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] Petitioner, v. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Respondent.	Date Issued: September 23, 2014 Hearing Officer: Peter B. Vaden Hearing Date: September 11, 2014 Office of Dispute Resolution, Washington, D.C.

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 Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools' (DCPS) not complying with the IDEA's discipline procedures following a March 2014 incident at

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

PUBLIC CHARTER SCHOOL (PCS) and by PCS' failing to implement Student's Individualized Education Program (IEP).

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 20, 2014 and corrected on August 22, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 22, 2014. The parties met for a resolution session on September 3, 2014 and did not resolve the due process complaint. On September 2, 2014, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on September 11, 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 and Student appeared in person and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called Student as her only witness. DCPS called PCS DEAN OF STUDENTS as its only witness. Petitioner's Exhibits P-1 through P-19 were admitted into evidence without objection, with the exception of Exhibits P-4, P-6, P-7 and P-11, which were admitted over DCPS' objections; Exhibit P-10 to which DCPS' objection was sustained; and Exhibit P-5, which was not offered. DCPS' Exhibits R-1 through R-17 were admitted into evidence without objection. Counsel for the respective parties made opening and closing statements. Neither party requested leave to file post-hearing written argument.

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.

ISSUE AND RELIEF SOUGHT

The issue(s) to be resolved in this case, and relief requested, are:

- Whether DCPS, as the LEA for PCS, denied Student a FAPE by failing to conduct a Functional Behavioral Assessment (FBA) in order to create a Behavior Intervention Plan ("BIP") after Student's November 2013 IEP called for a BIP to be implemented;

- Whether DCPS denied Student a FAPE by failing to implement the November 2013 IEP's requirement to implement a BIP;

- Whether PCS school administration denied Student a FAPE by failing to involve the parent when it unilaterally decided to implement a "student profile" instead of a BIP as required by the IEP;

- Whether DCPS, as the LEA for PCS, denied the student a FAPE when it changed his placement to outside of his regular classroom, following a March 2014 disciplinary incident, in violation of the least restrictive environment ("LRE") provisions of the IDEA;

- Whether DCPS denied Student a FAPE by failing to involve the parent when, following the March 2014 incident, PCS unilaterally changed Student's placement by substituting instruction outside the general education environment for 5.5 hours per week of; and

- Whether DCPS denied Student a FAPE by failing to convene a Manifestation Determination Review (MDR) meeting after removing Student from his then-current placement following the March 2014 behavior incident and placing him in an interim setting for more than ten days.

For relief, Petitioner seeks an order for DCPS to conduct an FBA of Student and to convene Student's IEP team to revise and update Student's IEP to incorporate the findings in the FBA and develop a BIP; an order for DCPS to fund Student's nonpublic placement at a school to be selected by the parent, where Student will be free from assault and other discriminatory harassment for the 2014-2015 school year; an order for

DCPS to correct allegedly unfounded grades – F's given to Student in HOMEROOM TEACHER's classes; a determination that DCPS denied Student a FAPE by not ensuring that Student was not bullied or discriminated against at PCS, specifically by being allegedly assaulted by a teacher. Petitioner also seeks an award of compensatory education in the form of DCPS funding for a summer camp to be chosen by the parent and funding for 100 hours of counseling.

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 is an AGE resident of the District of Columbia, where he resides with Mother. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). His last special education eligibility meeting date was December 8, 2011. Exhibit P-2.

3. Since the beginning of the 2013-2014 school year, Student has attended PCS. He is currently in the GRADE. Testimony of Mother.

4. PCS has elected to be treated as a District of Columbia public school for purposes of the IDEA. *See* 5E DCMR § 923.3. Therefore, DCPS is the Local Education Agency (LEA) for PCS. Hearing Officer Notice.

5. At an IEP annual review meeting at PCS on October 16, 2013, Student's IEP team identified annual goals for Student in Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. At the IEP meeting, SCHOOL PSYCHOLOGIST reported "Will develop a [Behavior Intervention Plan] with positive reinforcement/classroom behavior." In the Emotional, Social and Behavioral

Development section of the IEP, the IEP team reported that a Behavior Intervention Plan (BIP) should be implemented to provide positive reinforcement to promote more acceptable social behaviors, classroom deportment and academic and organization skills. The October 16, 2013 IEP provided that Student would receive 8 hours per week of Specialized Instruction in the general education setting and 60 minutes per week of Behavioral Support Services (individual and group counseling). The IEP stated that Student's only need for removal from general education was for Behavioral Support Services. Exhibits P-1, P-2.

6. After the October 16, 2013 IEP was developed, School Psychologist determined from collected data, including Student's academic and disciplinary records, behavioral observations, an interview with Student, data from teachers and checklists and behavior rating scales that Student did not warrant a BIP, because he had not exhibited any behavior problems during the period concerned. Exhibit R-17.

7. A follow-up IEP meeting was convened at PCS on November 6, 2013 to finalize the draft IEP from the October 16, 2013 meeting. Mother attended and participated in the meeting. The Special Education Coordinator related that a profile would be developed and shared with teachers to detail the best methods/strategies/ techniques for working with Student. Exhibit P-3. The profile was developed and proved useful in addressing Student's behaviors that were initially going to be addressed through an FBA/BIP. Exhibit P-9.

8. On March 26, 2014, an incident occurred in Homeroom Teacher's classroom initially involving Student and another student. Homeroom Teacher intervened. Student alleges that Homeroom Teacher punched him causing a nosebleed. Student was conducted to the Dean of Student's office. Testimony of Student. Student

telephoned Mother. Mother went to the school and found Student in a conference room with his nose bleeding. She took him to MEDICAL CENTER, where a physician treated the nosebleed and accompanying pain. Student was discharged after the medical examination and treatment. Testimony of Mother, Exhibit P-7. The D.C. Metropolitan Police investigated the incident and completed a written report. Exhibit R-9.

9. The PCS principal first told Mother that Homeroom Teacher said that he had hit Student's nose by accident. The following day, the principal denied to Mother that he had told her that Homeroom Teacher had hit Student, by accident or otherwise. Testimony of Mother.

10. Student returned to PCS on March 27, 2014, which was a Wednesday. For two days, Student was not allowed to go to his classes and had to stay in a room with the Dean. Testimony of Student.

11. After the March 26, 2014 incident, Mother told Dean of Students that she did not want Student returned to Homeroom Teacher's class. Testimony of Mother. Student had been in Homeroom Teacher's class Monday through Wednesday for computer technology and twice daily for 15 minute Quiet Time/Meditation periods in the morning and in the afternoon. Testimony of Student. PCS modified Student's schedule. For the remainder of the school year, Student stayed in the Dean of Student's office or in the language arts teacher's classroom during the period he would have been in Homeroom Teacher's class – approximately 5½ hours per week. During those periods, no other students were with Student. Testimony of Dean of Students.

12. On August 7, 2014, DCPS issued a funding authorization to Mother to obtain an Independent Educational Evaluation FBA of Student. Exhibit R-13, Testimony of Mother.

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, as the LEA for PCS, deny Student a FAPE by failing to conduct a functional behavioral assessment in order to create a behavior intervention plan ("BIP") after Student's November 2013 IEP called for a BIP to be implemented?

- Did DCPS deny Student a FAPE by failing to implement the November 2013 IEP's requirement to implement a BIP?

- Did PCS deny Student a FAPE by failing to involve the parent when it unilaterally decided to implement a "student profile" instead of a BIP as required by the IEP?

The first three issues raised by the parent all concern the alleged failure of the PCS IEP team to develop a Behavior Intervention Plan (BIP) for Student in the fall of 2013. Petitioner alleges that Student's IEP team decided at a November 2013 IEP meeting that Student required a BIP, but that the school unilaterally implemented a "student profile" instead of a BIP. DCPS counters that although at the October 16, 2013 IEP team meeting, School Psychologist recommended a BIP, he later changed his recommendation and told the IEP team that Student only needed a student profile. DCPS contends that at

the November 6, 2013 meeting to finalize Student's IEP, which Mother attended, the IEP team adopted the recommendation for a student profile.

The IDEA requires the IEP team, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. *See* 34 CFR § 300.321(a)(2)(i). This provision focuses on interventions and strategies, not assessments, to address the needs of a student whose behavior impedes the child's learning or that of others. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46683 (August 14, 2006). Under the IDEA, Functional Behavioral Assessments (FBAs) and BIPs are only specifically required when a Manifestation Determination Review (MDR) team determines, under 34 CFR §300.530(e), that a student's code of conduct violation was a manifestation of his disability. *See* 34 CFR §300.530(f).

In this case, the evidence establishes that in November 2013, Student's IEP team agreed that Student would have a student profile – not a BIP. At the November meeting, the special education coordinator related that a profile would be developed and shared with teachers, "to detail best methods/strategies/ techniques for working with [Student]." Mother does not dispute that the student profile was developed and implemented. I find that Mother has not shown that the development of a formal BIP was required by the November 6, 2013 IEP or that PCS failed to implement the IEP. *See Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013) (Parent must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP in order to prevail on a failure-to-implement claim.) Neither has the parent shown that PCS decided to implement a student profile, instead of

an IEP, unilaterally, without her input. The IEP team decided to develop the student profile at the November 6, 2013 IEP meeting, at which Mother was a participant.

B.

> Did DCPS deny Student a FAPE by failing to convene an Manifestation Determination Review (MDR) meeting after removing Student from his then-current placement following the March 26, 2014 behavior incident, and placing him in an interim setting for more than ten days?

Following an altercation with another Student on March 26, 2014, Student received a nose injury, which Mother alleges resulted from Homeroom Teacher's assaulting her son. (The teacher denied that he hit Student. Whether a physical assault did, or did not, occur is beyond the purview of this Hearing Officer.[2]) Mother contends that following the incident, PCS disciplined Student and failed to comply with the IDEA's requirement for convening an MDR meeting when disciplining a child with a disability. DCPS responds that no MDR meeting was required because Student was not disciplined following the incident.

The IDEA regulations require that within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team must review all relevant information in the student's file to determine—

> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

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[2] *See S.S., ex rel Stutts v. Eastern Kentucky University*, 307 F.Supp.2d 853, 858 (E.D.Ky.2004), vacated on other grounds, 125 Fed. App'x. 644 (6th Cir.2005) (Allegations of physical assault or sexual abuse of a student by a school staff member or administrator would fall outside of the scope of the IDEA since they are not related to the way that a school provides education.)

See 34 CFR § 300.530(e). This manifestation determination is only required for disciplinary removals that constitute a change of placement. *See Assistance to States for the Education of Children with Disabilities,* 71 Fed. Reg. at 46721.

In this case, Petitioner has not established that Student was subjected to a disciplinary removal following the March 26, 2014 incident. After the incident, Mother requested that Student not be returned to Homeroom Teacher's classroom. Student's class schedule was changed and for the rest of the school year, for periods he had been scheduled to be in Homeroom Teacher's classroom for computer technology or quiet times, Student was sent instead to the Dean's office or another classroom. Mother has not rebutted Dean of Student's testimony that this schedule change was made to comply with Mother's request that Student not be sent back to Homeroom Teacher's classroom and was not a disciplinary removal. Because there was no disciplinary removal, the IDEA did not require an MDR determination.

C.

– Did DCPS deny Student a FAPE by failing to involve the parent when, following the March 2014 incident, it unilaterally changed Student's placement by adding 5.5 hours per week of instruction outside the general education environment?

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– Did DCPS, as the LEA for PCS, deny Student a FAPE when it changed his placement outside of his regular classroom, following the March 26, 2014 disciplinary incident, in violation of the least restrictive environment ("LRE") provisions of the IDEA?

Following the March 26, 2013 alleged assault incident, Student was removed, at Mother's request, from Home Room Teacher's classroom. During those class periods, totaling 5½ hours per week, Student was instructed to report to the Dean of Student's office or another classroom where no other students were present. The parent contends that assigning Student to settings where he was the only student present constituted a

unilateral change of placement which denied Student a FAPE. DCPS maintains that the school was simply complying with Mother's request that Student not be returned to Home Room Teacher's classroom and that this was not a change in placement.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *See Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C.2006). Under the Act, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled" and "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *See* 34 CFR § 300.114(a)(2). The setting where a student will be educated must be decided by the IEP team, including the parents. *See, e.g., R.L. v. Miami-Dade County School Bd.*, 757 F.3d 1173, 1177 (11th Cir. 2014); *Wilkins v. District of Columbia* 571 F.Supp.2d 163, 167 (D.D.C.2008) (The student's parents must be members of any group making a decision regarding the student's placement.)

Here, PCS' decision to remove Student for 5½ hours per week from the general education setting and to place him in a separate office or classroom – where he was not educated with any other children – was a change of placement which could only be decided by Student's IEP team. *Cf. Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.*, 629 F.2d 751, 754 (2nd Cir.1980) (Transfer of a handicapped child from one type of program to another would constitute a change in educational placement.) The IEP team was not convened to consider the change in placement. I conclude that PCS's removal of Student from the general education setting for 5½ hours per week, however well-intentioned, violated the IDEA

and denied Student a FAPE. *See, e.g., DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989) ("Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act.")

Remedy

As compensation for the denial of FAPE in this case, Petitioner requests a compensatory education award, including DCPS funding for summer camp and funding for 100 hours of private counseling for Student. 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, 522-23 (D.C.Cir. 2005). A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* at 524. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* "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*, 952 F.Supp.2d 31 (D.D.C.2013).

The denial of FAPE, which I have found in this case was Student's removal from the general education classroom for 5½ hours per week, which lasted some ten weeks from March 27, 2014 through the end of the school year. Unfortunately, Petitioner

offered no evidence of' what position Student "would have occupied" had PCS not removed him from the regular education setting or what services he needs to elevate him back to that position. While a trial court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 770 F.Supp.2d 112, 114 (D.D.C.2011), *aff'd., Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011), I am constrained under the IDEA to issue my Hearing Officer Determination in this expedited case no later than September 25, 2014. *See* 34 CFR § 500.532(c)(2). I find that the evidence before me does not provide a "fact-specific" evidentiary basis for a compensatory education remedy. *See Reid, supra; Gill, supra*, 770 F.Supp.2d at 118 (Due to the lack of evidentiary support, Plaintiffs have failed to support their claim for compensatory education.) Therefore, 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:

i. Petitioner's request for a compensatory education award to compensate Student for PCS' changing his placement after the March 26, 2014 incident is denied without prejudice; and

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

Date: September 23, 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).