

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: July 27, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2014-0198

v.

Hearing Date: July 14, 2014

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2004
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her expedited due process request, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) failed to conduct a Manifestation Determination Review (MDR) meeting, as required by the IDEA after Student had been suspended from school for more than 10 school days during the 2014-2015 school year. Petitioner also contends

¹ Personal identification information is provided in Appendix A.

that DCPS failed to provide Student appropriate Individualized Education Plans (IEP) and suitable educational placements for the 2014-0215 and 2015-2016 school years.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 5, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on June 8, 2015. The parties met for a resolution session on June 6, 2015 and did not resolve the due process complaint. On June 24, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On June 29, 2015, counsel for Petitioner filed a motion objecting to the June 24, 2015 Prehearing Order's provision concerning the burden of proof for compensatory education. By order entered July 1, 2015, I overruled Petitioner's objection.

The expedited due process hearing was held before this Impartial Hearing Officer on July 14, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, and DIRECTOR from NONPUBLIC SCHOOL. DCPS called as witnesses HHIP PROGRAM MANAGER 2 and COMPLIANCE CASE MANAGER. Petitioner's Exhibits P-1 through P-20 were admitted into evidence, including Exhibits P-7² and P-15 which were admitted over DCPS' objections. DCPS' Exhibits R-1, R-4, R-5, R-7 through R-9, R-11, R-13 through R-19, R-21 through R-33, R-

² Petitioner's Counsel stipulated that the pages in Exhibit P-7 were compiled out of numerical order.

35 through R-40 and R-42 were admitted without objection. Exhibits R-6 and R-20 were admitted over Petitioner's objections. Exhibits R-2, R-3, R-10, R-12, R-34 and R-41 were not offered. Counsel for the respective parties made opening and closing statements. At the request of Petitioner's Counsel, the parties were granted leave until July 16, 2015 to file post hearing written argument. Petitioner's Counsel filed written citations of authority on July 16, 2015.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the June 24, 2015

Prehearing Order:

– Whether DCPS failed to convene a Manifestation Determination Review (MDR) meeting after Student had been suspended from school for more than ten school days during the 2014-2015 school year;

– Whether DCPS denied Student a FAPE by not conducting a Functional Behavioral Assessment (FBA) and not developing a Behavior Intervention Plan (BIP) after Student had been suspended from school for more than ten school days during the 2014-2015 school year;

– Whether DCPS denied Student a FAPE by failing to develop adequate IEPs on December 1, 2014 and April 27, 2015, in that the IEPs as developed, including the transition plans, were not written to provide meaningful educational benefit;

– Whether DCPS has failed to provide Student an appropriate educational placement for the 2014-2015 school year and 2015-2016 school years.³

For relief, Petitioner requests that the Hearing Officer order DCPS to place

³ A fifth issue certified in the Prehearing Order – whether DCPS denied Student a FAPE by failing to conduct IDEA reevaluations of Student that DCPS deemed appropriate after obtaining the parent's consent on December 1, 2014 – was withdrawn with prejudice by Petitioner's Counsel at the beginning of the due process hearing.

Student at Nonpublic School, at public expense, for the 2015-2016 school year.

Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in her complaint.

FINDINGS OF FACT

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

1. Student, an AGE youth, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification Multiple Disabilities (MD). His last special education eligibility meeting date was May 28, 2015. Exhibit R-21.

3. In a May 6, 2013 psychoeducational evaluation ordered by the D.C. Superior Court, Student was reported to be before the court on a Felony Assault charge. Mother reported to the evaluator that at home, Student had poor response to authority figures and at times was violent in the home. He also had a history of staying out past curfew. Exhibit P-6.

4. Since the 2013-2014 school year, Student has been enrolled at CITY HIGH SCHOOL. In the 2014-2015 school year, Student repeated GRADE. Exhibit P-6.

5. Mother reported that shortly after the beginning of the 2013-2014 school year, she began receiving calls from City High School about Student's behavior. The school informed Mother that Student skipped classes, walked the halls and refused to do his class work. Exhibit P-6.

6. Student's October 15, 2013 IEP at City High School provided that he would receive 18.5 hours per week of Specialized Instruction, including 6.5 hours per week

outside general education. Exhibit P-6. (The 2013 IEP was not offered into evidence.)
For the 2013-2014 school year, Student received 1.5 academic credits toward high school graduation. Exhibit P-14.

7. On July 30, 2014, Petitioner entered into a Settlement Agreement with DCPS in resolution of a previous due process complaint she had brought on behalf of Student (Case No. 2014-0302). The Settlement Agreement provided, *inter alia*, that DCPS would fund an Independent Educational Evaluation (IEE) Comprehensive Psychological Evaluation of Student, that DCPS would conduct a Functional Behavioral Assessment (FBA), and that DCPS would fund 175 hours of independent tutoring and 25 hours of independent behavioral support for Student. Petitioner's Counsel also represented Petitioner in the prior due process proceeding. Exhibit R-24. Educational Advocate provided the independent tutoring authorized by the Settlement Agreement. Testimony of Educational Advocate.

8. On June 21, 2014, Student was severely injured in a shooting incident. He suffered a ballistic fracture of his left tibia, which required surgery and physical therapy. Due to Student's pain and difficulty ambulating on his own, his physician ordered that he not return to school until March 2015. Exhibit R-5, Testimony of Mother.

9. On August 25, 2014, Petitioner's Counsel wrote ASSISTANT PRINCIPAL at City High School that, "[a]s DCPS knows, [Student] was shot and severely injured this summer. He cannot walk. He requires home schooling for a yet-unidentified period of time. Please email me and the mother the forms that the parent needs to get signed in order for this to take place immediately." Exhibit P-18. Mother went to the school and was told there was nothing the school could do – but for Mother to keep them updated. Mother always kept the school updated. Assistant Principal was Mother's contact at

school. Testimony of Mother. DCPS' Compliance Case Manager was first told about Student's need for home instruction on September 2, 2014. Testimony of Compliance Case Manager.

10. Mother obtained the required DCPS forms for home instruction from City High School on August 28, 2014 and, before September 12, 2014, submitted the paperwork to Student's physician for completion. Exhibit P-18. Later in September 2014, Mother returned the completed forms to Assistant Principal. In October 2014, Mother received a call from HHIP Program Manager 1, of the DCPS Home and Hospital Instruction Program (HHIP), to inform her that the home instruction forms had been received and were being processed, but that it would take some time to obtain approval from HHIP. DCPS repeatedly lost the home instruction application forms and Mother resubmitted them. On December 18, 2014, DCPS first approved home instruction for Student. Testimony of Educational Advocate. However HHIP Program Manager 1 left her job at DCPS and HHIP Program Manager 2 took over Student's case. HHIP Program Manager 2 found that Student's physician verification was incomplete and requested the physician to fully complete the justification document. HHIP Program Manager 2 received the completed documents on January 8, 2015. Testimony of HHIP Program Manager 2.

11. From the beginning of the 2014-2015 school year, Student was not attending school due to his gunshot injury. DCPS was not providing home instruction services to Student. Not being able to go to school, Student became depressed and suicidal. Against the orders of Student's physician, Mother decided to send Student back to City High School. Testimony of Mother. Student attended school for some three weeks beginning around early November 2014. Testimony of Mother. On December 18,

2014, Student's physician again certified that Student was not well enough to participate and benefit from an instructional program at school. Testimony of Educational Advocate, Exhibit R-4. Student did not again return to school until March 12, 2015. Testimony of Mother.

12. On January 9, 2015, DCPS HHIP again approved Student for home instruction services. Student was approved to receive two hours per week of 1:1 instruction, in addition to all of his IEP specified Behavioral Support Services. On January 19, 2015, HHIP Program Manager 2 delivered to Student a laptop computer and internet card, his books and a folder of schoolwork assignments. In order to provide home-based instruction, DCPS required that there be another adult present in the home while Student was receiving instruction. Mother is employed outside the home and could not be present for the home instruction sessions. Except for one session, DCPS never provided home instruction to Student because Mother was unable to arrange for an adult to be present when the HHIP teacher would be serving Student. Testimony of HHIP Coordinator-2, Testimony of Educational Advocate. On or about March 12, 2015, Student was released by his physician to return to City High School. Testimony of Mother, Exhibit R-29.

13. On November 7, 2014, Clinical Psychologist conducted an IEE Comprehensive Psychological Evaluation of Student. She interviewed Student and Mother and had one of Student's prior school year teachers complete a behavior scales questionnaire. Clinical Psychologist administered cognitive, educational and Visual Motor Integration tests of Student. Student received a Brief Intellectual Ability score of 67 (Very Low). His scores on the educational achievement tests were Broad Reading - 67 (Very Low), Broad Math - 57 (Very Low) and Broad Written Language - 58 (Very Low).

Clinical Psychologist diagnosed Student with Disruptive Mood Dysregulation Disorder and Attention-Deficit Hyperactivity Disorder, Combined Presentation (By History). In her November 16, 2014 report, Clinical Psychologist reported that Student was an adolescent with multiple disabilities (Other Health Impairment, Learning Disorder, and Emotional Disturbance). She recommended that Student required full time special education supports in a full time, stand-alone special education school. Exhibit P-6.

14. At a meeting on December 1, 2014, Student's IEP team reviewed Clinical Psychologist's November 16, 2014 report. The IEP team agreed to change Student's educational placement to full time, 26 hours per week, Specialized Instruction in a small, outside of general education, classroom with no more than 10 students, a teacher and a support staff member. Mother objected to Student's remaining at City High School. The DCPS representatives stated that City High School would be able to implement the full-time IEP. Exhibit P-7.

15. On April 27, 2015, Student's annual IEP review meeting was convened at City High School. Mother and Educational Advocate attended. No changes were made to Student's special education and related services from his December 1, 2014 IEP. Mother stated that when Student was present at City High School, he was permitted to walk the halls. Educational Advocate affirmed that Mother was not happy with Student's placement at City High School and she believed the school had not provided the necessary services for Student. DCPS did not agree to change Student's location of services. Due to Student's absences from school, an FBA for Student had not been completed before the April 27, 2015 meeting. An FBA and a BIP were completed on April 29, 2015. Exhibits P-12, P-13.

16. Student was suspended from school on March 31, 2015 for 8 school days.

Exhibit P-14. After Student returned from the suspension, he was repeatedly sent home for behavior issues. Testimony of Educational Advocate, Testimony of Mother.

17. Between April 20, 2015 and April 27, 2015, Student was sent home from school twice and told not to return for two days. On April 27, 2015, Student was suspended for two days for being in the cafeteria when he was supposed to be in class. In May and June 2015, Student was suspended three more times for not being in the right place. The reason that Student was suspended on March 30, 2015 and on the subsequent removal dates was always that he was not at the right class at the right time. Declaration of Mother (Exhibit R-19).⁴

18. In its response to the due process complaint, DCPS states that Student was suspended from City High School for his conduct on March 30, 2015, that the suspension was from March 31 to April 10, that Student was scheduled to return after spring break on April 20 and that there were no other records indicating suspensions for the 2014-2015 school year. DCPS does not deny that an MDR meeting was not convened for Student.

19. Nonpublic School is a nonpublic therapeutic day school in suburban Maryland for Students in grades 9 through 12. It has a total enrollment of some 35 students. A Licensed Clinical Social Worker on the school staff provides counseling to all students. There are no more than 7 students in a classroom. All teachers are certified

⁴ This information in this paragraph comes from Mother's July 7, 2015 signed declaration (Exhibit P-19). Although the rules of civil procedure do not apply to special education due process proceedings, receiving a written declaration into evidence, when the declarant is present and available to testify, is unusual. However, this declaration was admitted into evidence without objection from DCPS and DCPS had the opportunity to cross examine Mother at the hearing. Therefore, I accord the same weight to Mother's written statement as to her sworn testimony. Mother's statements in the declaration about Student's removals from school were not rebutted by DCPS.

in special education. All students at Nonpublic School are on IEPs. Most of the Students have Emotional Disability, Intellectual Disability, or Other Health Impairment disabilities. Director believes that the tuition at Nonpublic School is roughly \$75,000 per year. Nonpublic School holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education. Testimony of Director.

20. Student has been accepted by Nonpublic School for the 2015-2016 school year, based upon a review of his records and an intake meeting with Mother and Educational Advocate. Student did not attend the intake meeting and school staff have not yet met him. Testimony of Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument 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 due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C.2006).

Analysis

A.

– Did DCPS fail to convene a required Manifestation Determination Review (MDR) meeting after Student had been suspended from school for more than ten school days during the 2014-2015 school year?

– Did DCPS deny Student a FAPE by not conducting a Functional Behavioral Assessment (FBA) and not developing a Behavior Intervention Plan (BIP) after Student had been suspended from school for more than ten school days during the 2014-2015 school year?

The first issues to be addressed in this decision concern whether DCPS failed to comply with the requirements of the IDEA for disciplining a student with a disability. Specifically, Petitioner alleges that after Student was suspended from school for more than ten school days during the 2014-2015 school year, DCPS failed to comply with the IDEA’s requirements to convene an MDR meeting, to conduct a functional behavioral assessment (FBA) or to develop a behavior intervention plan (BIP).

The IDEA protects disabled students from being removed from the classroom because of their disability. 34 CFR § 300.530(e); 34 C.F.R. § 300.536(a). The Act requires that, when a child with a disability is removed from his current educational placement for more than ten consecutive school days for violation of a code of student conduct, the child must continue to receive educational services, so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. *See* 34 CFR § 300.530(d). The Act permits children with disabilities to be removed from their current educational placement for not more than 10 consecutive school days at a time. Additional removals of 10 consecutive school days or less, in the same school year, would be permissible, provided any removal does not constitute “a change in placement.” *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46714 (August 14, 2006). A change in placement occurs if,

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—

- (i) Because the series of removals total more than 10 school days in a school year;
- (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 CFR § 300.536(a).

If a student with a disability is suspended for disciplinary reasons for more than ten consecutive school days, or for ten non-consecutive days if the removals constitute a pattern, the school district must conduct a manifestation determination to decide whether the conduct at issue was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E); 34 CFR § 300.536(a)(1). To make this determination, members of the student's IEP team and others meet to review the student's educational file. 20 U.S.C. § 1415(k)(1)(E)(i); 34 CFR § 300.530(e)(1). If the review team determines that (1) the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (2) the conduct was the direct result of the district's failure to implement the student's IEP, then the student's conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii); see 34 CFR § 300.530(e)(2). If the review team determines that the student's conduct was a manifestation of his disability, then the district is required to conduct a functional behavioral assessment, implement a new – or review an existing behavioral intervention plan – and return the student to the placement from which the student was removed. 20 U.S.C. § 1415(k)(1)(F); 34 CFR § 300.530(f). If the MDR team determines that the student's conduct was not a manifestation of his disability, then the district may apply the same disciplinary procedures that apply to children without disabilities. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R § 300.530(c).

In this case, Mother alleges that Student has been subjected to a series of removals that constitute a “pattern” within the meaning 34 CFR § 300.536(a)(2). At the due process hearing, Mother testified that Student was suspended on four separate occasions in the spring of 2015 for a total of 16 school days. Although Mother did not document Student’s alleged suspensions for more than 10 school days, DCPS did not offer any testimony or documentation that refuted Mother’s claim.⁵ I find, therefore, that Mother has established that Student’s series of removals, beginning March 31, 2015, totaled more than 10 school days. For the non-consecutive removals to constitute a “pattern” under 34 CFR § 300.536(a), the Petitioner must also establish that the student’s behaviors which resulted in the later discipline incidents was substantially similar to his behavior in previous incidents. In her July 7, 2015 written declaration, Mother averred that Student’s behavior which resulted in his suspensions was, on each occasion, being somewhere else in the school when he was supposed to be in class. I conclude that Mother has met her burden of proof to show that Student subjected to a “change of placement” for which an MDR meeting was required, in that he was removed from school for more than 10 school days beginning March 31, 2015, and the behaviors which led to his removals were substantially similar. DCPS’ failure to convene an MDR meeting was therefore a violation of the IDEA, 20 U.S.C. § 1415(k)(1)(E).

Where an LEA has failed to conduct a required MDR meeting, a hearing officer is authorized by the IDEA to return the student to the placement from which he was removed. *See* 34 CFR §300.532(b)(2)(i). In this case, Student’s suspensions ended

⁵ Mother put in evidence Student’s City High School Attendance Summary for the period August 18, 2014 through April 27, 2015. (Exhibit P-14) That document records suspensions of Student from March 31, 2015 through April 10, 2015 (for 8 school days). Counsel for DCPS stated in closing argument, apparently mistakenly, that the Attendance Summary established Student had been suspended for 12 school days.

before the 2014-2015 school year finished and Student was allowed to return to his prior placement at City High School. In addition, DCPS completed an FBA on April 29, 2015 and a BIP was developed for Student. Therefore, there is no further relief authorized by the IDEA which this hearing officer may grant for DCPS' failure to convene an MDR meeting for Student. *See J.F. v. New Haven Unified School District*, 2014 WL 6485643, 5 (N.D.Cal. Nov. 19, 2014) (Any relief available under the IDEA—return to prior placement and implementation of a behavioral plan—is already available to plaintiff.)

B.

– Did DCPS deny Student a FAPE by failing to develop adequate IEPs on December 1, 2014 and April 27, 2015, in that the IEPs as developed, including the transition plans, were not written to provide meaningful educational benefit?

Petitioner contends that after Student's IEP was revised at an IEP meeting on December 1, 2014 to provide for full-time, 26 hours per week of Specialized Instruction services, the December 1, 2014 IEP and the April 27, 2015 IEP were still inadequate to provide meaningful educational benefit to Student. The IDEA's free appropriate public education (FAPE) requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).)

Petitioner's expert, Educational Advocate, opined that the December 1, 2014 and April 27, IEPs were inadequate, and denied Student a FAPE, because the IEP Post-Secondary Transition Plans were not individualized to Student and because the IEP Behavioral Support Services were not sufficient. DCPS did not offer expert evidence on

the substantive content of the IEPs.

The IDEA's transition services provisions require that beginning not later than the first IEP to be in effect when the student turns 16, the IEP must include—

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

34 CFR § 300.320(b). The Act does not require transition planning or transition assessments, however the IEP transition services must always be individualized, based on the student's needs, taking into account his strengths, preferences, and interests. *See* 34 CFR § 300.43; Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46667 (August 14, 2006). The transition plan must be updated annually. 34 CFR § 300.320(b).

The Post-Secondary Transition Plans in both the December 1, 2014 IEP and the April 27, 2015 IEP were copied verbatim from his October 8, 2014 IEP. The plan recommends that the student would benefit from training in customer services and basic computer skills and states that upon graduation, Student will work full time in the retail or hospitality industries. As Educational Advocate pointed out in her testimony, this transition plan is not individualized to Student, but appears to be cut and pasted from another Student's IEP. For example, in one section the plan named a different student as the subject and the plan references an Independent Living Assessment supposedly conducted on September 19, 2014, when was Student was not even attending school due to his medical condition. I find that the transition plans in the December 1, 2014 IEP and the April 27, 2015 IEP were not personalized or reasonably calculated to permit Student

to benefit educationally.

With regard to Behavioral Support Services, although Educational Advocate thought the IEP behavioral services were insufficient, Clinical Psychologist, who qualified as Petitioner's expert in clinical psychology, opined that Student needs one hour per week of counseling. Both the December 1, 2014 IEP and April 27, 2015 IEP provide that Student will receive 60 minutes per week of Behavioral Support Services. (The IEPs state that the setting for these services will be in general education. Presumably that was a scrivener's error because the December 1, 2014 IEP team agreed that Student required a full time out of general education setting.) Inasmuch as the IEPs provide the level of counseling services recommended by Petitioner's psychology expert, I find that Petitioner has not established that the Behavioral Support Services provided in Student's December 1, 2014 and April 27, 2015 IEPs were inadequate.

C.

– Did DCPS fail to provide Student an appropriate educational placement for the 2014-2015 school year and 2015-2016 school years?

i. The 2014-2015 school year

Student's educational placement at the beginning of the 2014-2015 school year, as provided in his October 15, 2013 IEP, was in a mixed general education/outside general education setting at City High School, including 13 hours per week of Specialized Instruction in general education and 6.5 hours per week outside general education. Parent contends that after Student suffered a serious injury from a gunshot wound in July 2014, this placement was no longer appropriate. I agree.

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a

student may be instructed in the regular classroom, a specialized classroom, at home, or in a care facility. 20 U.S.C. § 1412(a)(5); *see also* 34 CFR § 300.115 (continuum of placements). The IDEA further requires that the educational placement be “reasonably calculated to enable the child to receive educational benefits,” that is, “sufficient to confer some educational benefit upon the handicapped child.” *See Dawkins by Dawkins v. District of Columbia*, 1989 WL 40280, 3 (D.C.Cir. Apr. 24, 1989), quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

In *Rodriguez v. Independent School Dist. of Boise City, No. 1*, 2014 WL 1317697, 16 (D.Idaho 2014), the Court considered the parents’ claims that the LEA had denied their child a FAPE by refusing to provide homebound services despite receiving a letter from the child’s pediatrician recommending that the child receive homebound services due to his extreme anxiety over returning to his school. The Court found that the cause of the child’s anxiety or behaviors at school was not pertinent to the Court’s analysis. The critical question was whether the LEA provided the child with a meaningful opportunity to receive educational benefit. Citing the IDEA’s requirement to review and revise a child’s IEP “as appropriate” in light of, among other things, information provided by a child’s parents, the child’s needs, or other matters, 20 U.S.C. § 1414(d) (4), the Court found that the LEA denied the child a FAPE by not providing homebound services and in fact, providing him no services at all for several months.

The Court’s analysis in *Rodriguez* is instructive for the present case. Prior to the beginning of the 2014-2015 school year, Petitioner and Petitioner’s Attorney informed Assistant Principal at City High School that due to Student’s gunshot injury, he required home schooling for an indefinite period of time. Pursuant to DCPS’ instructions, Mother

obtained certification from Student's physician that he was unable to attend school and provided the documentation to City High School. Due to what can only be viewed as bureaucratic nonfeasance, DCPS did not finally approve home instruction for Student until the second week in January 2015. In the meantime, concerned by Student's depression resulting from his isolation at home, Mother disobeyed the physician's orders and allowed Student to return to school for several weeks in November 2014. That did not work out and, pursuant to the physician's order, Student again stopped attending school. Even after DCPS approved home instruction for Student in January 2015, the services were not delivered because Mother could not meet DCPS' requirement for another adult to be present when the DCPS tutor went to Student's home to provide instruction.

Assuming that Student's placement at City High School was appropriate when his IEP was developed on October 15, 2013, DCPS was required to ensure that his placement was revised, pursuant to 34 CFR § 300.324(b), when its personnel were informed in August 2014 that Student would not be able to attend school for an indefinite period due to his gunshot injury. Although HHIP Program Manager 1 apparently initiated processing of Mother's application for home instruction for Student in September 2014, home instruction services were not approved until January 2015. Student's IEP placement was never changed. After home instruction was finally approved, DCPS failed to provide the service to Student because Mother was unable to arrange for another adult to present.

Under the IDEA, the District has an affirmative duty to ensure that a FAPE is made available to disabled children. *See, e.g., Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). Even if Mother had failed to cooperate with DCPS, which did not

happen in this case, a “school district cannot abdicate its affirmative duties under the IDEA.” *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F .3d 1202, 1209 (9th Cir.2008). Nor may DCPS shift its burden to provide FAPE to the parent by requiring that she arrange for another adult to be present in order for Student to be provided home instruction. I conclude that DCPS’ failure to ensure that Student’s IEP placement was timely revised at the beginning of the 2014-2015 school year to provide for home instruction and its failure to ensure that Student received appropriate home instruction until he was able to return to City High School in March 2015 was a denial of FAPE.

The 2015-2016 School Year

Student’s IEP team convened on April 27, 2015 to review updated evaluations and to revise his IEP as necessary. Mother and Educational Advocate attended the meeting. The IEP team decided to continue Student’s full-time, outside of general education, educational placement at City High School. Mother objected to Student’s continued placement at City High School because she believed that City High School had not provided services which Student needed during the period he attended for the 2014-2015 school year. Mother contends that Student’s continued placement at City High School for the 2015-2016 school year is not appropriate.

In her November 16, 2014 IEE psychological evaluation report, Clinical Psychologist recommended that Student required full time special education supports in a full time, stand-alone special education school. She recommended that Student be placed at a school “well-versed” in working with students with medical problems and delivering education around medical appointments and surgeries. I discount Clinical Psychologist’s recommendation because she assessed Student in early November 2014 while he was still recovering from surgeries subsequent to his gunshot wound and before

he had been released by his physician to return to school.

Educational Advocate opined in her testimony that Student requires a lot of “hands-on learning” and that his social-emotional needs must be addressed first. The setting proposed by the IEP team – a classroom with a maximum of 10 students taught by a special education teacher and an assistant – should meet Student’s need for hands-on learning. DCPS must certainly also address Student’s social emotional needs. *See, e.g., Lauren P. ex rel. David P. v. Wissahickon School Dist.*, 2007 WL 1810671, 7 (E.D.Pa.2007), *rev’d in part on other grounds*, 310 Fed.Appx. 552, 2009 WL 382529 (3rd Cir. 2009) (LEA’s inconsistency of approach to Student’s behavioral problems, including lateness, absences, and failure to complete assignments, resulted in denial of FAPE.) Since Student returned to school in March 2015, DCPS has not ignored Student’s attendance and behavior issues. Besides offering an IEP which provides for full-time special education and one hour per week of behavioral support services, DCPS developed a BIP for Student on April 29, 2015 with specific strategies to target Student’s skipping class and hall walking. Student has a chronic history of attendance issues at City High School and whether he will now avail himself of the educational opportunities offered in the April 27, 2015 IEP cannot of course be assured. However, courts have underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. District of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). In the April 27, 2015 IEP, DCPS offered Student a full-time special education placement in a small classroom setting, with a low student to teacher ratio. I find that Petitioner has not met her burden of proof to establish that this placement was not reasonably calculated to

enable Student to receive educational benefits.

Remedies

Compensatory Education

Student was denied a FAPE by DCPS' failure to ensure that his IEP was revised and his placement changed to home instruction after DCPS was informed in August 2014 that Student would be unable to attend City High School. As a result, Student received almost no educational services from DCPS from the beginning of the 2014-2015 school year until March 12, 2015 when he was released by his physician to return to school. Predictably, after that long hiatus, following his return to school in March 2015, Student made no educational progress for the rest of the school year. He must now repeat Grade for a third time.

In her due process complaint, Petitioner requested that Student be awarded compensatory education for DCPS' denials of FAPE. This is certainly a case for which compensatory education is warranted. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)). The proper amount of compensatory education depends upon how much more progress a student might have shown if he had received the required special education services, and upon the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*. This means that the Petitioner has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs

and is supported by the record.” *Phillips ex rel. T.P. v. District of Columbia*, 736 F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.)). *See, also, Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012). (The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate.)

In my June 24, 2015 Prehearing Order I alerted the parties that to establish a basis for a compensatory education award, the Petitioner must be prepared at the due process hearing to document with exhibits and/or testimony “the correct amount or form of compensatory education necessary to create educational benefit” to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. In a written pleading filed on June 29, 2015, Petitioner’s Counsel objected to this requirement as “shifting the burden of crafting a compensatory education award from the Hearing Officer to [Petitioner].” In a decision and order entered July 1, 2015, I overruled the Petitioner’s objection and explained that the Prehearing Order did not require the Petitioner to craft a compensatory education award. “However, the order does provide notice that the burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate. Without such a record, the hearing officer would have no basis upon which to craft a compensatory education award.”

Despite being on notice of the Petitioner’s burden of proof, Petitioner did not offer any evidence at the due process hearing of “the type and quantum of compensatory education” needed to place Student “in the same position he would have occupied but for

the LEA's violations of the IDEA." Unfortunately, this omission leaves the hearing officer without an evidentiary basis upon which to craft an "individualized," "fact-specific," compensatory education award. *See Reid, supra*, 401 F.3d at 242. *See, also, Friendship Edison Public Charter School Collegiate Campus v. Nesbitt* 532 F.Supp.2d 121, 124 (D.D.C.2008) ("In the present case, there is no doubt that the record did not enable the Hearing Officer to craft an award that can pass muster under *Reid*.")

Because Petitioner's complaint included discipline claims, this case was required to be heard and decided on the expedited hearing calendar. It is not possible to reconvene the hearing to receive additional compensatory education evidence. *See* 34 CFR § 300.532(c)(2) (LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.) Therefore, for want of evidence upon which to craft a compensatory education award, I will deny Petitioner's request for compensatory education without prejudice to the parent's right to institute a new proceeding to seek compensatory education for the denials of FAPE found in this decision.

Private Placement

Petitioner also requests that I order DCPS to fund Student's private placement at Nonpublic School. In *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991), the D.C. Circuit Court of Appeals explained that "[i]f no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or

better able to serve the child.” *Id.* at 305 (internal citations and quotations omitted). Here Petitioner has not shown Student’s placement in the April 27, 2015 IEP was inappropriate or that with the proper special education and behavioral services, Student would be unable to receive educational benefits at City High School. Therefore, I find that an award of prospective private school placement is not warranted.⁶

ORDER

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

ORDERED:

- i. Within 20 calendar days of the issuance of this decision, DCPS shall ensure that the transition services section Student’s IEP is reviewed and that the IEP is revised to include an appropriate, individualized Post-Secondary Transition Plan, which is tailored to Student’s needs and otherwise complies with 34 CFR § 300.320(b). Student’s IEP shall also be corrected to provide that his Behavioral Support Services will be provided outside general education.
- ii. Petitioner’s request for a compensatory education award to compensate Student for DCPS’ failure to provide Student a home instruction placement and services from the beginning of the 2014-2015 school year is denied without prejudice; and
- iii. All other relief requested by the Petitioner herein is denied.

Date: July 27, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

⁶ This holding is without prejudice to Petitioner’s right, hereafter, to seek private placement as a compensatory education remedy. *See, e.g., Draper v. Atl. Indep. Sch. Sys.*, 518 F.3d 1275, 1283–90 (11th Cir.2008) (upholding an award of six years of prospective compensatory education at a private placement).

NOTICE OF RIGHT TO APPEAL

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