

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: June 4, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2015-0070

v.

Hearing Date: May 20, 2015

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 GUARDIAN), 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 (D.C. Regs.). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by failing to offer appropriate special education and related services in light of his behavior difficulties in school.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 2, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 3, 2015. The parties met for a resolution session on March 18, 2015 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 2, 2015. On March 27, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was originally scheduled for May 6, 2015, but was continued to May 20, 2015 due to the illness of counsel. Consequently, by order of May 12, 2015, the Chief Hearing Officer granted DCPS' unopposed motion to extend the due date for this final decision from May 16, 2015 to June 5, 2015. The hearing was held before the undersigned Impartial Hearing Officer on May 20, 2015 at the Office of Dispute Resolution in Washington, D.C. 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. Respondent DCPS was represented by LEA REP and by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. The Petitioner testified and called as witnesses CHILD PSYCHIATRIST, EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2, and NONPUBLIC SCHOOL DIRECTOR. Petitioner also called MARYLAND SCHOOL PSYCHOLOGIST as an expert witness. Upon request of Petitioner's Counsel, which was not opposed by DCPS, I granted Petitioner leave to withdraw this witness' testimony in its entirety. At the conclusion of Petitioner's case-in-chief, DCPS made an oral motion for a directed finding in its favor, which I denied. DCPS called as witnesses SCHOOL PSYCHOLOGIST, SPECIAL EDUCATION

TEACHER, and LEA Rep. Petitioner's Exhibits P-1 through P-41 were admitted into evidence, with the exceptions of Exhibits P-28, P-31, P-38 and P-40, which were withdrawn and P-35 to which DCPS' objection was sustained. DCPS' objections to Exhibits P-16, P-30, P-33, P-34, and P-41 were overruled. DCPS' Exhibits R-1 through R-10 were admitted into evidence without objection. At the request of both attorneys, the parties were granted leave until May 28, 2015 to file post-hearing written argument. Counsel for both parties filed post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the March 27, 2015 Prehearing Order:

- Whether DCPS denied Student a FAPE by not conducting a Functional Behavioral Assessment or ensuring that a Behavior Intervention Plan was developed for Student during the 2013-2014 school year or at the beginning of the 2014-2015 school year;
- Whether at a December 17, 2014 Individualized Education Program (IEP) meeting, DCPS failed to ensure that Student's IEP was appropriately revised to address Student's lack of expected progress toward annual goals or his ongoing and escalating behavioral issues;
- Whether Student's February 24, 2015 IEP was inappropriate, and denied Student a FAPE, due to the failure of the IEP to provide sufficient specialized instruction in an outside of general education, therapeutic, setting to address Student's lack of expected educational progress or his ongoing behavioral issues.

For relief, Petitioner requests that the Hearing Officer order DCPS to fund Student's prospective placement at Nonpublic School. In addition, Petitioner 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 arguments and legal memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Guardian. Testimony of Guardian.
2. Student is eligible for special education and related services under the primary disability classification Other Health Impairment due to Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit P-14.
3. In a note dated February 27, 2014, Student's prior psychiatrist reported that Student had been diagnosed with, *inter alia*, Depression-Oppositional Defiant Disorder, Post Traumatic Stress Disorder (PTSD), and Attention Deficit-Hyperactivity Disorder. He stated that Student required special education full-time. Exhibit P-34. (This psychiatrist did not testify at the due process hearing and his written opinion on Student's special education needs, was not admitted for the truth of the matter asserted.)
4. Student has been subjected to a traumatic and tragic early life, including the killings of his grandfather and father in early 2006. Exhibit P-33. His birth mother is incarcerated. Exhibit P-19.
5. Child Psychiatrist has been Student's treating psychiatrist since May 2014. She meets with Student and Guardian monthly. Student's current diagnoses are ADHD and PTSD. Child Psychiatrist reports that Student has poor attention, poor impulse control, and does not complete his work. Due to his PTSD, he perceives conflict and threats out of proportion to what is really going on. These conditions make it very difficult for Student to access learning. Testimony of Child Psychiatrist.

6. Student is currently enrolled in GRADE at City Elementary School. He was initially determined eligible for special education at the end of the 2012-2013 school year. Student's initial IEP, dated June 3, 2013, provided annual goals for Mathematics, Reading and Emotional, Social and Behavioral Development. The June 3, 2013 IEP provided Student 10 hours per week of Specialized Instruction and 120 minutes per month of Behavioral Support Services, all in the general education setting. Exhibit P-1.

7. Student's IEP was revised at an IEP annual review meeting on March 5, 2014. At that time, his Specialized Instruction Services were continued at 10 hours per week, half of which would be provided outside general education. His Behavioral Support Services were increased to 240 minutes per month and the setting was changed to all outside general education. Exhibit P-2.

8. SCHOOL SOCIAL WORKER completed the NICHQ Vanderbilt Assessment Scale for Student on May 15, 2014. She reported that Student's Academic and Classroom Behavioral Performance were "Problematic" in all areas, including Reading, Mathematics, Written Expression, Relationship with peers, Following directions, Disrupting class, Assignment completion and Organizational skills. Exhibit P-23.

9. At a June 9, 2014 MDT meeting, the City Elementary School MDT team, including the Guardian, agreed that Student would benefit from an FBA, and a BIP should be considered at the beginning of the 2014-2015 school year. Exhibit R-1.

10. At the end of the 2013-2014 school year, Student was reported to be "Progressing" on all of his IEP goals. In her comments on the Emotional, Social and Behavioral Development part of the June 22, 2014 IEP Progress Report, School Social Worker reported that, Student "needs ongoing incentives, reminders, and consequences

to help him manage his academic frustrations and classroom behaviors. According to a Strengths and Difficulties Questionnaire completed by his teacher in February, [Student] scores 'very high' in the areas of overall stress, behavioral difficulties, hyperactivity and attention difficulties, and difficulties getting along with other children. He scored 'slightly raised' for emotional distress. These responses, in combination with this social worker's observations and therapy session notes, indicate that [Student's] social-emotional and behavioral problems significantly impact him throughout his school day and require ongoing therapeutic and behavioral supports. Next year, a functional behavioral assessment and behavior intervention plan should be done in September and revised as-needed throughout the year." Exhibit P-5.

11. A functional behavioral assessment (FBA) of Student was not conducted until February 2015. Stipulation of the Parties. Student's initial behavior intervention plan (BIP) was developed on March 13, 2015. Exhibit P-13.

12. School started "all right" for Student in the 2014-2015 school year. Guardian noticed a change around December 2014. She started receiving more telephone calls from the school about Student. She was told Student was running out of the classroom, not participating in work and throwing paper at other children. Testimony of Guardian.

13. School Social Worker reported on the February 20, 2015 FBA that there was a period from the start of school to the end of October 2014 when Student was experiencing fewer behavior problems. This began to decline in November but it was difficult to assess him due to the frequent breaks and changes in school routine that occurred in November and December. Exhibit R-2.

14. Student's grades for the first quarter reporting period of the 2014-2015

school year were all 1's (Below Basic) in Reading, Writing & Language, Math and Social Studies. Exhibit P-10. It appeared to Guardian that Student was “falling apart.” She requested a meeting at the school to “help my child.” A multidisciplinary team (MDT) meeting was convened on December 17, 2014. Guardian and Educational Advocate 2 attended the meeting. At the meeting, Student’s teacher stated that she had seen a recent change for the worse in Student’s behavior and it was impeding him. Educational Advocate 2 requested a full time special education program for Student. The school representatives responded that the meeting was not an IEP team meeting and that Student’s IEP annual review meeting was set for February 25th 2015. Student’s IEP was not revised at the December meeting. Exhibit P-16, Testimony of Educational Advocate 2.

15. As of February 2015, Student exhibited chronic behavioral challenges, including walking out of the classroom, refusing to attempt work, restless, continuous movement, calling out, and talking to his neighbors. He was reported to, on some days, have very little impulse control and on some days, very little control over his feelings, becoming easily irritated and frustrated. His problem behaviors occurred primarily in his general education classroom. School Social Worker summarized in the February 20, 2015 FBA that Student has extreme difficulty regulating his emotions and behaviors while at school. Exhibit R-2.

16. Student’s annual IEP review meeting was convened at City Elementary School on February 25, 2015. Guardian and Educational Advocate 1 attended the meeting. The school representatives proposed to increase Student’s Specialized Instruction Services to 15 hours per week, including 10 hours outside of general education and to provide 240 minutes per month of Behavioral Support Services. The

Parent and Educational Advocate 2 did not agree and requested that Student be placed in a standalone classroom for full-time special education students. Exhibit P-15. Over the Parent's disagreement, the IEP team adopted an IEP which provided 15 hours per week of Specialized Instruction Services, including 10 hours outside of general education and 240 minutes per month of Behavioral Support Services. Exhibit P-14.

17. At the February 25, 2015 IEP meeting, the IEP team also agreed to have Student assessed for an Emotional Disturbance (ED) primary disability. School Psychologist conducted a targeted reevaluation of Student on March 10, 2015 to focus on whether Student qualified for an ED disability. The results of her assessment indicated that while Student displayed some of the characteristics of an ED disability at school, the data did not indicate that Student had a general pervasive mood of unhappiness or depression. Also, the assessment results indicated that Student's behaviors were not exhibited in the home setting. School Psychologist recommended, therefore, that Student's disability remain OHI-ADHD. Exhibit P-19, Testimony of School Psychologist.

18. Student's English-Language Arts teacher informed School Psychologist that most of the time, Student did not produce work. If he did something in class, it was usually not what was assigned to him. If Student attempted to complete an assignment, he usually gave up easily. Exhibit P-19.

19. In May 2015, School Social Worker told Child Psychiatrist that Student's behavior in general education had actually gotten worse and that his teachers spent most of the time trying to keep him quiet in the classroom. Testimony of Child Psychiatrist.

20. Nonpublic School is a full time special education day school in the District of Columbia serving children in primary and middle school with OHI-ADHD and other disabilities. There are 36 children enrolled, about one-half of whom have behavior issues. Student has been accepted in the program. If he enrolls there, he would be placed in a classroom of about 8 students taught by a special education teacher and a teaching assistant. The school has a clinical social worker on staff to work with the students. Students receive at least 1.5 hours per week of therapy, including 30 minutes per week of 1:1 therapy. Testimony of Director, Exhibit P-29. Nonpublic School holds a current full Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). Hearing Officer Notice.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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* D.C. Regs. tit. 5-E, § 3030.14. *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 deny Student a FAPE by not conducting a Functional Behavioral Assessment or ensuring that a Behavioral Intervention Plan was developed for Student during the 2013-2014 school year or at the beginning of the 2014-2015 school year?

At a June 9, 2014 MDT meeting, the City Elementary School MDT team, including Guardian, agreed that Student would benefit from an FBA, and a BIP should be considered at the beginning of the 2014-2015 school year. In Student's June 22, 2014 IEP Progress Report, School Social Worker described concerns about Student's stress, behavioral difficulties, hyperactivity, attention difficulties and difficulties getting along with other children. School Social Worker also wrote that an FBA and a BIP should be done in September at the beginning of the 2014-2015 school year. However, Student's FBA was not conducted until February 2015 and the resulting BIP was not developed until March 13, 2015. Petitioner claims that DCPS' delay in completing the FBA/BIP resulted in denial of FAPE to Student. DCPS responds that a behavioral assessment was not needed earlier in the current school year.

For a student who has already been determined eligible for special education, a subsequent assessment, including an FBA, is considered an IDEA reevaluation. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes*, 71 Fed. Reg. 46640 (August 14, 2006) (Once a child has been fully evaluated, the "initial evaluation," a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a "reevaluation.") Subject to limitations on frequency, a local education agency (LEA) must ensure that a reevaluation of child with a disability is conducted if requested by the child's parent or teacher. *See* 34 CFR § 300.303. I find the June 9, 2014 MDT team's decision that Student would benefit from an FBA to be equivalent to a request by the parent and a teacher for such an evaluation under 34 CFR § 300.303(a)(2), and that DCPS was required to ensure that the FBA of Student was

timely conducted.

The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent or teacher. *Cf. 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]evaluations 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 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). Student's FBA should have been conducted in September 2014, pursuant to the June 9, 2014 decision of his MDT team. When School Social Worker prepared Student's FBA in January 2015, she was able to complete the assessment and her written report within one month. I find that the five month delay, from September 2014 to February 2015, to complete Student's FBA was not a reasonable period of time under *Herbin*.

DCPS' failure to conduct Student's FBA more quickly does not necessarily entitle Petitioner to relief. A failure to timely reevaluate is at base a procedural violation of IDEA. *See Smith, supra*. "[A]n IDEA claim is viable only if those [violations of] procedural [deadlines] affected the student's substantive rights ." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). "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). In the present case, Student's grades for the first two quarters of the 2014-2015 school year were Below Basic in his core courses. From the start of the school year, until the end of October, Student experienced fewer behavior problems.

However, his behavior declined in November 2014. Following completion of the FBA in February 2015, Student's BIP was finally developed on March 13, 2015. Special Education Teacher testified that the March 13, 2015 BIP has been working well for Student. It follows that Student would have been better able to access the general education curriculum if a BIP had been developed for him at the beginning of the 2014-2015 school year as foreseen by his MDT team. Therefore, I find that Petitioner has established that DCPS' delay in conducting Student's FBA and developing his IEP did affect his substantive rights and Student was denied a FAPE as a result. *See Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (DCPS' failure to complete a BIP/FBA constitutes denial of a FAPE.)

B.

Did DCPS fail, at a December 17, 2014 Individualized Education Program (IEP) meeting, to ensure that Student's IEP was appropriately revised to address Student's lack of expected progress toward annual goals or his ongoing and escalating behavioral issues?

Following receipt of Student's report card for the 1st quarter of the 2014-2015 school year, Guardian was concerned over Student's poor grades. She requested a meeting at the school to "help my child." A multidisciplinary team (MDT) meeting was convened on December 17, 2014. At that meeting, Educational Advocate 2 requested a full time special education program for Student. The school representatives responded that the meeting was not an IEP team meeting and that Student's IEP would be reviewed at a meeting scheduled for February 25th 2015. Petitioner contends that the failure of DCPS to revise Student's IEP at the December 17, 2014 meeting was a denial of FAPE. DCPS responds that the December meeting was not an IEP team meeting and it would not have been appropriate to revise Student's IEP at that time.

The IDEA requires that a Student's IEP team review his IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved. *See* 34 CFR § 300.324(b); *Dixon v. District of Columbia*, 2015 WL 1244452, 7 (D.D.C. Mar. 18, 2015) (Child's IEP Team must review his IEP periodically to determine progress against his annual goals, but it is not obligated to conduct this review more than once a year.) In addition, although the LEA is responsible for determining when it is necessary to convene an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time. *See* 34 CFR Part 300, Appendix A, Q&A No. 20 (July 1, 2005).² The IDEA requires prior notice to the parent of a scheduled IEP team meeting. *See* 34 CFR § 300.322. The notice must inform the parent, *inter alia*, of the purpose, time, and location of the meeting, who will be in attendance and the right to have other individuals participate who have knowledge or special expertise about the child. *See* 34 CFR § 300.322(b).

In this case, Petitioner has not established either that she requested that the December 2014 meeting be an IEP meeting or that notice was given that Student's March 5, 2014 IEP would be reviewed at the meeting. Guardian testified that she requested the meeting to get help for Student. Educational Advocate 2 testified that she was told at the meeting that it was not an IEP meeting and that LEA Rep would get back to the parent in January 2015 with an IEP team meeting date. Although changes to an IEP are permitted outside of an IEP team meeting, so long as the parent and the public

² Appendix A, was appended to the 1999 U.S. Department of Education Regulations issued pursuant to the Individuals with Disabilities Education Act of 1997 (IDEA 97). Appendix A was not reissued with the 2006 IDEA regulations, issued pursuant to the Individuals with Disabilities Education Improvement Act of 2004. However the appendix does provide guidance and many of the questions and answers posed remain valid under the current IDEA regulations.

agency agree, the LEA is not required to do so. *See* 34 CFR § 300.324(a)(4). In this case, I find that Petitioner has not established that the December 17, 2014 meeting for Student was an IEP team meeting or that DCPS denied Student a FAPE by not revising his IEP at the meeting.

C.

Was DCPS' February 24, 2015 IEP inappropriate, and Student denied a FAPE, due to the failure of the IEP to provide sufficient specialized instruction in an outside of general education, therapeutic, setting, to address Student's lack of expected educational progress or his ongoing behavioral issues?

At the annual IEP review meeting on February 25, 2015, Student's IEP Specialized Instruction Services were increased to 15 hours per week, including an increase of services outside general education from five hours to 10 hours per week. His Behavioral Support Services were continued at 240 minutes per month. Petitioner contends that these services were inadequate and Student required a full-time special education placement. DCPS responds that the February 25, 2015 IEP was appropriate for Student.

To determine whether a FAPE has been provided, a hearing officer must determine “[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Petitioner has not raised an IDEA procedural issue with respect to

the development of the February 25, 2015 IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the February 25, 2015 IEP reasonably calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; see also *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S., 962 F.Supp.2d at 200-221.

At the end of the 2nd quarter of the 2014-2015 school year, Student’s grades were Below Basic in all four core subjects – Reading, Writing & Language, Math and Science. He exhibited chronic behavioral challenges, including walking out of the classroom, refusing to attempt work, restless, continuous movement, calling out, and talking to his neighbors. He was reported to, on some days, have very little impulse control and on

some days, very little control over his feelings, becoming easily irritated and frustrated. His problem behaviors occurred primarily in his general education classroom. School Social Worker summarized in the February 20, 2015 FBA that Student has extreme difficulty regulating his emotions and behaviors while at school. School Social Worker reported at the February 25, 2015 IEP meeting that Student was “on task” only 10 percent of the time in the general education setting compared to 60 percent of the time in the special education classroom. In May 2015, School Social Worker told Child Psychiatrist that Student’s behavior in general education had actually gotten worse and that his teachers spent most of the time trying to keep him quiet in the classroom.

Although DCPS’ witnesses School Psychologist and Special Education Teacher, opined that increasing Student’s outside of general education instruction on the February 25, 2015 IEP from 5 to 10 hours per week was sufficient, I did not find their opinions persuasive. School Psychologist testified, mistakenly that Student’s behavioral support services had been doubled, when there was no increase at all. Special Education teacher testified that she agreed with the level of services in the February 25, 2015 IEP because she was hoping Student would benefit from the increase in pull-out hours. However, she acknowledged it was very difficult to get Student to produce work in the general education setting and she did not differ with the English-Language Arts teacher’s assertion to School Psychologist that most of the time Student does not produce work in her general education class.

Although Petitioner did not have an education expert testify, I conclude nonetheless that the evidence establishes that on February 25, 2015, given the magnitude of Student’s behavior issues in the regular education setting and his Below Basic grades in all core subjects, the IEP team’s decision to continue Student’s

placement in the regular classroom setting for most of the school day, and to only increase his outside of general education Specialized Instruction by five hours per week, did not provide Student the “basic floor of opportunity” required by *Rowley, supra*. The IEP team’s failure to provide substantial interventions and placement adjustments to address Student’s well documented behavior issues in the regular education setting meant that the IEP was not likely to produce progress, as required by the IDEA. *See K.S., 962 F.Supp.2d at 221*. It is not surprising that, as School Social Worker reported in May 2015, Student’s behavior has only gotten worse after the IEP was developed. I conclude that the February 25, 2015 IEP was not reasonably calculated to confer meaningful educational benefit and Student has been denied a FAPE as a result.

Remedy

For relief in this case, Petitioner seeks an order for DCPS to fund Student’s prospective placement at Nonpublic School. In addition, Petitioner seeks an award of compensatory education for the denials of FAPE in this case. Nonpublic School is a full-time special education day school serving only children with disabilities. Although Student has exhibited chronic behavior problems in the general education setting at City Elementary School, the evidence does not support placing Student in a special school where he would be segregated from his nondisabled peers. *See Branham v. Gov’t of D.C., 427 F.3d 7, 12 (D.C.Cir. 2005)*. (In deciding whether a private school placement is appropriate, hearing officer must consider, *inter alia*, the extent to which the placement represents the least restrictive environment.) It is undisputed that Student benefits from and enjoys interacting with his nondisabled peers at City Elementary School. Moreover, School Psychologist testified that DCPS could amend Student’s IEP to increase his Specialized Instruction hours outside general education if needed. *See,*

e.g., Kerkam v. Superintendent, D.C. Public Schools, 931 F.2d 84, 86 (D.C.Cir.1991) (If there is an “appropriate” public school program available, District need not consider private placement.) Based upon the evidence at the due process hearing, I conclude that the appropriate remedy here is to order that Student’s IEP be revised to significantly increase his outside of general education instruction.

Petitioner also seeks an award of compensatory education for the denials of FAPE in this case, including the delay in developing Student’s BIP and the inappropriate February 25, 2015 IEP. In the March 27, 2015 Prehearing Order, I alerted counsel that under the case law in this jurisdiction, when a Petitioner seeks compensatory education, 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. A compensatory education award must be based upon a fact-specific, individualized assessment of the student’s needs. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005). At the May 20, 2015 due process hearing, Petitioner’s Counsel called a compensatory education witness to testify, but subsequently withdrew her testimony. DCPS’ objection to the admission of that witness’ written compensatory education proposal, Exhibit P-35, was sustained. Hence, the extent of harm and what would be appropriate compensatory education for DCPS’ not offering an appropriate IEP and not providing a timely BIP, cannot be determined from the testimony and exhibits admitted at the due process hearing. I must conclude, therefore, that Petitioner has failed to support her claim for compensatory education for the denials of FAPE in this case. *See Gill v. District of*

Columbia, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) Accordingly, I will deny, without prejudice, Petitioner's request for a compensatory education award.

ORDER

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

1. Within 20 business days of entry of this order, DCPS shall convene Student's IEP team to review and revise his IEP based upon current data including, *inter alia*, the March 27, 2015 psychological evaluation, Student's grades and assessment scores, recommendations from Child Psychiatrist, experiences with the March 13, 2015 BIP, and input from Guardian, Student's teachers and School Social Worker. Although, in the absence of competent expert evidence, I decline to order a specific level of special education services or to determine the appropriate placement for Student, DCPS shall ensure that Student's IEP is revised to substantially increase his outside of general education Specialized Instruction Services to a level – taking account of Student's documented behavior concerns – calculated to enable him to engage in and to make meaningful progress in the general education curriculum;

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

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

Date: June 4, 2015

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team