

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
September 27, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 27, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: September 12, 2013

Respondent.

Student Hearing Office, Room 2004
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 Respondent District of Columbia Public Schools (“DCPS”) has denied Student a free appropriate public education (“FAPE”) by failing to develop an appropriate Individualized Education Program (“IEP”), by failing to offer a suitable placement,

by failing to implement Student's IEPs and by not conducting a Functional Behavioral Assessment.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 2, 2013, named DCPS as respondent. The case, which was originally assigned to Hearing Officer Melanie Byrd Chisholm, was reassigned to the undersigned Hearing Officer on August 23, 2013. The parties waived the resolution session on August 15, 2013. Therefore, the 45-day period for issuance of my Hearing Officer Determination ends on September 29, 2013. On August 14 and 21, 2013, Hearing Officer Chisholm convened telephone prehearing conferences with counsel to discuss the hearing date, issues to be determined and other matters. The original Prehearing Order in this case was issued by Hearing Officer Chisholm on August 22, 2013. I issued a Supplemental Prehearing Order on August 26, 2013.

The due process hearing was convened before the undersigned Impartial Hearing Officer on September 12, 2013 at the Student Hearing Office 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. DCPS was represented by DCPS' COUNSEL.

On September 6, 2013, Petitioner's counsel filed a motion to exclude the proposed testimony of DCPS witnesses BEHAVIOR SUPPORT SPECIALIST and SPECIAL EDUCATION TEACHER from CITY MIDDLE SCHOOL on the grounds that DCPS had theretofore defended its placement of Student at CITY HIGH SCHOOL and had not proposed moving Student to City Middle School. At the beginning of the due process hearing, I denied Petitioner's motion.

Petitioner testified and called as witnesses PARALEGAL, Student's AUNT, EDUCATIONAL ADVOCATE, and SPECIAL EDUCATION ADVOCATE. DCPS called as witnesses DEAN OF STUDENTS and CASE MANAGER. Petitioner's Exhibits P-1 through P-16 and DCPS' Exhibits R-1 through R-4 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum. After the hearing, Petitioner's Counsel provided, by email, copies of redacted Hearing Officer Determinations issued in other cases, which she cited as persuasive authority.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case, as set forth in the original Prehearing Order, are:

- Whether DCPS denied the student a free appropriate public education (FAPE) by failing to provide the student with an appropriate placement in November 2012, specifically a placement which was able to appropriately manage the student's behaviors and provide the student an education benefit based on the student's failing grades and disciplinary incidents;
- Whether DCPS denied the student a FAPE by failing to develop an appropriate individualized education program (IEP) for the student on January 31, 2013, specifically by failing to include placement in an appropriate program with clinical staff, positive behavioral strategies, a de-escalation room and crisis intervention techniques;
- Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on January 31, 2013, specifically by failing to include annual goals based on the student's needs;
- Whether DCPS failed to include an appropriate behavior intervention plan (BIP) in the student's January 31, 2013, and if so, whether this failure constitutes a denial of a FAPE;
- Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement in February 2013, specifically by failing to include placement in an appropriate program with clinical staff, positive behavioral strategies, a de-escalation room and

crisis intervention techniques at the point DCPS proposed a safety transfer for the student;

– Whether DCPS failed to conduct a functional behavioral assessment (FBA) of the student during the 2012-2013 school year based on the student’s frequent behavior incidents and after the student was suspended for more than ten days, and if so, whether this failure constitutes a denial of a FAPE; and

– Whether DCPS failed to implement the student’s February 27, 2012 and January 31, 2013 IEPs during the 2012-2013 school year, specifically by failing to provide specialized instruction for 31 hours per week outside of the general education environment, and if so, whether this failure constitutes a denial of a FAPE?

For relief, Petitioner seeks an order to require DCPS to convene Student’s IEP team to develop an appropriate revised IEP and make an appropriate educational placement for ² and an order for DCPS to fund an independent FBA of Student and to convene Student’s IEP team to develop a BIP based upon the FBA. In addition, Petitioner seeks an award of compensatory education as compensation for education harm to Student resulting from DCPS’ alleged denial of FAPE in the 2012-2013 school year.

FINDINGS OF FACT

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

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

Testimony of Mother.

2. Student is a child with a disability, eligible for special education and related services, under the primary disability classification, Emotional Disturbance (“ED”). Exhibit P-1.

3. For an April 8, 2010 Psychological Triennial Review, a DCPS School Psychologist tested Student using the Woodcock-Johnson III Tests of Achievement, the

² At the Prehearing Conference, Petitioner’s Counsel indicated that Petitioner would seek an order for DCPS to fund Student’s nonpublic placement at a private special education day school. At the due process hearing, Petitioner’s Counsel represented that Student had not been accepted for admission by the private school where Student had applied.

examiner reported that Student's academic skills were low average. When compared to others at age level, overall level of achievement was low. Student's ability to apply academic skills was low average. fluency with academic tasks was low. Student's performance was average in written expression, low average in mathematics and written language and low in broad reading and math calculation skills. Exhibit P-11.

4. Regarding social-emotional functioning, it was reported to the examiner that Student had difficulty controlling impulses and actions, demonstrated by episodes of cursing, fighting and walking out of class. Student had difficulty at times ignoring provocations from peers and displayed negative behavior episodes that could occur frequently. had difficulty coping with negative feelings and low self esteem, which impacted performance at school. Student reportedly had a lot of difficulty accepting limits and reacted negatively when did not get way. The examiner concluded that Student appeared to meet the criteria for the designation category of ED, warranting continued specialized instruction and related services to address marked deficits. Exhibit P-11.

5. Prior to the 2012-2013 school year, Student was enrolled in several DCPS special education day programs that serve children with emotional/behavioral issues. For the 2012-2013 school year, Student was enrolled in the GRADE at SPECIAL NEEDS ACADEMY at CITY HIGH SCHOOL. Testimony of Mother.

6. Special Needs Academy is self-contained program located in a regular DCPS public high school, but physically separated from the regular school facilities. The program services some 65 students, in grades 9 through 12. Student's classrooms did not have more than 6 students. Classes are co-taught by a special education teacher and a regular education teacher. The program has 3 behavior teachers, assigned to different zones, and 3 behavior specialists

available to assist when needed. The behavior specialists are trained in verbal de-escalation, calming techniques and safety restraints. There are two clinical social workers on the staff who provide counseling and behavior therapy. Special Needs Academy has a de-escalation room where children may go to de-escalate. Testimony of Dean of Students.

7. At Special Needs School, Student's English teacher was dually certified in the content area and in special education. Student's Algebra class was co-taught by the mathematics teacher and a teacher certified in special education. Testimony of Dean of Students.

8. There are no physical impediments to a student's leaving the Special Needs Academy site at will. The exit doors can be opened from the inside, although the doors are locked to prevent unauthorized entry from the exterior. Testimony of Dean of Students.

9. A Behavior Intervention Plan ("BIP") for Student was developed at Special Needs Academy on December 19, 2012. Exhibit R-4. There was no evidence offered at the due process hearing that this BIP was based upon an FBA or was ever considered by Student's IEP team. The BIP listed new or replacement behaviors for Student instead of problem behaviors, including,

Student will follow school and classroom rules, every day, including wearing school uniform; Student will continue to recognize triggers (comments and/or actions) that make angry and upset, and will practice the coping skills of taking space, verbalizing feelings, and asking for assistance; Student will demonstrate impulse control, by maintaining appropriate boundaries, and respecting the personal space of others; Student will engage appropriately and respectfully with peers, and adults; and Student will engage in a structured problem-solving process when is faced with challenges or difficult situations.

The steps to help Student practice the "new behaviors" in the BIP included a small structured learning environment, a daily point sheet, prompts and warnings, close proximity to adults for support and encouragement, and individual counseling and mediation as needed. Positive incentives were identified in the BIP as rewards/reinforcements, including the opportunity to

participate in activities, events and field trips, computer time, board games, positive calls home and special lunches. Exhibit R-3.

10. For the Second Advisory Period, which ended on January 25, 2013, Student received F's in all of core classes, except World History in which received a D+. Exhibit P-4 (Hearing Officer Notice of end of term date).

11. In preparation for a January 31, 2013 IEP meeting, Student was administered the Kaufman Test of Educational Achievement II ("KTEA II"). On the Broad Math portion of the test, Student received a composite score of 66, placing in the lower extreme range for age group. The data suggested that Student was performing at the 2.6 grade level for math concepts and applications and at the 3.2 grade level for math computation. On the Broad Reading portion of the test, Student received a composite score of 72, placing in the below average range for age group. was then performing on a 3.5 grade level in the areas of letter and word recognition and of reading comprehension. In the area of Spelling, Student received a standard score of 86 placing at the average range for age, which translates to a 4.5 grade level equivalent. Exhibit R-1; Testimony of Case Manager.

12. On January 31, 2013, an IEP meeting was convened at Special Needs Academy to review Student's IEP. The IEP was finalized that day "because the student is truant." The IEP team decided that Student would continue to receive 31 hours per week of Specialized Instruction outside of the general education setting and 60 minutes per week of behavior support services. The only change in services in the January 31, 2013 IEP, to address Student's behavior issues, was to change hours of speech-language to 2 hours per month "to help [Student] develop new ways of expressing emotions" and to provide school transportation to "help improve [Student's] attendance." Exhibit R-2.

13. Student's January 31, 2013 IEP included annual goals in Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. For Present Levels of Performance ("PLOP") in Mathematics, the IEP reported that Student was capable of making great gains, but attendance was a key component of "limited success." Algebra teacher stated that Student did not regularly attend school and therefore missed out on instruction time and support. In Reading, Student was reported to be struggling. biggest obstacle to progress was reported to be poor attendance. In Written Expression, writing was reported to be Student's strength. However, current levels were still below that of the average student age. attendance was reported to be the primary reason for failure during the fall semester. For the Emotional, Social and Behavioral Development area of concern, Student was reported to engage in verbally disrespectful and defiant behavior frequently, to have a low frustration tolerance and to use excessive profanity. Exhibit P-8.

14. In March 2013, a Manifestation Determination Review ("MDR") meeting was held for Student at Special Needs Academy. The evidence does not establish what, if any, violation of a school code precipitated the MDR meeting. See Testimony of Special Education Advocate. The MDR team determined that Student's behavior was a manifestation of disability. There was no discussion at the meeting of developing an FBA or of revising Student's BIP. Testimony of Special Education Advocate. No FBA was conducted following the March 2013 MDR meeting. Testimony of Mother, Testimony of Special Education Advocate.

15. For the 2012-2013 school year, Student failed all of courses except for Culinary Arts (B+) and World History (D). was reported absent for over 98 days and present only for approximately 78 days. Exhibit P-4.

16. Since enrolling at Special Needs Academy, Student's school performance has gone "completely downhill" and has experienced no success at all. Testimony of Special Education Advocate.

17. According to Mother, Student's 2012-2013 school year at Special Needs Academy was a "disaster." received telephone calls from school every day about Student's bad behavior, not attending class or leaving the school building. Student was regularly in fights with peers and was repeatedly referred to the Metropolitan Police. Testimony of Mother.

18. Dean of Students testified that toward the end of the 2012-2013 school year, Student was making some educational progress. I find that testimony not credible. Not only did Student fail all but one of courses, but for the last seven weeks of school, was reported to have missed some 157 class periods. Exhibit P-5.

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, Hinson ex rel. N.H. v. Merritt Educational Center, 579 F.Supp.2d 89, 95 (D.D.C.2008)* (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).*)

Free Appropriate Public Education under the IDEA

The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit

educationally from that instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA’s procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The issues asserted by Petitioner in this case concern only the second prong of the inquiry.

The IDEA’s 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).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*,

Analysis

The issues for determination, identified in the original Prehearing Order in this case, are:

- *Did DCPS deny Student a FAPE by failing to provide [redacted] with an appropriate placement in November 2012, specifically a placement which was able to appropriately manage Student’s behaviors and provide [redacted] an education benefit based Student’s failing grades and disciplinary incidents?*
- *Did DCPS deny Student a FAPE by failing to develop an appropriate IEP on January 31, 2013, specifically by failing to include placement in an appropriate program with clinical staff, positive behavioral strategies, a de-escalation room and crisis intervention techniques?*
- *Did DCPS deny Student a FAPE by failing to develop an appropriate IEP on January 31, 2013, specifically by failing to include annual goals based on Student’s needs?*
- *Did DCPS deny Student a FAPE by failing to include an appropriate behavior intervention plan (BIP) in Student’s January 31, 2013 IEP?*
- *Did DCPS deny Student a FAPE by failing to provide the student an appropriate placement in February 2013, specifically by failing to include placement in an appropriate program with clinical staff, positive behavioral strategies, a de-escalation room and crisis intervention techniques at the point DCPS proposed a safety transfer for the student?*
- *Did DCPS deny Student a FAPE by failing to conduct an FBA of Student during the 2012-2013 school year based on the student’s frequent behavior incidents and after the student was suspended for more than ten days?*
- *Did DCPS deny Student a FAPE by failing to implement Student’s February 27, 2012 and January 31, 2013 IEPs during the 2012-2013 school year, specifically by failing to provide specialized instruction for 31 hours per week outside of the general education environment?*

Except for the last issue, the gist of Petitioner’s complaint in this case appears to be that DCPS failed to revise Student’s IEP to address [redacted] behavior issues, poor attendance and lack of educational progress at Special Needs Academy during the 2012-2013 school year. I address that claim first.

DCPS' Alleged Inadequate Response to Student's Lack of Educational Progress

Most of the issues asserted by Petitioner in [redacted] due process complaint concern the alleged failure of DCPS to address the breakdown in Student's behavior and [redacted] lack of educational progress since [redacted] matriculated to Special Needs Academy at the beginning of the 2012-2013 school year. In the school years before [redacted] enrolled in Special Needs Academy, Student had attended several other DCPS programs for children with emotional-behavioral disabilities. According to Special Education Advocate, Student "did not do extra well" at the last school attended, but Student has gone "completely down hill" at Special Needs Academy. This expert's opinion is borne out by Student's failing grades, abysmal attendance record and series of disciplinary problems since [redacted] started at Special Needs Academy. At the end of the Second Advisory Period, January 25, 2013, Student had received F's in all of [redacted] core classes, except World History in which [redacted] received a D+. When Student's IEP team convened on January 31, 2013, Student was certainly not making expected progress toward [redacted] prior IEP annual goals or in the general curriculum.

The IDEA requires that a Student's IEP team revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student's anticipated needs and other matters. *See* 34 CFR § 300.324(b). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program; the nature and effects of the child's disability have not been adequately monitored; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties." *Suggs v. District of Columbia*, 679 F.Supp.2d 43, 51-52 (D.D.C.2010) (citations

omitted.) The IDEA also requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i); *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C.2008). In *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) the Court stated "it is important to note that 'the IDEA . . . recognizes that the quality of a child's education is inextricably linked to that child's behavior,' and '[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.'" *Id.*, quoting *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C.2008). For a student with behavioral disabilities, an appropriate behavior management plan may be a required part of IEP. *Cf. Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2003) (School District failed to provide child an educational benefit by not developing and implementing an appropriate behavior management plan.)

When Student's IEP team met on January 31, 2013, the team noted Student's lack of academic progress and reported that the biggest obstacle was poor attendance. The IEP team also recognized the impact of Student's negative behaviors and lack of emotional regulation on progress in the general education curriculum. Although the IEP team clearly understood that Student's behavioral difficulties were impeding learning, the team did not obtain an FBA, which the *Harris* decision describes as "essential" in the development of an IEP for a student with behavioral difficulties. Except to increase Student's speech-language services to 2 hours per month (to help develop new ways of expressing emotions), the team did not adopt new behavioral interventions or supports to address behaviors. An IEP that does not address appropriately behavior that impedes a child's learning denies a student a FAPE. *W.A. ex*

rel S.A. v. Patterson Joint Unified School Dist., 2011 WL 2925393, 11 (E.D.Cal. Jul. 18, 2011).

Here, I conclude that Student was denied a FAPE by the January 31, 2013 IEP which did not include appropriate supports and interventions, based upon a current FBA, to address Student's behavior issues.³

Petitioner also alleges that the annual goals in the January 31, 2013 IEP were not appropriate because the goals were not based on Student's needs. The IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR § 300.320(a)(2). Case Manager testified that administered the KTEA II achievement test to Student on January 25, 2013 and that the academic goals in the January 31, 2013 IEP were based upon data from that assessment, as well as on narratives provide by Student's teachers. According due deference to the expertise of DCPS' special education personnel, I find that Petitioner has not shown that the IEP's annual goals for Student were inappropriate. *See, e.g., T.T. v. District of Columbia*, 2007 WL 2111032,

³ I also agree with Petitioner that DCPS was required to ensure that Student's IEP team conducted an FBA following the spring 2013 MDR meeting, at which Student's conduct was affirmatively determined to be a manifestation of disability. *See* 34 CFR § 300.530(f): If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior...

Id. Although a BIP had been drafted for Student on December 19, 2012, there was no evidence that the BIP was ever considered or modified by Student's IEP team.

9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

Lastly, Petitioner contends that Special Needs Academy is not an appropriate placement for Student because the program allegedly lacks clinical staff, positive behavioral strategies, a de-escalation room or crisis intervention techniques. This claim was not established by the evidence. Special Needs Academy has, on staff, two clinical social workers who provide counseling and behavior therapy, behavior teachers, and behavior specialists trained in de-escalation and therapeutic restraint procedures. The program's behavioral strategies include verbal prompts and rewards, offered period by period, for desired behaviors. The program also has a de-escalation room for use when needed to calm students. Notwithstanding, I will deny Petitioner's inappropriate placement claim without prejudice, because DCPS will have to convene Student's IEP team to revise IEP upon completion of the FBA discussed above, at which time the IEP team must also review and revise, as appropriate, Student's placement. *See* 34 CFR § 300.116.

Alleged Failure to Implement Student's IEPs

Petitioner alleges that Special Needs Academy has failed to implement the requirements in Student's February 27, 2012 and January 31, 2013 IEPs to provide 31 hours per week of Specialized Instruction outside of the general education environment. In order to prevail on a "failure to implement" claim, a petitioner "must show more than a *de minimis* failure to implement all elements of the student's IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP".

Johnson v. District of Columbia, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citations and internal quotations omitted.) "Courts applying this standard 'have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP)

of the specific service that was withheld.” *Id.*, quoting *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011).

The grounds for Petitioner’s failure to implement claim appear to be that, based upon information contained in a August 15, 2013 DCPS response to a “Parent’s Right to Know Request”, not all of Student’s Special Needs Academy teachers are certified in Special Education. The IDEA regulations, 34 CFR § 300.18(b), provide that a highly qualified special education teacher must have full state special education certification or have passed the state special education teacher licensing examination and hold a license to teach in the state. The highly qualified special education teacher requirements apply to all public school special education teachers. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46555 (August 14, 2006). Here, Petitioner alleges that Student’s Special Needs Academy teachers for Algebra and English do not have District of Columbia Special Education teacher certifications. Petitioner appears to contend that if a class were taught by a teacher who was not certified in special education, the class may not be considered an outside of general education setting. However, Special Needs Academy program is exclusively, self-contained, outside of general education. Moreover, Assistant Dean testified that Student’s English teacher was dually certified the content area and in special education and that Student’s Algebra class was co-taught by the mathematics teacher and a teacher certified in special education. I conclude, therefore, that Petitioner has not met burden of proof to establish that during the 2012-2013 school year, DCPS failed to implement Student’s IEP requirement for 31 hours per week of Specialized Instruction outside of the general education environment.

Remedy

In this decision, I have found that Student was denied a FAPE by DCPS' failure to conduct an FBA and its failure to ensure that the IEP team incorporated appropriate behavior interventions and supports in Student's January 31, 2013 IEP. For remedy, Petitioner requests that I order DCPS to fund an independent FBA and, when the FBA is completed, to reconvene Student's IEP team to revise IEP, as appropriate, and to identify an appropriate placement. I agree that this would be an appropriate remedy and will order this relief.

Petitioner also seeks an award of compensatory education as compensation for the educational harm, allegedly suffered by Student, as a result of DCPS' denial of FAPE during the 2012-2013 school year. "The IDEA gives [hearing officers] 'broad discretion' to award compensatory education as an 'equitable remedy' for students who have been denied a FAPE. *Reid, supra*, 401 F.3d at 522–23 (quoting *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15–16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)). The 'ultimate 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.* at 524. A compensatory award must 'rely on individualized assessments' after a 'fact-specific' inquiry. *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.' *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C.2006) (quoting *Reid*, 401 F.3d at 527)." *Turner v. District of Columbia*, 2013 WL 3324358, 10 (D.D.C. July 2, 2013).

Petitioner has proposed a compensatory education plan for Student devised by Educational Advocate (Exhibit P-1). recommends an award of 75-100 hours of instruction for Student at private READING CENTER and 50 hours of independent counseling or mentoring services. The proposed remedy is described as compensation for Student's not having

an appropriate placement and not having IEP implemented during the 2012-2013 school year. However, in this decision, I have found against Petitioner on inappropriate placement and failure to implement claims. I have held that DCPS denied Student a by not conducting an FBA and by not incorporating appropriate behavior interventions and supports in Student's January 31, 2013 IEP. Educational Advocate's proposal does not address what would be appropriate compensation for these denials of FAPE. Petitioner's compensatory education proposal is, therefore, not persuasive. While a trial 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.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011), I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than September 29, 2013. *See* DCMR tit. 5-E, § 3030.11. Here, I find that the evidence does not provide a "fact-specific" evidentiary basis for a compensatory education remedy. Therefore, based on the record before me, 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 10 school days of the date of this order, DCPS shall provide public funding authorization to Petitioner for an independent functional behavioral assessment of Student and, upon completion, shall promptly convene Student's IEP team to review the assessment and other relevant data, to develop appropriate behavior interventions and supports to address Student's behavior and class attendance issues and to revise, as appropriate, IEP and ongoing placement⁴; and
2. Petitioner's request for a compensatory education award is denied without prejudice. I encourage, but do not order, the parties to endeavor to reach a voluntary agreement on appropriate compensatory education for the denials of FAPE found in this decision; and

⁴ In this decision, I have made no finding on the appropriateness of Special Needs Academy as an ongoing placement for Student.

3. All other relief requested by the Petitioner in this matter is denied.

Date: September 27, 2013

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).