate, full time special education program. There is no doubt that the nature and severity of Student's disability is such that education in general education cannot be achieved satisfactorily. *See* 34 C.F.R. §300.114.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide him a full time IEP with a placement outside the general education setting at the March 12, 2013 IEP meeting.

5. *Whether DCPS denied Student a FAPE by failing to implement Student's IEPs during the 2012-2013 school year. Student was not provided the hours outside the general education setting required by his IEPs*

Student's March 16, 2012 IEP required he receive 20 hours of specialized instruction outside the general education setting each week. He also was to receive 240 minutes of behavior support each month.²⁰ While at Attending School, Student was enrolled in four classes each semester of the 2012-2013 school year. Each class at Attending School meets for 80 minutes. There was no evidence presented as to what constitutes a special education class. Petitioner provided information about teachers' certifications, and there was some testimony as to the number of students who had IEPs in particular classes. The teachers in three of the four classes in which Student was enrolled in each semester were special education certified. Specifically, HS Special Education Teacher testified that she has a special education certification. She also testified that the earth science teacher is special education certified. Petitioner provided a certification report from DCPS Human Resources that provides certification information. That report indicates Mr. [redacted] who taught Algebra 1 is special education certified. It does not however, identify either Ms. HS Special Education Teacher or Student's earth science teacher as having special education certifications. Thus the teachers in three of the four classes in which Student was enrolled in each semester appear to hold special education certification but the evidence is not consistent. While HS Special Education Teacher's testimony was credible throughout, it is at odds with the documented certification report from Human Resources. I note, however, there is no basis to determine the report's accuracy.

HS Special Education Teacher also testified that all the students in Read 180 and her English 1 class had IEPs. There was no evidence presented regarding the enrollment in Student's other classes. I note moreover, that Educational Advocate, when asked on cross examination

²⁰ The delivery of behavior support was not addressed during hearing so I do not address it here.

whether a class taught by a special education teacher with all students having IEPs was a special education class, was equivocal. I, therefore, have no basis for determining the type of classes in which Student was enrolled. While I accept HS Special Education Teacher's testimony as to her certification and the composition of the students in her classes I have less information regarding Student's other allegedly special education classes, and I have no basis to resolve the conflictual evidence provided. Most importantly I do not have any evidence defining what constitutes a special education class.

I, therefore, find that Petitioner failed to meet her burden of proof as to this issue and DCPS cannot, therefore, be deemed to have failed to provide Student a FAPE by failing to provide him the hours outside the general education setting required by his IEP.

Nonpublic School

While a private school's acceptance of a student and the school's concomitant assurance that it can provide the student the program and services needed are necessary for finding the school is an appropriate placement for a student, these two factors are not sufficient, in themselves, for such a finding. An award of a private school placement is prospective relief intended to insure that the student receives a FAPE in the future as required by the IDEA.

Branham v. District of Columbia, 427 F.3d 7, 11 (D.C.Cir. 2005). The courts have identified the factors relevant to determining whether a particular placement is appropriate for a particular student. They include

- the nature and severity of the student's disability;
- the student's specialized educational needs;
- the link between these needs and the services offered by the private school;

- the placement cost;²¹ and
- the extent to which the placement is the least restrictive environment.

Id. at 12.

In the instant matter, Petitioner has established Student has a severe learning disability in reading and writing. Despite consistent effort on his part and multiple interventions in general education schools, Student continues to read and write on an early elementary level. He requires intensive remediation, small class sizes with small student to teacher ratios. He requires opportunity for extensive one on one support. Petitioner has established that Student cannot learn the skills he needs in a general education environment.

Student has been accepted at Nonpublic School's therapeutic day school. The instruction in this program is provided in classes with a small number of students and substantial opportunity for one on one instruction. The student adult ratio is 3 – 1. All teachers are certified. Some have content certification and some are dually certified. Starting in the 2013-2014 school year, Nonpublic School will have a reading specialist in the therapeutic day school. A speech language therapist is assigned to each classroom. The work provided in the classroom is differentiated based on the needs of the students. Nonpublic School also provides ramp up classes to help students catch up in reading and math. These classes will provide Student the instruction he needs in the least restrictive environment appropriate to those needs. I conclude Nonpublic School is an appropriate placement for Student.

Compensatory education

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F. 3d 516, 365 U.S.

²¹ The OSSE approves private schools and sets the allowable costs for attendance for DCPS students. I, therefore, do not discuss this factor in the instant analysis of the proposed placement.

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

The compensatory education plan in the instant matter is intended to address Student’s failure to progress educationally in 14 months beginning in March 2012. It is intended to place him in the position he would have been had he made appropriate progress in those 14 months. The evidence shows Student made little to no academic progress in the areas of reading, writing and mathematics in the 14 months identified. The plan calls for Student to receive a

evaluation to determine which courses will best suit his needs and 175 to 200 hours of courses in reading, written language and mathematics following assessment to determine how best to provide appropriate services to Student. The hours of courses in reading, written language and mathematics appear appropriate to compensate Student for the 14 months of lost educational progress. However, it is important that Student’s new educational placement be afforded the opportunity to work with him in a manner of their choosing. I, therefore, will provide, See Order that follow, that the services are to be completed prior to Student’s enrollment in Nonpublic Schooling the fall. I find the plan presented with the limitation described is reasonably calculated to provide the educational benefits likely to have accrued from services that should have been provided by DCPS in that time period.

CONCLUSIONS OF LAW

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

1. DCPS did not deny Student a FAPE at the March 16, 2012 IEP meeting by failing to develop an appropriate IEP with appropriate goals. The goals on this IEP are designed to provide the student educational benefit.
2. DCPS did not deny Student a FAPE by failing to provide him a full time placement following the March 16, 2012 IEP meeting. There was no team agreement that Student required a full time IEP.
3. DCPS denied Student a FAPE by failing to provide him an appropriate IEP and placement at the January 13, 2013 meeting.
4. DCPS denied Student a FAPE by failing to provide him a full time IEP with a placement outside the general education setting at the March 12, 2013 IEP meeting.
5. DCPS did not deny student a FAPE by failing to provide him the hours of outside the general education environment required by his IEP.
6. Nonpublic School is an appropriate placement for Student.

ORDER

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

IT IS SO ORDERED:

1. DCPS shall make the necessary arrangements to effect Student's enrollment in Nonpublic School for the 2013-2014 school year. DCPS shall pay tuition and all IEP related costs, including related services and transportation. These arrangements shall be made so as to ensure Student is able to attend Nonpublic School on the first day of the 2013-2014 school year.

2. DCPS is to convene an MDT meeting, to include relevant Nonpublic School staff and Petitioner and her educational advocate, if Petitioner so chooses, in cooperation with the Nonpublic School, within 30 days of the date of this Hearing Officer Determination. This MDT meeting, which shall occur at Nonpublic School, is to review and revise Student's IEP. In the alternative, this MDT meeting may be delayed until 30 days after the start of the 2013-2014 school year if, after consultation with Nonpublic School, Petitioner so chooses.

3. Within 10 business days of the date of this Hearing Officer Determination, DCPS shall make the necessary arrangements for Student to be assessed by the _____ program. DCPS also is to make the necessary arrangements to assure Student is able to receive up to a maximum of 200 hours of tutoring services through _____ during the summer of 2013. No _____ services are to be provided once Student begins attending Nonpublic School.

4. If, after Student has attended Nonpublic School for at least 30 days, the staff at Nonpublic School determines additional tutoring outside the Nonpublic School program would be beneficial to Student, any remaining tutoring hours (of the 200 originally awarded) shall be provided as agreed upon by Petitioner and the Nonpublic School staff.

June 29, 2013
Date



Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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