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

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Peter B. Vaden

Student Hearing Office, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for an expedited hearing 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 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to provide him interim educational services during a 45-day suspension, following a disciplinary incident on October 4, 2013.

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

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on December 5, 2013, named DCPS as respondent. On December 23, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the expedited due process hearing was convened before the undersigned Impartial Hearing Officer on January 17, 2014 at the Student Hearing Office in Washington, D.C. This Hearing Officer Determination must be issued within 10 school days after the hearing. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Mother testified, and called as witness EDUCATIONAL ADVOCATE. DCPS called as witnesses RESOLUTION SPECIALIST and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-12 were admitted into evidence without objection with the exception of P-12 which was admitted over DCPS' objection and P-6, P-8 and P-10 which were not offered. DCPS' Exhibits R-1 through R-24 were admitted without objection, except for Exhibits R-9, R-10, and R-11, which were admitted over Petitioner's objections and R-18 which was not offered. Petitioner's Counsel made an opening statement. Counsel for both parties made closing statements.

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 issue to be determined in this case is:

– Whether DCPS denied Student a FAPE by failing to provide him an appropriate interim educational setting for the period of his 45-day disciplinary suspension from school, beginning October 4, 2013.

For relief, Petitioner seeks an award of compensatory education tutorial services to compensate Student for alleged harm resulting from his missing school during the 45-day suspension.

STIPULATIONS

The parties, by counsel, stipulated:

A. The disciplinary incident which resulted in the out of school suspension in this case occurred on October 4, 2013.

B. Members of a multidisciplinary team (MDT), convened on October 15, 2013, agreed that the October 4, 2013 disciplinary incident was not a manifestation of Student's disability.

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 young man, 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 Emotional Disturbance ("ED"). Exhibit R-5. At the time of the disciplinary incident in this case, Student was in the GRADE at CITY HIGH SCHOOL 1. Student's March 8, 2013 Individualized Education Program (IEP), as amended on August 26, 2013, provided that he would receive 25 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside the general education setting.

Exhibit P-1.

3. On October 4, 2013, Student was suspended from City High School 1 after allegedly attempting to enter the school building with a knife in his pocket. That day, the City High School 1 principal notified Mother in writing that she was proposing an Off-site Long-Term Suspension of 45 days. The notice informed Mother that Student would not be admitted back to school until the DCPS Instructional Superintendent's office had reviewed all information relating to the matter. In the notice, the principal requested Mother to pick up an "Educational Plan" for Student and to ensure that the plan was completed by Student to make up class assignments, homework and exams without penalty. Exhibit R-14.

4. Attached to the principal's October 4, 2013 letter was a statement of Parent/Guardian and Student Rights (Long-Term Suspension & Expulsion/Emergency). The statement notified Mother, *inter alia*, that an appeal of a Long-Term Suspension could be made to the head of the Office of Youth Engagement (OYE). Exhibit P-6. At a conference on October 7, 2013, Assistant Principal informed Mother that if the suspension were upheld on appeal, Student would be sent to ALTERNATIVE ACADEMY as an interim school and that, if Mother waived an appeal, Student would also be sent to Alternative Academy. Testimony of Assistant Principal.

5. On or about October 25, 2013, Mother informed Assistant Principal by telephone that she would waive the Long-Term Suspension appeal hearing in order to get Student into a school. Exhibits R-18, R-20, Testimony of Assistant Principal. Assistant Principal informed the OYE officer that Mother wanted to waive the appeal hearing. Mother was supposed to go to City High School 1 to sign appeal waiver forms but failed to do so. Assistant Principal then made multiple unsuccessful attempts to contact Mother. Testimony of Assistant Principal.

Mother never completed the formalities to waive the appeal hearing. The appeal hearing was never convened. Testimony of Mother.

6. City High School 1 convened an IEP team meeting on October 15, 2013 for a Manifestation Determination Review (MDR) . Mother attended the meeting. Petitioner's Counsel was unable to attend because he was provided late notice. Exhibits R-14, R-11. The MDR team determined that Student's October 4, 2013 code of conduct violation was not caused by and did not have a direct and substantial relationship to his disability and that the conduct was not a direct result of DCPS' failure to implement Student's IEP. Exhibit R-14. Petitioner does not contest the MDR determination. Representation of Petitioner's Counsel.

7. After his October 4, 2013 suspension from City High School 1, Student did not attend any school. On or about November 20, 2013, Mother went to Alternative Academy to inquire about enrolling Student there. Mother testified that at Alternative Academy, she was informed that the school could not provide for Student's needs, which Mother described as one-on-one instruction. Testimony of Mother. I found Mother's testimony to be confused and unreliable. I did not find her to be a credible witness.

8. Student's 45-day suspension was scheduled to end on December 9, 2013. Exhibit R-23. Student did not return to classes at City High School 1 after the end of the suspension period. Testimony of Assistant Principal.

9. On December 16, 2013, Student's IEP team was convened for a Location of Services (LOS) meeting, which Student, Mother and Petitioner's Counsel attended. The IEP team decided to change Student's location of services to City High School 2. Petitioner's Counsel did not understand the reason for the change in school location. Exhibit R-17. A December 16, 2013 letter from the principal of City High School 1 stated that the reason was

that City High School 2 had the programming in place to meet Student's needs. Exhibit R-16. The appropriateness of the change in school location from City High School 1 to City High School 2 is not an issue in this case.

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 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

The only issue asserted by the Petitioner in this case is whether DCPS violated the IDEA by failing to ensure that Student continued to receive appropriate alternative interim educational services after the October 4, 2013 discipline incident.

The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The Act requires that when a child with a disability is removed from his current educational placement for more than 10 consecutive school days for violation of a code of student conduct, the child must continue to receive educational services, although in another setting. *See* 34 CFR § 300.530(d). While the Act does not specify the alternative setting in which educational services must be provided, the Act is clear that the

determination of an appropriate alternative educational setting must be selected "so as to enable the child to continue to participate in the general education curriculum" and "to progress toward meeting the goals set out in the child's IEP." *See* 20 U.S.C. § 1415(k)(1). Further, Section 1415(k)(2) of the IDEA provides that the interim alternative educational setting must be determined by the IEP Team. What constitutes an appropriate interim alternative educational setting will depend on the circumstances of each individual case. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46722 (August 14, 2006).

In this case, Student was suspended for more than 10 consecutive school days after the October 4, 2013 incident and he did not continue to receive educational services during the suspension. Neither did DCPS convene Student's IEP team to determine his interim alternative educational setting. Instead, Assistant Principal repeatedly informed Mother that Student would be assigned to Alternative Academy for the period of his suspension, if the discipline were upheld on appeal to OYE, but that, if Mother waived appeal of the disciplinary suspension, Student could begin attending Alternative Academy right away. Although Mother stated to Assistant Principal on October 24, 2013 that she would waive appeal of Student's suspension, Mother never completed the waiver paperwork. Apparently, the OYE appeal hearing was never scheduled. Student did not attend any school for the duration of the 45-day suspension.

DCPS' failure to convene Student's IEP team to determine his interim alternative educational setting was a procedural violation of the IDEA. *See, e.g., Metropolitan Bd. of Public Educ. of the Metropolitan Government of Nashville and Davidson County v. Bellamy* 116 Fed.Appx. 570, 578, 2004 WL 2452567, 7 (6th Cir. 2004) (Affirming failure to timely convene IEP meeting constituted a procedural violation.) Procedural violations of the IDEA do not, in

themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). A parent is required to demonstrate that the child suffered an "educational harm" in order to establish that he was denied a FAPE by a procedural violation of the IDEA. *See, e.g., Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011). I find that Student certainly suffered an educational harm from not receiving educational services for the 45 school days of his suspension. Petitioner has, therefore, established that Student was denied a FAPE.

Compensatory Education

The only remedy Petitioner seeks in this case is a compensatory education award. The IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005). A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* at 524. "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) *(*quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 2013). 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. *Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff'd., Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011).

In my December 23, 2013 Prehearing Order in this case, I alerted the parties that to establish a basis for a compensatory education award, the Petitioner must be prepared at the 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. I informed the parties that if an adequate record were not established, the Hearing Officer may be obliged to deny a compensatory education award or to continue the hearing for the Petitioner to offer additional evidence sufficient to support the claim for compensatory education.

At the due process hearing in this case, it was Petitioner's burden to present evidence regarding Student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *See Reid, supra*, 401 F.3d at 526. However, Petitioner did not offer competent evidence either as to Student's educational deficits or as to appropriate compensatory measures. Educational Advocate, who testified as Petitioner's educational specialist, recommended a compensatory education award of 1,125 hours of one-on-one academic tutoring and six hours of behavioral support. Despite her many years' experience as a special educator and school administrator, Educational Advocate was not a credible witness on this issue. She had never met Student or conducted any type of assessment to determine the specific educational deficits caused by DCPS' denial of FAPE. Moreover, Educational Advocate's recommended award was one hour of compensatory education for each hour of special education services not provided. The D.C. Circuit in *Reid*, explicitly rejected this "one-for-one formula." *See id.*, 401 F.3d at 524. As in *Gill, supra*, the witness indicated that her estimate of 1,131 total hours for compensatory education was based on

her professional experience, but she provided no support for the claim that 1,131 hours was reasonable instead of, for example, 1,500 hours or 100 hours. *See Gill, supra*, 770 F.Supp.2d at 118. Due to this lack of evidentiary support, I am compelled to find that Petitioner has failed to support her claim for compensatory education.

While a Court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C.2010), aff'd., *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011), under the IDEA, I am constrained to issue my final Hearing Officer Determination within ten school days after the hearing. *See* 34 CFR § 300.532(c)(2). Therefore, I will deny, without prejudice, Petitioner's request for a compensatory education award.

Although under the D.C. Circuit's decision in *Reid*, a hearing officer may not delegate his authority to an IEP team to formulate a compensatory education award, I find in this case that an appropriate equitable remedy would be to order DCPS to convene Student's IEP team to consider what educational deficits resulted from Student's missing school during the 45-day suspension and to determine what supplemental programming and services Student now needs to resume his progress toward meeting the goals set out in his IEP. *But see Friendship Edison Public Charter School Chamberlain Campus v. Suggs*, 562 F.Supp.2d 141, 151-152 (D.D.C.2008) (Nothing in *Reid* prohibits a hearing officer from ordering a meeting to determine compensatory education.)

ORDER

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

1. Petitioner's request for a compensatory education award is denied without prejudice;

2. DCPS shall convene Student's IEP team, within 15 school days of the issuance of this Order, to consider what educational deficits resulted from Student's missing school during the 45-day suspension after the October 4, 2013 code of conduct violation and to revise, as appropriate, Student's program to supplement his Specialized Instruction and Related Services to enable Student to resume his progress toward meeting the goals set out in his IEP; and

3. All other relief requested by Petitioner herein is denied.

Date: January 22, 2014

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

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).