OSSE
Student Hearing Office
April 22, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

Parent, on behalf of,
Student,[1]
Petitioner,

v.

District of Columbia Public Schools,
Respondent.

Date Issued: April 21, 2013

Hearing Officer: Melanie Byrd Chisholm

Case No: 2013-0063

Hearing Date: April 9, 2013

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [redacted] year old male, who is currently a 10th grade student attending School A. The student's current individualized education program (IEP) lists Other Health Impaired (OHI) as his primary disability and provides for him to receive specialized instruction within the general education environment and outside of the general education environment and behavioral support services.

On February 5, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by: (1) failing to conduct a triennial reevaluation for the student in a timely manner by February 2011; (2) failing to timely conduct a comprehensive reevaluation as requested by the parent; (3) failing to review the results of the requested reevaluation and revise the student's IEP as appropriate; (4) failing to allow the parent access to the student's educational records; (5) failing to conduct a behavior intervention plan (BIP) [sic] and/or develop a behavior plan based on evaluation results and declining behaviors; (6) failing to develop an appropriate transition plan based on age appropriate transition assessments; and (7) failing to implement the student's February 2012 IEP by failing to provide 7.5 hours of instruction outside of the general education environment. As relief for these alleged denials of FAPE, Petitioner requested, *inter alia*, a detailed functional behavioral assessment (FBA); an independent comprehensive transition assessment; an IEP Team meeting to review the results of independent evaluations and revise the student's IEP as appropriate including increased

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

instruction in a small structured setting, one hour of counseling and a revised transition plan; a detailed behavior plan; and compensatory education.

On February 15, 2013, Respondent filed its Response to the Complaint. The response was timely. In its Response, Respondent asserted that Petitioner did not include adequate details regarding the alleged failure to conduct timely evaluations to allow DCPS to respond to the allegation; DCPS did not receive a request from the parent to conduct a reevaluation; a copy of the student's records was provided to the parent at the February 27, 2012 IEP Team meeting; the student has no behavioral issues that would warrant a BIP; the transition plan in the student's February 27, 2012 IEP is appropriate; and DCPS is providing the student with 7.5 hours of specialized instruction outside of the general education environment.

On February 26, 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 complaint during the remainder of the 30 day resolution period. Accordingly, the parties agreed that the 45-day timeline starts to run on March 8, 2013, following the conclusion of the 30-day resolution period, and ends on April 21, 2013. The Hearing Officer Determination (HOD) is due on April 21, 2013.

On March 5, 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 March 8, 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.

On April 2, 2013, Petitioner filed Disclosures including forty-six (46) exhibits and six (6) witnesses.[2] On April 2, 2013, Respondent filed Disclosures including seventeen (17) exhibits and eleven (11) witnesses.

The due process hearing commenced at approximately 8:41 a.m.[3] on April 9, 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 1-46 were admitted without objection. Respondent's Exhibits 1-17 were admitted without objection.

At the close of Petitioner's case, the Respondent moved for a Directed Verdict for Issues #1, 2, 3 and 5. Respondent argued that Petitioner had not met his burden with the evidence presented with respect to those issues. Based on the fact that the Hearing Officer had not yet had the opportunity to review all of the exhibits admitted into evidence, the Hearing Officer reserved ruling on Respondent's motion.

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

[3] The due process hearing was scheduled to begin at 8:30 a.m. At the scheduled start time, the Hearing Officer and counsel for DCPS were present. Counsel for Petitioner arrived at 8:32 a.m. At 8:41 a.m. the Hearing Officer commenced the hearing, without Petitioner, providing introductions and reviewing the governing statute and regulations, the issues presented and relief sought. The Petitioner arrived at 9:23 a.m.

The hearing concluded at approximately 4:59 p.m. following closing statements by both parties.

Jurisdiction

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

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to timely complete a comprehensive psychological reevaluation as agreed upon by the student's IEP Team in February 2011[4], and, if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS was required to conduct comprehensive psychological, speech-language and occupational therapy evaluations of the student following the parent's written requests on January 31, 2012 and February 21, 2012, and, if so, whether DCPS' failure to conduct the evaluations in a timely manner constitutes a denial of a FAPE?
3. Whether DCPS failed to conduct a timely review of the student's independent comprehensive psychological evaluation, dated November 28, 2012, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS denied the student a FAPE by failing to revise the student's IEP to include specialized instruction, accommodations and modifications to address the student's deficits in math, reading, oral language, written expression and memory; increased counseling; specialized instruction in a small group setting for academic subjects; and appropriate goals to address the student's social/emotional functioning based on the results of the November 28, 2012 comprehensive psychological evaluation?
5. Whether DCPS was required to conduct an FBA and develop a BIP for the student on or about June 2011 based on the student's lack of participation in counseling, incomplete classwork, withdrawn behaviors, problems with peers and truancy and, if so, whether these failures constitute a denial of a FAPE?
6. Whether DCPS failed to develop an appropriate transition plan based on age appropriate transition assessments for the student on February 27, 2012 and, if so, whether this failure constitutes a denial of a FAPE?

[4] The Respondent alleges that the student's IEP Team meeting was held in January 2011 and therefore this issue is barred by the statute of limitations. The Petitioner alleges that the IEP Team's written request for the evaluation was completed on February 24, 2011 and therefore falls within the statute of limitations. The Hearing Officer decided to include the issue and will allow the parties to present arguments during the due process hearing regarding the statute of limitations for this issue.

7. Whether DCPS failed to implement the student's February 27, 2012 IEP by failing to provide 7.5 hours of specialized instruction outside of the general education environment and, if so, whether this failure constitutes a denial of a FAPE?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is [redacted] years old and entitled to appropriate measureable postsecondary goals based upon age appropriate transition assessments. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
3. In 2003, the student's full scale IQ was 109. (Respondent's Exhibits 1 and 2)
4. In June 2004, the student was referred for an occupational therapy evaluation based on a psychiatric evaluator's suspicion that the student had sensory integration problems. (Respondent's Exhibit 1)
5. DCPS conducted an occupational therapy initial evaluation of the student in June 2004. (Respondent's Exhibit 1)
6. In 2004, the student did not demonstrate any deficits in motor skills, sensory processing skills, perceptual or self-care skills. The student also demonstrated good fine motor coordination and writing skills and average perceptual skills. (Respondent's Exhibit 1)
7. In 2004, occupational therapy was not recommended for the student. (Respondent's Exhibit 1)
8. In 2004, DCPS conducted a speech-language evaluation of the student. (Respondent's Exhibit 2)
9. In 2004, the student had age appropriate language functioning across form, content and function/use and was not eligible for speech-language services. (Respondent's Exhibit 2)
10. In 2005, the student's full scale IQ was 105. (Petitioner's Exhibit 35)
11. In January 2008, the student's full scale IQ was 115. (Petitioner's Exhibit 3; Respondent's Exhibits 4 and 5)
12. An IEP Team meeting was held for the student on January 19, 2011. (Petitioner's Exhibit 31)
13. On February 8, 2011, DCPS conducted an educational assessment of the student. (Petitioner's Exhibit 33)
14. On February 8, 2011, the student scored an 8.5 grade equivalency in Broad Reading, a 9.4 grade equivalency in Brief Reading, a 7.2 grade equivalency in Broad Math and an 8.8 grade equivalency in Brief Math. (Petitioner's Exhibit 33)
15. On February 8, 2011, the student's speech-language skills, in conversation, were appropriate for his grade level. (Petitioner's Exhibit 33)

16. In February 2011, the student's IEP Team attempted to reevaluate the student however was unable to complete this process based on the student's excessive absences. (Petitioner's Exhibit 32)
17. Prior to February 24, 2011, the student's IEP Team attempted multiple methods of obtaining data regarding the student's current functioning. (Petitioner's Exhibit 32)
18. In February 2011, the student was not functioning in the classroom environment to the extent of his potential. (Petitioner's Exhibits 21, 25, 33 and 34; Respondent's Exhibit 10)
19. On February 24, 2011 a Psychological Evaluation Referral Form was filled out for the student. (Petitioner's Exhibit 32)
20. The Psychological Evaluation Referral Form was requested as "a part of the triennial process." (Petitioner's Exhibit 32)
21. The student ended the 2010-2011 school year with five "F's," two "D's," two "C's" and one "B." (Petitioner's Exhibit 25; Respondent's Exhibit 10)
22. During the 2011-2012 school year, the student received specialized instruction in the general education environment in math and science. (Petitioner's Exhibit 1)
23. The parent withdrew the student from the student's special education reading class. (Petitioner's Exhibit 27; Case Manager's Testimony)
24. During the 2011-2012 school year, the student was chronically absent from school. (Petitioner's Exhibits 1, 20, 22, 23, 24, 29; Respondent's Exhibits 6; Parent's Testimony; Counselor's Testimony; Social Worker A's Testimony; Case Manager's Testimony)
25. During the 2011-2012 school year, when the student was present in school he participated in counseling as behavioral support services. (Petitioner's Exhibit 29; Respondent's Exhibit 6; Social Worker A's Testimony)
26. During the 2011-2012 school year, Social Worker A counseled the student regarding school attendance. (Petitioner's Exhibit 29; Respondent's Exhibit 6; Counselor's Testimony; Social Worker A's Testimony)
27. During the 2011-2012 school year, when the student attended class, the student was able to complete assigned work. (Petitioner's Exhibits 11, 24)
28. During the 2011-2012 school year, the Counselor and the Social Worker met with the parent and the student, together and separately, multiple times to discuss the student's truancy and informed the parent about community resources to assist her with managing the student's behaviors at home. (Counselor's Testimony; Social Worker A's Testimony)
29. During the 2011-2012 school year, School A offered the student a credit recovery class. (Respondent's Exhibit 14; Counselor's Testimony)
30. On February 17, 2012, the student, one of the student's teachers and Social Worker A met with student and developed a Daily Attendance Contract. (Petitioner's Exhibits 1, 29; Respondent's Exhibits 6 and 15; Social Worker A's Testimony)
31. Social Worker A offered to buy the student an art kit, at her own expense, if the student successfully completed the Daily Attendance Contract. (Social Worker A's Testimony)
32. On February 17, 2012 the student agreed to participate in a Daily Attendance Contract. (Respondent's Exhibits 1, 6, 15; Social Worker A's Testimony)

33. The Daily Attendance Contract was shared with all of the student's teachers and signed by the student's teachers each class period. (Respondent's Exhibit 15; Social Worker A's Testimony)
34. A copy of the Daily Attendance Contract was provided to the student's February 27, 2012 IEP Team. (Petitioner's Exhibit 1)
35. On February 23, 2012, the student filled out information regarding his academic interests, functional interests and employment interests. (Respondent's Exhibit 3)
36. The student completed a job/career interest inventory, a daily living checklist and a Transportation and Community Life Activities Checklist. (Respondent's Exhibit 3; Case Manager's Testimony)
37. On the daily living checklist and the Transportation and Community Life Activities Checklist, the student checked "I Do It Well" for every item. (Respondent's Exhibit 3)
38. The information filled out by the student on February 23, 2012 to assist in his transition planning was provided prior to the development of the student's February 27, 2012 IEP. (Petitioner's Exhibit 2; Respondent's Exhibits 3 and 7)
39. The student, the student's parent and the parent's advocate participated in the student's February 27, 2012 IEP Team meeting. (Petitioner's Exhibits 1 and 2; Respondent's Exhibit 7; Case Manager's Testimony)
40. The student's February 27, 2012 IEP Team directly discussed the student's truancy and discussed options for addressing the student's truancy. (Petitioner's Exhibits 1 and 2; Respondent's Exhibit 7; Social Worker A's Testimony)
41. The student's February 27, 2012 IEP Team debated the merits of whether or not to refer the parent to truancy court and referred the family to the Truancy Social Worker. (Petitioner's Exhibit 1)
42. The student's February 27, 2012 IEP included the student's challenges with attendance in the present level of performance in the emotional/social/behavioral section of his IEP and developed an IEP goal related to attendance. Petitioner's Exhibit 2; Respondent's Exhibit 7)
43. The student's February 27, 2012 IEP Team conducted achievement assessments, gathering anecdotal information from the student's teachers, reviewing the student's records and soliciting information from the student regarding his academic interests, functional interests and employment interests. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
44. The student's February 27, 2012 IEP Team determined that the student is a student with disabilities with a primary disability of OHI. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
45. The student's February 27, 2012 IEP Team updated the student's present levels of performance and IEP goals. (Petitioner's Exhibits 2 and 31; Respondent's Exhibit 7)
46. The student's February 27, 2012 IEP prescribes five (5) hours per week of specialized instruction within the general education environment and sixty (60) minutes per month of behavioral support services. The student's February 27, 2012 IEP also prescribes an additional seven and one half (7.5) hours per week of specialized instruction however the setting for this service is described in one section of the IEP as outside of the general education setting and in another section of the IEP as a

combination of within the general education setting and outside of the general education setting. (Petitioner's Exhibit 2; Respondent's Exhibit 7)

47. On February 27, 2012, the IEP Team noted that the student was receiving one half (.5) credit for his special education classes. (Petitioner's Exhibit 1)
48. The student's February 27, 2012 transition plan includes input from the student. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
49. The student's February 27, 2012 transition plan includes information gathered from the student's responses on a functional checklist, completed by the student on December 12, 2011, and the Sunraye Work Interest Inventory completed by the student on December 12, 2011. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
50. The student's February 27, 2012 transition plan includes information gathered from the Brigance, completed by the student on December 12, 2012, however the scores from the Brigance are not listed. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
51. The student's February 27, 2012 transition plan includes short-term measureable goals in the areas of postsecondary education and training, employment and independent living. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
52. The student's February 27, 2012 transition plan includes the courses of study in which the student was enrolled. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
53. The student's February 27, 2012 transition plan includes transition services for postsecondary education and training, employment and independent living. (Petitioner's Exhibit 2; Respondent's Exhibit 7)
54. On April 6, 2012, the parent, through her attorney, requested comprehensive psychological, occupational therapy and assistive technology assessments. (Petitioner's Exhibit 10)
55. The April 6, 2012 written request asks for DCPS to evaluate the student "for special education and its related services" "pursuant to 34 CFR §§300.301-300.311 and DCMR 5 §3021.1" as a result of "the student's ongoing academic difficulties." (Petitioner's Exhibit 10)
56. The student ended the 2011-2012 school year with six "F's," two "D's," one "C," and one "B." (Petitioner's Exhibit 25; Respondent's Exhibit 10)
57. From the end of the 2011-2012 school year to the beginning of the 2012-2013 school year, DCPS did not conduct an FBA or implement a BIP. (Social Worker A's Testimony)
58. On August 31, 2012, the parent, through her attorney, requested a reevaluation and specifically requested comprehensive psychological, occupational therapy and assistive technology assessments. (Petitioner's Exhibit 9)
59. On August 31, 2012, the Petitioner filed a Complaint alleging, *inter alia*, that DCPS denied the student a FAPE by failing to complete a comprehensive psychological evaluation. (Petitioner's Exhibits 28, 37 and 40)
60. On October 4, 2012, DCPS provided an explanation of why the LEA refused to conduct an occupational therapy assessment. (Petitioner's Exhibit 28)
61. On October 4, 2012 DCPS explained that the student did not qualify for occupational therapy and provided "samples" to support its position. (Petitioner's Exhibit 28)
62. On October 5, 2012, DCPS issued an authorization for an independent comprehensive psychological evaluation for the student. (Petitioner's Exhibit 38)

63. On October 17, 2012 the Petitioner withdrew the August 31, 2012 Complaint stating that she "wants to synthesize newly acquired information with the information alleged in the above captioned complaint and re-file a more comprehensive complaint at a later date." (Petitioner's Exhibit 40)
64. On October 24, 2012, the Hearing Officer dismissed the Petitioner's August 31, 2012 Complaint without prejudice. (Petitioner's Exhibit 40)
65. From August 27, 2012 through October 18, 2012, the student was absent two days, tardy five days and present and on time for all other days. (Petitioner's Exhibit 18; Parent's Testimony; Counselor's Testimony; Social Worker A's Testimony; Social Worker B's Testimony; Case Manager's Testimony)
66. For the five days the student was tardy between August 27, 2012 and October 18, 2012, his tardiness ranged from six minutes to 19 minutes. (Petitioner's Exhibit 18)
67. During the 2012-2013 school year, the student has received individual counseling by the social worker as behavioral support services. (Respondent's Exhibit 6; Social Worker A's Testimony; Social Worker B's Testimony)
68. During the 2012-2013 school year, Social Worker B addressed the student's attendance goals during behavioral support services, spoke directly with the student regarding his motivation for attending or not attending school and attempted to acquire funding for rewards for the student's attendance. (Petitioner's Exhibit 29; Respondent's Exhibit 6; Social Worker B's Testimony)
69. During the 2012-2013 school year, the student's attendance improved dramatically compared to the 2011-2012 school year. (Petitioner's Exhibit 18; Respondent's Exhibits 6, 9; Parent's Testimony; Advocate's Testimony; Counselor's Testimony; Social Worker A's Testimony; Social Worker B's Testimony; Case Manager's Testimony)
70. The student's attendance improved because the student made a personal decision to attend school. (Social Worker A's Testimony; Social Worker B's Testimony)
71. During the 2012-2013 school year, the Truancy Social Worker continued to work with the student and parent. (Respondent's Exhibits 11, 12 and 13)
72. During the 2012-2013 school year, the student's academic performance improved dramatically compared to the 2011-2012 school year. (Petitioner's Exhibits 19, 20; Respondent's Exhibit 6; Social Worker B's Testimony; Case Manager's Testimony)
73. During the 2012-2013 school year, the student was provided an on-line course, Plato, to allow the student to work at his own pace. (Respondent's Exhibits 11 and 12; Counselor's Testimony)
74. The student has attended Plato and has performed very well in the class.
75. The student achieved all A's for the first quarter and A's and one B for the second quarter of the 2012-2013 school year. (Petitioner's Exhibits 19 and 25; Respondent's Exhibits 4, 6, 8, 9, 10; Parent's Testimony; Social Worker B's Testimony; Case Manager's Testimony)
76. In November 2012, the student was progressing well in all classes, was close to mastery of his social-emotional goals, took initiative in math and history, had excellent participation in academic classes, was "a pleasure to have in class" and was demonstrating appropriate behavior in all school settings. (Petitioner's Exhibit 19, 25 and 29; Respondent's Exhibits 6, 9 and 10; Social Worker B's Testimony; Case Manager's Testimony)

77. On the Attention Deficit/Hyperactivity Disorder Test (ADHDT) teacher questionnaires provided to the student's special education teacher and two of the student's general education teachers, as data collection for the November 2012 independent comprehensive psychological evaluation, all of the teachers rated the student as having a low probability of ADHD. (Petitioner's Exhibit 3; Respondent's Exhibit 5; Evaluator's Testimony)
78. The student's November 28, 2012 Comprehensive Psychological Evaluation reveals intellectual functioning scores for the student which are two standard deviations below the student's intellectual functioning as determined in each of the student's prior evaluations. (Petitioner's Exhibits 3, 34, 35 and 36; Respondent's Exhibits 1, 2 and 4; Evaluator's Testimony)
79. The student did not suffer traumatic brain injury between prior evaluations and November 28, 2012 evaluations. (Evaluator's Testimony)
80. During the student's November 3, 2012 evaluation, which resulted in the November 28, 2012 Comprehensive Psychological Evaluation report, the student moved slowly and lacked motivation. (Petitioner's Exhibit 3; Respondent's Exhibit 5; Evaluator's Testimony)
81. The student's low energy and tendency to give up quickly on assessment tasks give a minimal measure of his true potential. (Petitioner's Exhibit 36)
82. The recommendations contained within the November 28, 2012 Comprehensive Psychological Evaluation were based on the evaluation conducted on November 3, 2012. (Petitioner's Exhibit 3; Respondent's Exhibit 5)
83. On November 28, 2012, DCPS was informed that the student's independent Comprehensive Psychological Evaluation was completed. (Petitioner's Exhibit 7)
84. On November 28, 2012, Petitioner's attorney provided DCPS a copy of the student's independent November 28, 2012 Comprehensive Psychological Evaluation. (Petitioner's Exhibit 8)
85. On December 3, 2012, a DCPS school psychologist reviewed the student's independent November 28, 2012 Comprehensive Psychological Evaluation. (Respondent's Exhibit 4)
86. DCPS' Winter Break was December 21, 2012 through January 4, 2013. (Social Worker B's Testimony)
87. The parties agreed to review the student's independent November 28, 2012 Comprehensive Psychological Evaluation on January 31, 2013. (Petitioner's Exhibit 4; Respondent's Exhibit 16)
88. The parent and the advocate were present for the January 31, 2013 meeting however DCPS was unable to contact the psychologist therefore the parties agreed to reschedule the meeting. (Petitioner's Exhibit 4; Respondent's Exhibit 16; Parent's Testimony; Advocate's Testimony)
89. DCPS rescheduled the IEP Team meeting to review the student's independent November 28, 2012 Comprehensive Psychological Evaluation for February 11, 2013. (Petitioner's Exhibit 4; Respondent's Exhibit 16)
90. On February 8, 2013, the advocate requested that the February 11, 2013 meeting be rescheduled to accommodate the parent's desire to have IEP meeting for the student and his brother on the same day. (Petitioner's Exhibit 4; Respondent's Exhibit 16)

91. DCPS agreed to reschedule the February 11, 2013 IEP Team meeting. (Petitioner's Exhibit 4; Respondent's Exhibit 16)
92. In January 2013, the student was promoted to 10th grade English. (Respondent's Exhibit 10; Case Manager's Testimony)
93. On February 6, 2013, the truancy social worker met with the student, the student's parent, the student's case manager and a staff member from the Collaborative to discuss the student's absences. (Respondent's Exhibits 11, 12, 13)
94. On February 8, 2013, the Advocate requested that the February 11, 2013 IEP Team meeting to be rescheduled. (Petitioner's Exhibit 4; Respondent's Exhibit 16)
95. With the exception of truancy, the student did not exhibit behavior problems in school during the 2010-2011, 2011-2012 or 2012-2013 school years. (Petitioner's Exhibits 2, 3, 19 and 29; Respondent's Exhibits 5, 6, 7, 9 and 13; Counselor's Testimony; Social Worker A's Testimony; Social Worker B's Testimony; Case Manager's Testimony)

CONCLUSIONS OF LAW

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

Burden of Proof

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

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id*. at 200-203. Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set

forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. Therefore, an "IDEA claim is viable only if ...procedural violations affected the student's substantive rights." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828,834 (D.C.C. 2006).

<u>Issue #1</u>

Statute of Limitations

During the Prehearing Conference and at the start of the Due Process Hearing, the Hearing Officer requested that counsel for both Petitioner and Respondent present evidence as to whether this issue was barred by the statute of limitations. Counsel for Petitioner made no oral argument pertaining to this matter. Counsel for Respondent argued that the issue was barred by the statute of limitations because the evidence suggests that the violation occurred during the 2010-2011 school year and the parent knew or should have known and should have filed a Complaint in February 2011.

The record is clear that an IEP Team meeting was held for the student on January 19, 2011. If this were the meeting where the IEP Team attempted to reevaluate the student then this issue may have been barred by the statute of limitations. However, there is no evidence that the IEP Team's decision to conduct a psychological evaluation for the student occurred at the January 19, 2011 IEP Team meeting. The record indicates that the student's IEP Team was preparing for the student's reevaluation by conducting an achievement assessment on February 8, 2011 and attempting other methods of obtaining data during that time period. The only evidence of the date of the team's decision is the date of the Psychological Evaluation Referral Form which is February 24, 2011. Therefore, the Hearing Officer concludes that this issue is not barred by the statute of limitations.

Substantive Issue

Districts must reevaluate a special education student at least once every three years, and not more frequently than one time per year, unless the parents and district agree otherwise. 20 U.S.C. § 1414(a)(2)(b). A reevaluation occurs "if the local educational agency determines that the educational or related service needs, including improved academic achievement and

functional performance, of the child warrant a reevaluation ... or if the child's parents or teacher requests a reevaluation." 20 U.S.C. § 1414(a)(2)(1).

The Petitioner alleged that DCPS failed to complete a comprehensive psychological reevaluation, as agreed upon by the student's IEP Team, in February 2011. The student's IEP Team met on January 19, 2011 and developed an annual IEP for the student. On February 24, 2011, DCPS completed a Psychological Evaluation Referral Form for the student. The form indicated that the student's triennial evaluation was due; that DCPS had conducted an achievement assessment for the student on February 4, 2011; that DCPS had attempted to conduct vision, hearing and speech-language screenings of the student but the student was not present in school; that the student had been absent from school for 67 days since August 2010; that DCPS attempted several observations of the student but the student was not present in school for the observations; and that the case manager and the social worker had made several attempts to contact the parent to ascertain the parental concerns for the student but the parent had not responded. The IDEA acknowledges an LEA's difficulty in conducting an evaluation when the student is not present. (*See* 34 CFR §300.301(d)(1)).

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, a local educational agency (LEA) must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b).

Here, it is important to note the distinction between "evaluation" and a specific assessment tool. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)).

In February 2011, the student's IEP Team attempted to reevaluate the student however was unable to complete this process based on the student's excessive absences. DCPS did conduct an achievement assessment of the student on February 8, 2011 and attempted other methods of gathering relevant data however was thwarted in this endeavor. Regardless of the team's inability to fully reevaluate the student, the team determined that a particular assessment tool, namely a psychological evaluation, was necessary. The team did not note whether the psychological evaluation was needed to determine whether the child continued to have a disability and/or determine the educational needs of the child. The team only noted that a psychological evaluation was requested as "a part of the triennial process." DCPS did not complete the psychological evaluation requested on the referral form.

A failure to timely reevaluate is, at base, a procedural violation of IDEA. *See Lesesne ex rel. B.F. v. District of Columbia,* Civil Action No. 04-620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005) (characterizing cases "where a student is seeking a reevaluation, but is already in

a placement" as involving procedural violations of IDEA). An IDEA claim is viable only if the procedural violations of procedural affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"). "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued).

In this case, the question of whether there was a violation of the student's substantive rights related to DCPS' failure to conduct the agreed upon psychological evaluation is unusually difficult. At the time of the February 24, 2011 referral, the record indicates that the student had excessive absences. The student's February 4, 2011 Educational Evaluation noted that the student's conversational proficiency seemed advanced for his grade level; he was exceptionally cooperative; his activity level seemed typical for his grade; he was attentive; and he scored in the average range of academic achievement in Broad Reading, in the low average range in Broad Math, in the average range in Spelling and in the average range in Writing Fluency.

However, it is clear that the student was not functioning in the classroom environment to the extent of his potential. The student's grades during the 2010-2011 school year included a grade letter "B" in U.S. History, a grade letter "C" in music, a grade letter "F" in Algebra I, a grade letter "F" in World History, a grade letter "D" in Academic Support, a grade letter "F" in Algebra I-B, a grade letter "F" in Study Skills, a grade letter "F" in music, a grade letter "C-" in art and a grade letter "D" in Comprehension Development. Unfortunately, the record does not indicate at what point during the 2010-2011 school year the student's grades began to decline. For example, the student's transcript notes a grade letter "C-" in music and a grade letter "F" in music. It is likely that the grades are from two different semesters yet the record does not indicate which grade was for which semester. Likewise, the student's transcript indicates a grade letter "B" for U.S. History and a grade letter "F" for World History. Again, it is likely that the grades represent two different semesters but for which semester is not noted. It is clear that the student was failing Algebra during the entire year. Therefore, the Hearing Office is unable to determine the student's academic functioning in school in February 2011.

Case law does not provide adequate guidance on from what point a Hearing Officer must determine whether a substantive violation occurred as a result of a delay in conducting an assessment requested by the student's IEP Team. If the Hearing Officer were to analogize case law for determining the appropriateness of an IEP, it would be clear that the determination would be 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. In other words, since the student was not performing to his abilities in February 2011, at that time, the

Hearing Officer would be persuaded that a psychological evaluation would be necessary to assist the student's IEP Team in determining the student's educational needs.

However, if the Hearing Officer is to view this question in hindsight, the Hearing Officer would be persuaded that the delay in conducting the psychological evaluation did not affect the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828,834 (D.C.C. 2006). First, the student's February 27, 2012 IEP Team conducted achievement assessments, gathering anecdotal information from the student's teachers, reviewing the student's records and soliciting information from the student regarding his academic interests, functional interests and employment interests. The student's February 27, 2012 IEP Team was able to update the student's present levels of performance and IEP goals accordingly. There was no evidence to suggest that the IEP developed for the student on February 27, 2012 was inappropriate or was not reasonably calculated to enable a child to receive some educational benefit. *See Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982). Next, the overwhelming evidence in this case is not that the educational programming was inappropriate for the student but that the student chose not to avail himself of the education offered by the LEA. As soon as the student made an independent decision to attend school, he was able to achieve A's in all of his classes, with the same IEP goals, supports and services that were in place prior to his decision to attend school.

In this case, with these particular set of facts, the Hearing Officer concludes that DCPS denied the student a FAPE by failing to conduct a psychological evaluation as agreed upon by the student's IEP Team on February 24, 2011. The student ended the 2010-2011 school year with five "F's," two "D's," two "C's" and one "B." The student went on to end the 2011-2012 school year with six "F's," two "D's," one "C," and one "B." While DCPS was aware that the student's academic functioning was directly related to his attendance, the student's IEP Team chose to utilize the tool of a psychological evaluation to appropriately plan for the student however DCPS did not complete the assessment as agreed upon by the student's IEP Team. Therefore, the failure significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child because the parent, as a member of the student's IEP Team, did not have access to the data deemed necessary by the IEP Team to make decisions regarding the student's educational programming.

The Petitioner met its burden with respect to Issue #1.

<u>Issue #2</u>

The Petitioner also alleged that DCPS was required to conduct comprehensive psychological, speech-language and occupational therapy evaluations of the student following the parent's written requests on January 31, 2012 and February 21, 2012. The Petitioner presented no evidence that the parent made written requests for comprehensive psychological, speech-language and occupational therapy evaluations on January 31, 2012 and February 21, 2012. The Petitioner did present evidence that the parent, through her attorney, made written requests for comprehensive psychological, occupational therapy and assistive technology assessments on April 6, 2012 and August 31, 2012.

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. District of Columbia,* 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)).

Speech-Language and Assistive Technology Assessments

There was no evidence presented to support the contention that the parent made a request for a speech-language evaluation at any point after 2004 or that between May 2004 and November 28, 2012 there was any concern regarding the student's speech-language functioning. Therefore, the Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to conduct a speech-language evaluation pursuant to a parental request. The Hearing Officer notes that the Petitioner neither alleged a violation regarding an assistive technology assessment nor presented evidence regarding the student's need for an assistive technology assessment.

Occupational Therapy Assessment

The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)).

The Petitioner presented no evidence as to what concerns the parent may have had to request an occupational therapy assessment on April 6, 2012 and August 31, 2012. Likewise, the record contains no evidence of any occupational therapy concern the school had for the student on or about April 6, 2012 and August 31, 2012. In fact, the only information in the record which suggested that the student required an occupational therapy assessment at any point prior to April 6, 2012 or August 31, 2012 is the information in the student's June 2004 Occupational Therapy Initial Evaluation which states that a psychiatric evaluator suspected sensory integration problems. DCPS conducted the occupational therapy assessment and found that the student did not demonstrate any deficits in motor skills, sensory processing skills, perceptual or self-care skills. At that time, the student also demonstrated good fine motor coordination and writing skills and average perceptual skills. In 2004, occupational therapy was not recommended for the student. In the student's February 27, 2012 IEP Team neither the parent nor the advocate nor any other IEP Team member presented any concern which would have indicated that the student was in need of an occupational therapy assessment.

In the October 4, 2012 Resolution Meeting, the Petitioner seemed to suggest that an occupational therapy assessment was required since one was not completed since 2004. There is no requirement that an LEA reevaluate a student every three years for a related service for which the student has already been found to be ineligible. Later in the meeting, the Petitioner's attorney stated that the student continued to exhibit occupational therapy problems however there is no evidence which supports that claim. DCPS explained that the student did not qualify for occupational therapy and provided "samples" to support its position. Within the October 4, 2012

meeting and by providing the meeting notes to Petitioner thereafter, DCPS provided an explanation of why the LEA refused to conduct the occupational therapy assessment. Specifically, DCPS clearly indicated that the student did not exhibit issues in this area. The Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to conduct an occupational therapy assessment following parental requests on April 6, 2012 and August 31, 2012. The Hearing Officer also notes that although the Petitioner alleged that DCPS denied the student a FAPE by not timely conducting an occupational therapy assessment pursuant to the parent's requests, the Petitioner did not request an occupational therapy assessment as relief in this matter.

Comprehensive Psychological Assessment - April 6, 2012 Request

The parent, through her attorney, requested a comprehensive psychological evaluation for the student on April 6, 2012. The April 6, 2012 written request asks for DCPS to evaluate the student "for special education and its related services" "pursuant to 34 CFR §§300.301-300.311 and DCMR 5 §3021.1" as a result of "the student's ongoing academic difficulties." The Hearing Officer notes that DCMR § 5-3021.1 pertains to the parents right to inspect and review student records and that while the IDEA regulations cited in the parental request encompass topics ranging from initial evaluation to documentation for eligibility determinations, the parental request leads the reader to believe that the student has not yet been determined as a student eligible for special education and related services.

The written request for a comprehensive psychological evaluation was sent to DCPS on April 6, 2012, approximately one week after the February 27, 2012 IEP Team meeting. The April 6, 2012 written request asks for DCPS to evaluate the student "for special education and its related services" however there is no evidence that the student's IEP Team, one week earlier, questioned the student's eligibility for special education and related services. In fact, the February 27, 2012 IEP indicates that the student is a student with disabilities with a primary disability of OHI.

Further, as discussed in Issue #1, DCPS denied the student a FAPE by failing to complete a comprehensive psychological evaluation as determined necessary by the student's IEP Team in February 2011. The Hearing Officer's conclusion in Issue #1 renders the question of whether DCPS denied the student a FAPE by failing to complete a comprehensive psychological evaluation of the student pursuant to a parental request on April 6, 2012 moot.

Comprehensive Psychological Assessment - August 31, 2012 Request

The parent, through her attorney, also requested a comprehensive psychological evaluation for the student on August 31, 2012. The August 31, 2012 request is specific to a reevaluation but does not include the reason the reevaluation is being requested.

On August 31, 2012, the same day that the parent, through her attorney, forwarded the second written request for comprehensive psychological and occupational therapy assessments, the Petitioner filed a Complaint alleging, *inter alia*, that DCPS denied the student a FAPE by failing to complete a comprehensive psychological evaluation. On October 5, 2012, following the Resolution Meeting for the Complaint, DCPS issued an authorization letter for the Petitioner to obtain an independent comprehensive psychological evaluation. On October 17, 2012 the

Petitioner withdrew the Complaint stating that she "wants to synthesize newly acquired information with the information alleged in the above captioned complaint and re-file a more comprehensive complaint at a later date." The Hearing Officer dismissed the Complaint without prejudice on October 24, 2012. The independent comprehensive psychological evaluation was completed on November 28, 2012.

The parent's agreement to have an independent comprehensive psychological evaluation conducted in lieu of DCPS conducting a comprehensive psychological evaluation, following the parent's August 31, 2012 request renders this portion of this issue moot. The parent provided a written request to DCPS on August 31, 2012 for a comprehensive psychological evaluation. The parent then filed a due process complaint on August 31, 2012 which included the issue of DCPS' failure to conduct a comprehensive psychological evaluation. The parent accepted DCPS' offer to fund an independent comprehensive psychological evaluation. The independent comprehensive psychological was completed within three months of the August 31, 2012 request and within 54 days of DCPS' authorization letter for the parent to obtain the independent comprehensive psychological evaluation. For the August 31, 2012 request for a comprehensive psychological evaluation, the assessment was completed within reasonable period of time and without undue delay.

The Petitioner did not meet its burden with respect to Issue #2.

Issue #3

The student's independent comprehensive psychological evaluation was completed on November 28, 2012. While the evaluator believed that the results of the evaluation were an accurate assessment of the student's current cognitive, academic and social-emotional functioning, and while DCPS concluded that the results of the independent November 28, 2012 Comprehensive Psychological Evaluation were valid, the Hearing Officer disagrees with this conclusion. First, during the testing by the independent evaluator, the Evaluator acknowledged that the student moved slowly and lacked motivation. As indicated in the student's February 26, 2003 Psychoeducational Evaluation, the student's low energy and tendency to give up quickly on assessment tasks "give a minimal measure of his true potential…"

Next, the results of the student's cognitive functioning in no way align with previous testing of the student. In 2003, the student's IQ was measured to be 109. In 2005, the student's IQ was measured to be 105. In 2008, the student's IQ was measured to be 115. Yet, in the November 28, 2012 testing, the Evaluator testified that the student scored a 78 in IQ testing. Without some form of head trauma or traumatic brain injury, which was not the case in this matter, an IQ score two standard deviations below all other measurements for the student cannot be regarded as reliable.

Further, the November 28, 2012 testing indicated that the student was functioning at 6.6 grade equivalency in Broad Reading, a 5.9 grade equivalency in Broad Math and a 6.0 grade equivalency in Broad Written Language. These scores are in direct conflict with evidence of the student's functioning in the classroom in November 2012. In November 2012, the student was receiving a grade letter A in all academic subject areas, in the 9th grade, and indeed, was promoted to 10th grade English at the beginning of 2013. Likewise, the student's teachers from

both the 2011-2012 and 2012-2013 school years indicated that the student was able to complete grade level work when he was present in the classroom. The student's academic functioning, as demonstrated by his school work, is much more aligned with the student's February 8, 2011 Educational Evaluation which measured the student's Broad Reading to be at the 8.5 grade equivalency, the student's Brief Reading to be at the 9.4 grade equivalency, the student's Broad Math to be at the 7.2 grade equivalency and the student's Brief Math to be at the 8.8 grade equivalency.

Finally, the November 28, 2012 social-emotional testing does not give due weight to teacher's input. For example, on the ADHDT teacher questionnaires for the student's special education teacher and two of the student's general education teachers, all of the teachers rated the student as having a low probability of ADHD. Following each of the teacher's responses, the evaluator indicates that the student is taking medication for ADHD and therefore the medication has a positive impact of his behavior and that the student has already been diagnosed with ADHD. There was no indication that the evaluator confirmed that the student regularly takes the prescribed medication. Likewise, the special education teacher noted that the student had good classroom behavior, good leadership skills, good relationships with peers and teachers, is respectful to authority and that his attendance had improved dramatically. On the BASC, one teacher noted concerns with the student's externalization of problems but neither teacher noted concerns with the student's internalization of problems, school problems or behavior problems.

Despite these positive assessments of the student's school functioning by the student's teachers, the evaluator nonetheless recommended individualized instruction or instruction in small group settings for all of the student's academic subjects, a behavior plan for truancy and absenteeism and an hour per week of counseling. When asked why she did not give more weight to teacher responses, the Evaluator testified that she had a concern with how well the teachers answering the questions knew the student and remarked that "dealing with [School A] was an adventure." She highlighted her difficulty in obtaining information from the school and her concern with whether School A was giving her accurate information about the student's presence in school. She explained that "just because a teacher says he's not ADHD" does not overcome the weight of the student being prescribed medication for ADHD and a previous evaluator's determination that the student was ADHD. The evaluator seemed to ignore positive comments regarding the student's school behavior and the teachers' reports that the student was able to appropriately participate in school and in a general education setting.

On November 28, 2012, the parent's attorney forwarded a copy of the independent comprehensive psychological evaluation to DCPS. On December 12, 2012, a DCPS psychologist reviewed the independent evaluation and drafted a report of the review. DCPS' Winter Break was December 21, 2012 through January 4, 2013. The parties agreed to convene an MDT meeting on January 31, 2013 to review the independent comprehensive psychological evaluation. On January 31, 2013, the parent and the parent's advocate were present for the MDT meeting however DCPS was unable to secure the participation of the DCPS psychologist to discuss the DCPS review of the independent comprehensive psychological evaluation. Therefore, the parent and DCPS agreed to reconvene the MDT on February 11, 2013. On February 5, 2012 the Petitioner filed the current Complaint and on February 8, 2013, the parent's advocate requested that the MDT again be postponed in order to allow the parent to participate in

MDT meetings for the student and his brother on the same date. DCPS agreed to reschedule the meeting.

There is no requirement in the IDEA or its implementing regulations which mandate a time period in which an independent reevaluation must be reviewed. Pursuant to 34 CFR §300.502(c)(1), an independent educational evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. To date, the parties have not agreed upon a date on which to review the November 28, 2012 Comprehensive Psychological Evaluation and revise the student's IEP, if appropriate. There has not yet been a meeting to make decisions with respect to the provision of FAPE to the child.[5]

In the Due Process Complaint, the Petitioner alleged that DCPS was required to convene an IEP Team meeting to review the results of the evaluation and revise the student's IEP pursuant to 34 CFR §300.324(b). The IDEA regulations at 34 CFR §300.324(b) discuss the LEA's responsibility to review and revise the student's IEP at least annually to determine if the student's annual goals are being achieved, to address any lack of progress toward annual goals, to address the results of any reevaluations, to address information provided by the parents, to address the child's anticipated needs or other factors. With the exception of the IEP's annual review date, this provision does not give a timeline within which a reevaluation must be reviewed. To the extent that the "reevaluation" should have been reviewed by the annual review date of the student's IEP, the student's IEP did not expire until February 27, 2013. The Complaint was filed on February 5, 2013. On February 5, 2013, the issue of whether the student was denied a FAPE by not having an annual review of his IEP by February 27, 2013 was neither ripe nor alleged.

Even if there were some requirement for the "timely review" of the independent comprehensive psychological assessment, the Petitioner, in part, contributed to the delay. Further, as discussed above, the Hearing Officer concludes that the November 28, 2012 evaluation results are not reliable. The recommendations are based on cognitive and academic data which do not align with three previous tests or the student's school functioning and social-emotional data which do not adequately weigh teacher input. Even if the results of the November 28, 2012 Comprehensive Psychological Evaluation were reliable, the Petitioner would nonetheless have to prove some harm or deprivation of educational benefit to the student. Here, the record clearly indicates that in November 2012, the student was progressing well in all classes, was close to mastery of his social-emotional goals, took initiative in math and history, had excellent participation in academic classes, was "a pleasure to have in class" and was demonstrating appropriate behavior in all school settings. The Hearing Officer concludes that the student was not denied a FAPE by DCPS' delay in reviewing the results of the independent November 28, 2012 Comprehensive Psychological Evaluation.

[5] Although DCPS disclosed an IEP for the student dated February 11, 2013, which includes data from the November 28, 2012 Comprehensive Psychological Evaluation and signatures from IEP Team members, the Hearing Officer concludes that any February 11, 2013 meeting was, in fact, not an IEP Team meeting because the parent, a vital member of the IEP Team, was not present and had informed DCPS that she would not be present.

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

Issue #4

The Petitioner argued that DCPS denied the student a FAPE by failing to revise the student's IEP to include specialized instruction, accommodations and modifications to address the student's deficits in math, reading, oral language, written expression and memory; increased counseling; specialized instruction in a small group setting for academic subjects; and appropriate goals to address the student's social/emotional functioning based on the results of the November 28, 2012 Comprehensive Psychological Evaluation. Pursuant to 34 CFR §300.502(c)(1), an independent educational evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. There is no requirement in the IDEA, its implementing regulation, or the District of Columbia Code and Municipal Regulations that an IEP Team adopt all of the recommendations in an independent evaluation or any evaluation conducted on behalf of a student.

As discussed in Issue #3, there was no requirement for a time period in which DCPS was obligated to review the independent November 28, 2012 Comprehensive Psychological Evaluation. The student's IEP Team has not convened following DCPS' receipt of the November 28, 2012 Comprehensive Psychological Evaluation therefore there has not been an opportunity for the student's IEP Team to accept or reject the recommendations in the November 28, 2012 Comprehensive Psychological Evaluation. Further, as discussed in Issue #3, the Hearing Officer concluded that the results of the November 28, 2012 Comprehensive Psychological Evaluation are not reliable. Therefore, adopting the recommendations contained within the November 28, 2012 Comprehensive Psychological Evaluation would be inappropriate for the student.

Finally, the Petitioner did not prove that the student is in need specialized instruction, accommodations and modifications to address the student's deficits in math, reading, oral language, written expression and memory; increased counseling; specialized instruction in a small group setting for academic subjects; and additional goals to address the student's social/emotional functioning in order for the student to receive educational benefit. The record is clear that the student is able to achieve at high levels with the supports prescribed in his February 27, 2012 IEP. After the student made the decision to attend school at the beginning of the 2012-2013 school year, the student achieved all A's for the first quarter and A's and one B for the second quarter without any revision to the student's February 27, 2012 IEP. Teachers report that the student has become a "model student" and a "leader" in his classes.

Although the Petitioner is not satisfied with the services currently being provided to the student, 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. The parent stated in the student's February 27, 2012 IEP Team meeting that her desire is for the student to be placed in a self-contained class. However the record clearly indicates that the student's current IEP is reasonably calculated to enable the child to receive some educational benefit. *See Board of Education v.*

Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to revise the student's IEP to include specialized instruction, accommodations and modifications to address the student's deficits in math, reading, oral language, written expression and memory; increased counseling; specialized instruction in a small group setting for academic subjects; and additional goals to address the student's social/emotional functioning based on the results of the November 28, 2012 Comprehensive Psychological Evaluation.

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

Issue #5

IDEA regulations at 34 CFR §300.304(c)(6) require the public agency to ensure that evaluation of a child is sufficiently comprehensive to identify all the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. An FBA is an educational evaluation. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). "The IDEA…recognizes that the quality of a child's education is inextricably linked to that child's behavior" and "[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Id.* at 68. However, within the IDEA, the only circumstance for which an FBA is *required* is an change in placement pursuant to 34 CFR §300.530(c) or (g), for disciplinary changes in placement that would exceed 10 consecutive school days for behavior determined not to be a manifestation of the child's disability and for removal of a student to an interim alternative educational setting.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

In the District of Columbia, there are specific provisions in the District of Columbia Municipal Regulations that relate to BIPs. According to DCMR 5-3007.3, if a student's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

In the present matter, the Petitioner alleges that DCPS was required to conduct an FBA and develop a BIP for the student on or about June 2011 based on the student's lack of participation in counseling, incomplete classwork, withdrawn behaviors, problems with peers and truancy. The Respondent argued that, with the exception of truancy, the student had no

behavioral issues that would warrant a BIP; that the Petitioner did not provide evidence that the student did not participate in counseling, did not complete his classwork, was withdrawn or had problems with peers; and that DCPS took appropriate and proactive actions to address the student's truancy.

The Hearing Officer agrees that the Petitioner did not present sufficient evidence that the student did not participate in counseling, did not complete classwork, was withdrawn or had problems with peers. In fact, the record indicates that when the student was present in school, he routinely participated in counseling, generally completed classwork and generally behaved appropriately. It is uncontested that, during the 2011-2012 school year, the student had excessive absences from school and from individual classes.

DCPS has an "affirmative duty" to address a student's truancy. *R.B. v. Mastery Charter School*, 762 F. Supp.2d 745 (E.D. Pa 2010) (District had duty to respond to absences through educational intervention). Further, courts in the District of Columbia have held that the failure to create BIPs to address behavior issues can result in a material deprivation and lead to a finding of FAPE denial. *See Long v. District of Columbia*, 780 F. Supp.2d 49, 61 (D.D.C. 2011) (in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); *Shelton v. Maya Angelou Charter School*, 578 F.Supp.2d 83 (D.D.C. 2008) (FBA/BIP required where learning disabled student was suspended).

In this case, on the student's final report card for the 2010-2011 school year, the student had 47 absences from Academic Support, 50 absences from Algebra I, 43 absences from English I, 21 absences from Comprehension Development, 21 absences from Art and Design Foundations, 40 absences from Study Skills, 28 absences from General Music and 49.5 absences from homeroom. The student's final report card was the only evidence presented for the 2010-2011 school year through exhibits or testimony. For the 2011-2012 school year, on January 20, 2012, the student had 73 absences from Academic Support, 21 absences from English I, 20 absences from Fluency Skills, 21 absences from Algebra I and 23 absences from Hospitality Comp Apps II. In February 2012, the student's Algebra I teacher indicated that when the student is in class he participates and gives great examples for the concept being taught but that the student needed to come to class every day; the student's Environmental Science teacher stated that the student rarely completed assignments and needed prompting to make an effort but displayed good concentration, good compliance and good interaction with peers; the student's World History teacher was unable to assess the student's classroom progress because the student rarely attended class.

At the beginning of the 2012-2013 school year, the student regularly attended school and performed "exceptionally" well in all classes. From August 27, 2012 through October 18, 2012, the student was absent two days, tardy five days and present and on time for all other days. For the five days the student was tardy, his tardiness ranged from six minutes to 19 minutes. The student did not display challenges with attendance during the 2012-2013 school year until the week before Spring Break.

There was no change in the student's educational programming from the end of the 2011-2012 school year to the beginning of the 2012-2013 school year, DCPS did not conduct an FBA at the end of the 2011-2012 school year to assess the student's underlying purpose to miss school and DCPS did not implement a BIP at the beginning of the 2012-2013 school year. The Case Manager testified that the sole difference between the 2011-2012 and 2012-2013 school years in the student's participation in school, as reported by the student, is that the student made an individual decision to attend school. The student wanted to demonstrate what he is capable of achieving and that he is "not dumb." When the student made the decision to attend, he achieved all A's for the first quarter and A's and one B for the second quarter without any revision to the provision of specialized instruction, related services or behavior intervention. When the student began to miss school around Spring Break, the student informed Social Worker B that he was going to a friend's house before school and leaving school to attempt to retrieve his dirt-bike which was impounded by the police.

The law requires DCPS to "address truancy" and for the IEP Team to consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address the student's behavior that interferes with his learning. There is no affirmative requirement to address truancy by conducting an FBA. Also, while the DCMR requires an individual behavior plan to be developed, incorporated into the IEP and provided to the child's parents and to each teacher and service provider, the failure of DCPS to fulfill this requirement *may* result in a denial of a FAPE.

During the 2011-2012 school year, School A addressed the student's truancy in several ways. First, the Counselor and the Social Worker met with the parent and the student, together and separately, multiple times to discuss the student's truancy and informed the parent about community resources to assist her with managing the student's behaviors at home. During the student's prescribed behavioral support services sessions, the Social Worker counseled the student regarding the importance of attendance. The Social Worker also solicited the student's agreement to enter into a behavior contract and offered to buy the student an art kit, at her own expense, if the student successfully attended school. The Attendance Contract was shared with all of the student's teachers and signed by the student's teachers each class period. Additionally, the student's February 27, 2012 IEP Team directly discussed the student's truancy. The IEP Team was given a copy of the student's Attendance Contract, included the student's challenges with attendance in the present level of performance in the emotional/social/behavioral section of his IEP and developed an IEP goal related to attendance. The IEP Team also debated the merits of whether or not to refer the parent to truancy court and referred the family to the Truancy Social Worker. During the 2012-2013 school year, the Truancy Social Worker continued to work with the student and parent. Likewise, Social Worker B continued to address the student's attendance goals during behavioral support services, spoke directly with the student regarding his motivation for attending or not attending school and attempted to acquire funding for rewards for the student's attendance.

While the Evaluator who conducted the student's November 28, 2012 Comprehensive Psychological Evaluation did not conduct an FBA of the student, the Evaluator did assess the student's social/emotional/behavioral functioning. Even through the Hearing Officer concluded that the results of the evaluation are not reliable, the Hearing Officer will address the Evaluator's

testimony regarding recommendations for modification techniques to use to address the student's truancy. First, the Evaluator suggested that the student receive a reward for attending school. This method was attempted by Social Worker A in offering to purchase an art kit for the student if he displayed appropriate attendance. Social Worker B also attempted to establish a reward system for the student but was unable to secure funding from the principal for a reward. Next, the Evaluator suggested that a formalized document be used in school setting to address the student's attendance. This method was also utilized by School A. Specifically, Social Worker A and the student agreed on a Daily Attendance Contract which was shared with all of the student's teachers. Finally, the Petitioner also suggested that the student required credit recovery and online instruction to address his loss of academic instruction due to truancy. Both credit recovery and an on-line course, Plato, were offered by School A to the student. In fact, the student has attended Plato and has performed very well in the class.

The present case is remarkable in that rarely is evidence so clear that the efforts of an LEA to address a student's truancy are inconsequential unless the student makes a decision to attend and that when the student avails himself of the education being offered, he is able to achieve at a high level. Once this student decided to attend class and demonstrate his capabilities, he became a "model student" and a "leader" in his classes. He achieved the Honor Roll for the first two semesters without any additional assistance or change in programming. While the parent testified that attending school at the beginning of the year and subsequently not attending is a pattern for the student, this statement is not supported by the record. Likewise, the Evaluator's testimony that the student's truancy is a result of Dysthymic Disorder is not supported by the record.

The Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to conduct an FBA and develop a BIP for the student on or about June 2011. DCPS' failure to develop and incorporate an individual behavior plan into the student's IEP in accordance with DCMR 5-3007.3, is a procedural violation that did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child or cause a deprivation of educational benefit.

The Petitioner failed to meet its burden with respect to Issue #5.

<u>Issue #6</u>

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.

In the present matter, the Petitioner alleges that DCPS failed to develop an appropriate transition plan based on age appropriate transition assessments on February 27, 2012. The student turned 16 years old the summer prior to the 2012-2013 school year. Therefore, the student's February 27, 2012 transition plan was developed when the student was 15 years old.

Prior to the development of the student's February 27, 2012 transition plan, the student completed a Sunraye Work Interest Inventory, a Job Search Manual which contained information regarding his academic interests, functional interests and employment interests and information gathered from the Brigance, completed by the student on December 12, 2012, however the scores from the Brigance were not listed on the student's transition plan. The student was able to express his interest in the field of law enforcement and computer technology and his desire to obtain a job that will allow him to become independent and self-sufficient.

Transition assessment data capturing the student's interests is the common thread in transition planning and it should define the transition goals and services in the IEP, and link directly to the transition services and activities. *Brandywine Sch. Dist.,* 111 LRP 64084 (SEA DE 2011). All witnesses who testified regarding transition planning agreed that the beginning step in transition planning is the assessment of the student's interests and basic skills.

A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.,* 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and strategies). Here, DCPS' choice of a functional checklist and work interest inventory, in conjunction with the student's Brigance, to assess the student's long range goals and interests in order to develop transition goals and services, were age appropriate choices. The district was not required to administer a "more intensive" or standardized assessment in order to fulfill its obligation to conduct age appropriate transition assessments. While there are other assessment tools that can be used to develop appropriate postsecondary goals for a student, a functional checklist and a work interest inventory are appropriate for a 15 year old, who will turn 16 years old in the next school year, and is just beginning the process of transition planning through the IEP process.

A transition plan must include appropriate measurable postsecondary goals 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. *See* 34 CFR §300.320(b). 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 student's February 27, 2012 transition plan includes a long range goal and a short-term goal related to postsecondary education and training, a long range goal and a short-term goal related to employment and a long range goal and a short-term goal related to independent living. The goals are based on the long-term goals and interests the student expressed in his work interest inventory. While each of the short-term goals contains a measurement, the measurement for the student's short-term postsecondary education and training goal is difficult to apply. Specifically, that goal states that the student will "gather information from institutions or agencies that will enhance his knowledge of the requirement for his chosen career field" in 3 out of 4 trails. Although there is a "measurement," it is unclear how the accuracy of this goal will

be measured. The Hearing Officer concludes that although the student's postsecondary education and training goal includes a "measurement," the measurement is inappropriate for this particular goal. The measurement for the student's employment and independent living goals are to complete the tasks with 80% accuracy. Unlike the postsecondary education and training goal, these measurements are clear and easy to apply to the stated goals.

The student's transition plan also includes the transition activities and services for postsecondary education and training (attending a career fair), employment (assistance with completing a summer job application) and independent living (assistance with attending community events). Each of the activities and/or services includes a location and time/frequency. While extremely basic, the services promote movement from school to post-school activities and are based on the child's needs, taking into account his preferences and interests.

The student's February 27, 2012 transition plan includes the courses of study in which the student was enrolled. Given the student's desire to receive a high school diploma, the courses listed were courses that would assist the student in obtaining a high school diploma for the duration of the February 27, 2012 IEP. Like the other services listed in the student's transition plan, the courses listed were an extremely basic implementation of this requirement however appropriate for this student at the time of the development of 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).

Procedural violations raise a viable claim only if the procedural violations affect the student's substantive rights under the IDEA. *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (United States Court of Appeals, District of Columbia (2006)). The failure of DCPS to include an appropriate measurement for the student's postsecondary education and training goal in the student's transition plan is a procedural violation that does not affect the student's substantive rights under the IDEA. The Petitioner presented no evidence of how the lack of an appropriate measurement has harmed the student. The Hearing Officer finds that the lack of an appropriate measurement for the postsecondary education and training goal neither, (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, nor (3) caused a deprivation of educational benefit for the student.

The Petitioner failed to meet its burden with respect to Issue #6.

<u>Issue #7</u>

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 Firth 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 DCPS failed to implement the student's February 27, 2012 IEP by failing to provide 7.5 hours of specialized instruction outside of the general education environment. On the Services Delivery page of the student's February 27, 2012 IEP, the student is prescribed five hours per week of specialized instruction within the general education environment and an additional seven and one half (7.5) hours per week of specialized instruction outside of the general education setting. On the Least Restrictive Environment page of the student's February 27, 2012 IEP, the student is prescribed 7.5 hours of specialized instruction as a combination of within the general education setting and outside of the general education setting. This section includes the justification that the student requires accommodations in his general education classes.

The record contains no evidence of whether the student's February 27, 2012 IEP Team intended to prescribe 7.5 hours of specialized instruction outside of the general education environment or 7.5 hours of specialized instruction as a combination within the general education environment and outside of the general education environment. Since the record is not clear as to the student's February 27, 2012 IEP Team's intention of where the student would receive specialized instruction, the Hearing Officer considered the nature and severity of the student's disability. The record contains no evidence that the student's disability is such that the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* 34 CFR §300.114(a)(2).

The record also lacks substantial evidence of where and how the student received specialized instruction from February 27, 2012 through the filing of the Complaint. The advocate's meeting notes from the student's February 27, 2012 IEP Team meeting indicate that during the 2011-2012 school year, the student received specialized instruction in the general education environment in math and science and received one half credit for a special education class. This evidence was not refuted. The notes also seem to support the Least Restrictive

Environment page that the IEP Team determined that the student would receive specialized instruction in a combination of within and outside of the general education environment. There was also testimony offered by Social Worker B and the Case Manager that in addition to the specialized instruction the student received within the general education environment, the student received some level of pull-out service or specialized instruction outside of the general education environment. The record contains no evidence of how much time per week the student received specialized instruction outside of the general education environment.

The Petitioner argued that the information filled out by the student on February 23, 2012 to assist in his transition planning and the notes from the Resolution Meeting on October 4, 2012 support the claim that the student did not receive specialized instruction. The argument that the information provided by the student on February 23, 2012 substantiates the claim that the student did not receive the specialized instruction on his February 27, 2012 IEP is not compelling. In addition to the remiss answers provided by the student on the document, the document was completed by the student prior to the development and implementation of his February 27, 2012 IEP. Therefore, the Hearing Officer finds that the document completed by the student on February 23, 2012 carries no weight in the determination of this issue.

The record contains both the DCPS and the advocate notes from the October 4, 2012 Resolution Meeting. While the advocate's notes state that the student's IEP was not being implemented, the DCPS notes are not necessarily aligned. The advocate's notes state that the student is not receiving specialized instruction out of the general education setting for any classes and that "none of core classes can be provided in" out of general education. The DCPS notes indicate that a discussion occurred regarding how the school provides specialized instruction within and outside of the general education environment. The notes do not indicate that the discussion was specific to the student. The only statement that could align with the advocate's notes is the statement that "It sounds like mom wants to pull him out of inclusion and put him back into self-contained." The statements immediately preceding this statement indicates that the school provides one-on-one specialized instruction by a special education teacher even when students are enrolled in inclusion classes. Although the advocate's notes state, "confirmed not implementing IEP," the Parent testified that DCPS stated in the meeting that the student was receiving the prescribed hours of specialized instruction.

The student's Case Manager testified that she could not recall the specialized instruction provided to the student but that she believed that during the 2011-2012 school year the student received specialized instruction within the general education environment in Earth Science and math and that the student also received specialized instruction outside of the general education environment through pull-out services with a special education teacher and may have received specialized instruction in English. The Case Manager also testified that the student was assigned to a special education English class during the 2011-2012 school year however the student's parent unilaterally withdrew the student from the special education English class. For the 2012-2013 school year, the Case Manager testified that she believed that the student was receiving specialized instruction outside of the general education environment in math and reading. The Social Worker B testified that, to the best of his knowledge, the student received specialized instruction in inclusion classes as well as outside of the general education environment.

Finally, the Advocate testified that the student reported that he was not receiving specialized instruction. The Hearing Officer does not find this hearsay evidence compelling. The Advocate testified that she had great difficulty in soliciting answers from the student during her informal interview and that she found the student's ability to answer questions limited. Also, the student's response that there was no special education teacher in any of his classes is in conflict with uncontested evidence that the student was receiving specialized instruction in general education classes.

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 Hearing Officer is not persuaded that the student did not receive specialized instruction as prescribed in his February 27, 2012 IEP nor is the Hearing Officer persuaded that he did. First, the Hearing Officer is unable to determine whether the student's February 27, 2012 IEP Team intended to prescribe the student 7.5 hours of specialized instruction outside of the general education environment or as a combination of within and outside of the general education environment. It is possible that the student's February 27, 2012 IEP Team intended to prescribe 7.5 hours of specialized instruction outside of the general education environment. It is also possible and potentially probable that DCPS did not provide the student 7.5 hours of specialized instruction outside of the general education environment. However, the Petitioner did not meet its burden in proving that the student's IEP actually prescribed 7.5 hours outside of the general education environment or that DCPS did not provide 7.5 hours per week of specialized instruction in a combination of within and outside of the general education environment.

The Petitioner failed to meet its burden with respect to Issue #7.

<u>Requested Relief</u>

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 (4 h Cir. 2003).

In this case, the denial of FAPE is DCPS' failure to conduct a psychological evaluation as agreed upon by the student's IEP Team on February 24, 2011. The most appropriate remedy is to Order that DCPS conduct the psychological evaluation. Although an independent comprehensive psychological evaluation of the student was conducted in November 2012, which would typically negate the need for further evaluation, the Hearing Officer concluded that the results of the evaluation are not reliable. The Petitioner has requested compensatory education for DCPS' failure to conduct a psychological evaluation as agreed upon by the student's IEP Team on February 24, 2011. In particular, the Petitioner has requested 144 hours of tutoring and 64 hours of therapeutic mentoring or community case management/counseling services.[6] The hours requested also encompass the Petitioner's allegation that other denials of FAPE occurred.

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 her child has been denied a FAPE, she has met her 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.")

Here, although DCPS did not complete the psychological evaluation as requested on the referral form, at the student's next IEP Team meeting on February 27, 2012, the student's IEP Team updated the student's present levels of performance based on updated Woodcock Johnson III achievement scores, information from school staff members (e.g. information regarding the student's attendance and the student's participation in counseling), and a review of the student's records. The IEP Team also utilized information from a Brigance assessment and student input to develop the student's transition plan on the student's February 27, 2012 IEP. The IEP Team prescribed services consistent with the updated present levels of performance and goals developed by the IEP Team. Both the parent and the student, along with the parent's advocate, were present for and participated in the February 27, 2012 IEP Team meeting.

Next, as discussed multiple times within this Order, the evidence is clear that the efforts of DCPS to provide services for the student and to address the student's truancy were meaningless until the student made a decision to attend school and avail himself of the education

[6] The Petitioner's proposed compensatory education plan included additional services and evaluations however the additional services and evaluations were requested for other alleged denials of FAPE.

being offered. Once this student decided to attend class and demonstrate his capabilities, he became a "model student" and a "leader" in his classes. He achieved the Honor Roll without any additional assistance or change to his February 27, 2012 IEP or educational programming.

Finally, the compensatory education award proposed by the Petitioner is based on the alleged harm as calculated by data included in the independent November 28, 2012 Comprehensive Psychological Evaluation. The Petitioner argued that the student's "regression" was so significant that only this level of compensatory education would address the deprivation of educational benefit to the student. However, the Hearing Officer concluded that the results of the November 28, 2012 testing were not reliable. The results of the student's cognitive functioning in no way align with previous testing of the student, the student's academic functioning scores are in direct conflict with evidence of the student's functioning in the classroom and the evaluator did not give due weight to teacher's input.

Therefore, the Hearing Officer concludes that compensatory education is not warranted in this case because it would not compensate for the denial of FAPE based on the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child being impeded and because the student has shown high levels of achievement an progress following his personal decision to attend school. Ordering DCPS to conduct the evaluation, as agreed upon by the student's IEP Team on February 24, 2011, is an appropriate remedy.

ORDER

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

1. Respondent's Motion for Directed Verdict for Issues #1, #2, #3 and #5 is **denied**.
2. Issues #2, #3, #4, #5, #6 and #7 are **dismissed** with prejudice.
3. Within 60 days of the date of this Order, DCPS shall conduct a psychological evaluation of the student. If the student is not present for school on the days DCPS attempts to assess the student, DCPS will be given an additional day to complete the evaluation for each day the student is not "produced" for the evaluation.
4. Within 20 school days of the completed psychological evaluation, DCPS shall convene an IEP Team meeting to review the psychological evaluation and, if necessary, revise the student's IEP based upon the results of the psychological evaluation.
5. 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: April 21, 2013

Melanie Byrd Chisholm
Hearing Officer