OSSE
Student Hearing Office
July 05, 2013

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

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: July 5, 2013

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: July 1, 2013

Student Hearing Office, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This expedited 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 Titles 5-E, Chapter 5-E30 and 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations ("DCMR"). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools' ("DCPS") violated the IDEA by failing to convene a Manifestation Determination Review meeting after Student was allegedly suspended for more 10 school days in the 2012-2013 school year. In addition, Petitioner alleges that DCPS' March 20, 2013

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

Individualized Education Program ("IEP") is inappropriate for Student and that Student requires an updated functional behavioral assessment ("FBA").

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 31, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on May 31, 2013. The 10 school-day deadline for issuance of this Hearing Officer Determination began on July 1, 2013. The parties met for a resolution session on June 26, 2013 and were unable to reach an agreement. On June 20, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

In its response to the due process complaint, DCPS moved to dismiss the complaint, in part, for want of sufficiency. I denied the motion. On June 20, 2013, DCPS filed a second motion to dismiss on the grounds that Petitioner had not appeared for the scheduled resolution session meeting. After Petitioner attended a resolution session on June 26, 2013, I denied DCPS' motion.

The due process hearing was convened before the undersigned Impartial Hearing Officer on July 1, 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 and CO-COUNSEL. DCPS was represented by COMPLIANCE CASE MANAGER and DCPS COUNSEL.

Petitioner testified and called as witnesses, PRIVATE SCHOOL ADMISSIONS DIRECTOR, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses ASSISTANT DEAN and Compliance Case Manager. Petitioner's Exhibits P-2, P-3, P-5 through P-14, and P-17 through P-37 were admitted into evidence without

objection. Exhibits P-40 through P-42 were admitted over DCPS' objection to their untimely disclosure. DCPS' objections to Exhibits P-1, P-4, P-38 and P-39 were sustained. Exhibits P-15 and P-16 were not offered. DCPS' Exhibits R-1 through R-9 were admitted without objection.

Counsel for both parties made opening and closing statements. At the conclusion of Petitioner's case in chief, DCPS made a motion for a directed finding against Petitioner which I took under advisement. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.14.

ISSUES AND RELIEF SOUGHT

This issues to be determined in this case are:

- Whether DCPS violated the IDEA and denied Student a FAPE by failing to convene a manifestation determination review meeting after Student was suspended from school for more than 10 school days in the current school year;

- Whether DCPS' March 20, 2013 IEP for Student is inappropriate because it does not identify Student's ED/OHI disabilities, because it provides insufficient hours of specialized instruction, because it does not provide all specialized instruction in an outside of general education setting, because it lacks an appropriate behavior intervention plan to address Student's behavior and attendance issues, and because it lacks adequate goals, objectives and accommodations to address Student's oppositional-defiant behaviors;

- Whether DCPS' March 20, 2013 IEP for Student is inappropriate because DCPS has not conducted a vocational evaluation and the IEP does not include an appropriate transition plan for Student; and

- Whether DCPS has denied Student a FAPE by failing to update her functional behavioral assessment which has allegedly not been effective in improving Student's behaviors.

For relief, Petitioner seeks an order for DCPS to fund Student's placement at Private School; an order for DCPS to conduct an evaluation to assess whether Student is exhibiting oppositional defiance disorder; an order for DCPS to conduct a Vocational assessment/ evaluation; an order for DCPS to develop a revised FBA; an order for DCPS to convene an MDT

meeting to be convened within 10 days of receiving the last of the assessments to review those assessments and update Student's IEP and placement as warranted; alternatively, an order for DCPS to convene a MDT meeting to develop an appropriate student evaluation plan (SEP), and for the LEA to timely complete and review said assessments; develop and implement an appropriate IEP; update the Student's disability classification as warranted; provide therapeutic wrap-around services as a related service; implement an appropriate BIP and Attendance Intervention Plan; and implement an appropriate transition plan. In addition, Petitioner seeks compensatory education services to compensate for DCPS' alleged failure to conduct an MDR review and alleged failure to provide an appropriate IEP and appropriate placement/location of services.

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 young woman, resides with Mother in the District of Columbia. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Specific Learning Disability ("SLD"). Exhibit R-1.

3. For the 2012-2013 school year, Student was enrolled in GRADE at CITY HIGH SCHOOL. Exhibit R-3. For the 2011-2012 school year, Student was enrolled in PUBLIC CHARTER SCHOOL. Mother transferred Student to City High School because of a change in her residence in the District. Testimony of Mother.

4. PSYCHOLOGY RESIDENT conducted a psychological evaluation of Student on April 4, 2011. She interviewed Student, made in-school behavior observations and administered cognitive, academic achievement and visual-motor integration tests. In her April 12, 2011 report, Psychology Resident concluded that Student's overall cognitive ability was within the Low Average range. Academic achievement testing showed that Student's reading was within the Low range. Student performed slightly better on mathematics. Her performance on writing tasks was variable, with writing appearing as a strength though Student had difficulties with

spelling. Testing of Visual-Motor Integration fell within the Average range of functioning. Psychology Resident, recommended, *inter alia*, that the test results supported continuation of Student's special education classification of an SLD in reading; that Student would continue to benefit from a highly structured academic setting where she could continue to have assistance from a special education teacher and that one-to-one tutoring could be beneficial to support Student's reading and spelling needs; and that Student would benefit from a well-structured learning environment to help maintain attention and focus in the classroom. Exhibit P-18.

5. Student's May 18, 2012 IEP at Public Charter School, Exhibit P-21, contained annual goals for Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. For each area of concern, the IEP team reported for Student's Present Level of Educational Performance that, *inter alia*,

> [Student] has had significant difficulties with controlling her behaviors this year and has been suspended from school for fighting and stabbing a classmate with a pencil in the arm. Based on behavior ratings from one of [Student]'s teachers and her mother, she does not currently display symptoms associated with an ADHD diagnosis. She does, however, display significant relational, learning aud school problems. Her teacher believes [Student] struggles with aggression, externalizing her problems Atypicality, and adaptability. [Student] endorsed numerous problems, including her attitude towards teachers, hyperactivity, school problems, social stress, depression, sense of inadequacy, somatization internalizing problems, attention problems, and interpersonal relationship problems. Her responses on the MAPI suggest a variable mood with frequent outbursts, which leads her to isolation. She tends to act before thinking and therefore gets into trouble, which is similar to adolescents diagnosed with Conduct Disorder. [*sic*]

Exhibit P-21.

6. Public Charter School's May 18, 2012 IEP provided Student 18 hours per week of Specialized Instruction in the General Education setting and 1 hour per week of Behavioral Support Services. Exhibit P-21. But for the addition of the single hour per week of Behavioral Support Services, these services were identical to the services offered Student under Public Charter School's May 20, 2011 IEP. Exhibit P-22.

7. Although Mother testified that Student's 2011-2012 school year at Public Charter School "went well," the evidence shows that Student's tenure at Public Charter School was marked by discipline issues and attendance problems. Exhibits P-27, P-28, P-29, P-30, P-31.

8. Student's behavior and class attendance did not improve after she transferred to City High School. For the term ending February 28, 2013, Student received "F" grades in all courses except for a "D" in Advisory and a "B" in Art and Culture. Excessive Absences were reported in all courses. Exhibit P-20. As of June 20, 2013, Student was reported present at school for only 60.5 out of 166 school days. She had accumulated 451 unexcused class absences. Exhibit P-7.

9. Petitioner filed a prior due process complaint on behalf of Student against DCPS (Case No. 2012-0841). On January 10, 2013, Petitioner and DCPS concluded a settlement agreement in Case No. 2012-0841. In that agreement, DCPS agreed to fund 50 hours of independent tutoring of Student; to conduct an FBA of Student, and, upon completion of the FBA to convene an IEP meeting to develop a Behavior Intervention Plan ("BIP"); to develop an attendance intervention plan; and to review and, if necessary, revise Student's IEP. Exhibit P-32.

10. DCPS SOCIAL WORKER conducted an FBA of Student in February 2013. Social Worker requested Student's teachers to complete the Ohio Mental Health Consumer Outcomes System questionnaires ("Ohio Scales"). The teachers agreed that Student argues with others, yells/screams/swears at others, has fits of anger, refuses to do things teachers and other staff members ask of her, and skips school or class. As relates to Student's day-to-day functioning, the teachers endorsed severe-to-extreme impairments due to Student's troubles getting along with friends, establishing interpersonal relationships, getting along with adults

outside of her family, keeping neat and clean and looking good, caring for her health needs/ keeping good health habits, controlling her emotions and staying out of trouble, being motivated to finish projects, participating in hobbies and recreational activities, attending school and getting passing grades, learning skills that will be useful in future jobs, feeling good about herself, thinking clearly and making good decisions, concentrating/paying attention/completing tasks, earning money/learning how to use money wisely, doing things without supervision, accepting responsibility for her actions, and her inability to pro-socially express her feelings. Student told Social Worker in an interview that "I am a good person but when I get mad no one can control it. . . . I get an attitude real quick." Exhibit P-14.

11. Social Worker reported that as of January 29, 2013, Student had accumulated 29 days of unexcused absences for the school year. Exhibit P-14.

12. On March 20, 2013, Student's IEP team met to discuss Social Worker's FBA and conducted an annual review of Student's IEP. In the revised IEP, for the academic Present Levels of Performance ("PLOP"), the IEP team incorporated, essentially verbatim, the statements of Student's present levels from the May 18, 2012 Public Charter School IEP. Exhibits R-1, P-21.

13. For Student's PLOP for Emotional, Social and Behavioral Development, the March 20, 2013 IEP team also incorporated, essentially verbatim, the Student's present levels from May 18, 2012 Public Charter School IEP, reporting, *inter alia*, that Student acts similarly to adolescents diagnosed with Conduct disorder including getting into physical altercations, struggling with managing her temper and physical outbursts; struggling with aggression, externalizing her problems, atypicality, and adaptability. Exhibits R-1, P-21.

14. In the March 20, 2013 IEP, the IEP team carried over many of Student's annual goals from the May 18, 2012 IEP, mostly unchanged. Exhibits R-1, P-21.

15. In the March 20, 2013 IEP, the City High School IEP team continued the same level of Special Education and Related Services provided in the May 18, 2012 IEP, including 18 hours per week of Specialized Instruction in the General Education setting and 1 hour per week of Behavioral Support Services, outside General Education. Exhibit R-1.

16. The March 20, 2013 IEP contains a post-secondary transition plan for Student based upon a March 19, 2013 Educational and Vocation Assessment of Student. The assessment tools included C.I.T.E. Learning Styles Instrument and Interest Inventory and Self-Directed Search. Exhibit R-1.

17. During the 2012-2013 school year, Student was suspended, out of school, for 2 days in September, 4 days in March and 2 days in May. There was a disciplinary incident on May 21, 2013, where City High School indicated it would suspend Student for 5 days. However that suspension was withdrawn by the school, apparently because of Student's status as a special education student. Student was in school that week and the attendance records to the contrary are incorrect. Testimony of Assistant Dean. I found Assistant Dean to be a credible witness and his testimony was not rebutted by Student, who did not attend the due process hearing. I did not find credible Mother's testimony, to the extent if differed from that of Assistant Dean.

18. Private School is located in suburban Virginia. It serves students with disability classifications Learning Disorder ("LD"), Emotional Disturbance ("ED"), Intellectual Disability ("ID"), Other Health Impairment ("OHI"), Autism Spectrum disorders, SLD and Multiple Disabilities ("MD"). At Private School, Student would be placed in a class of 8 students with a 3:1 student to teacher ratio. All classes are taught by teachers certified in special education.

Some teachers are also dual-certified in subject content areas. Private School has on staff reading and math specialists to work with students who need tutoring. Testimony of Admissions Director.

19. Private School's services to address students' behavior issues include psychological counseling, and art therapy. Private School works closely with DCPS to address needs of children with truancy issues. Testimony of Admissions Director.

20. The tuition expense at Private School is $47,000 to $50,000 per year. Private School has a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education ("OSSE"). At Private School, Students may earn Carnegie Units credits toward a regular DCPS high school diploma. Testimony of Admissions Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, 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).)

Analysis

1. DID DCPS VIOLATE THE IDEA AND DENY STUDENT A FAPE BY FAILING TO CONVENE A MANIFESTATION DETERMINATION REVIEW MEETING AFTER STUDENT WAS SUSPENDED FROM SCHOOL FOR MORE THAN 10 SCHOOL DAYS IN THE 2012-2013 SCHOOL YEAR?

Under the IDEA, a disciplinary change of placement occurs if a student is subjected to a series of removals that total more than 10 school days in a school year. *See* 34 CFR § 300.536. In such cases, the local education agency ("LEA") must conduct a Manifestation Determination Review ("MDR") to determine if the conduct in question was caused by or had a direct relationship to the student's disability. 34 CFR § 300.530(e).

In this case, Petitioner alleges that Student was removed from City High School for a cumulative total of more than 10 school days in the 2012-2013 school year and that DCPS failed to convene an MDR meeting. Although the Student's DCPS Attendance Summary shows out-of-school suspensions for more than 10 school days, Assistant Dean testified that the Attendance Summary was not correct, because the last suspension, following a May 21, 2013 disciplinary incident, was withdrawn and Student did not miss school due to that disciplinary incident. Assistant Dean testified that he verified Student's attendance with the school attendance counselor and he saw Student in the building on the school days in question. Assistant Dean testified that in school year 2012-2013, Student was subjected to a total of 8 school days of removals, including 2 days in September, 4 days in March and 2 days in May.

I did not find credible Mother's contrary testimony that Student was at home from May 21 through May 28, 2013. Mother appears to have had a relatively hands-off role in Student's education. For example, when Social Worker attempted to meet with Mother for the February 2013 FBA, Mother missed the scheduled interview at her home. She told Social Worker to interview Student at school instead because, "She's who y'all need to talk to anyway." (Exhibit P-14.) With regard to the May 2012 disciplinary incident, Mother testified she thought that Student's suspension was for "walking the halls." The May 24, 2013 Notice of Disciplinary Action, addressed to Mother, described the incident as "Causing disruption on school properties

or at any DCPS-sponsored or supervised activity." Mother also seemed, in her testimony, to be unaware of the seriousness of Student's documented disciplinary and attendance problems at Public Charter School in the prior school year. In sum, I find Assistant Dean's testimony to be more credible and conclude that Petitioner has not met her burden of proof to show that Student was subjected to more than 10 school days removal in the 2012-2013 school year. Accordingly, DCPS was not required to convene an MDR meeting.

2. IS DCPS' MARCH 20, 2013 IEP INAPPROPRIATE FOR STUDENT BECAUSE IT DOES NOT IDENTIFY STUDENT'S ED/OHI DISABILITIES, BECAUSE THE IEP PROVIDES INSUFFICIENT HOURS OF SPECIALIZED INSTRUCTION, BECAUSE THE IEP DOES NOT PROVIDE ALL SPECIALIZED INSTRUCTION IN AN OUTSIDE OF GENERAL EDUCATION SETTING, BECAUSE THE IEP LACKS AN APPROPRIATE BEHAVIOR INTERVENTION PLAN TO ADDRESS STUDENT'S BEHAVIOR AND ATTENDANCE ISSUES, AND BECAUSE THE IEP LACKS ADEQUATE GOALS, OBJECTIVES AND ACCOMMODATIONS TO ADDRESS STUDENT'S OPPOSITIONAL-DEFIANT BEHAVIORS?

Petitioner asserts that DCPS' March 20, 2013 IEP denies Student a FAPE because it does not identify and address Student's alleged emotional-behavioral disabilities and because the IEP provides insufficient hours of special education services and an inappropriate placement. "The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C.2010), quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004). In this case, Petitioner has not raised a procedural issue with the development of the March 20, 2013 IEP. Therefore, I move directly to 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.*, 774 F.2d 629, 636 (4th Cir.1985).

I find that DCPS' March 20, 2013 IEP fails to meet the *Rowley* "basic floor of opportunity" standard because the IEP team wholly failed to address Student's lack of progress under her prior, May 18, 2012 IEP. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is likely to produce progress, not regression.") (citations omitted); *Danielle G. v. N.Y. City Dept. of Educ.*, 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the

IEP affords the student with an opportunity greater than mere trivial advancement.") (citations omitted); *P.K. v. Bedford Cent. Sch. Dist.*, 569 F.Supp.2d 371, 385 (S.D.N.Y. 2008) ("[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged IEP.")

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). In addition, 34 CFR § 300.321(a)(2)(i) requires the IEP Team, in the case of a student whose behavior impedes the student's learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. The evidence in this case shows that when Student's IEP team met on March 20, 2013, Student had made no academic or behavioral progress under the May 18, 2012 IEP, which provided 18 hours per week of Specialized Instruction in the General Education setting and one hour per week of Behavioral Support Services. Student's February 28, 2013 Report on Student Progress showed her failing five of her seven courses. Student had excessive absences in all of her classes. As of January 29, 2013, she had accumulated 29 days of unexcused absences for the school year. In February 2013 FBA interviews, Student's teachers endorsed severe-to-extreme impairments in Student, including, *inter alia*, getting along with friends, establishing interpersonal relationships, getting along with adults outside of her family, controlling emotions and staying out of trouble, being motivated to finish projects, attending school and getting passing grades, thinking clearly and making good decisions, concentrating/ paying attention/ completing tasks, doing things without supervision and accepting responsibility

for her actions.

Yet, at the March 20, 2013 IEP meeting, despite having an abundance of evidence of Student's total lack of academic progress, abysmal school attendance, and serious emotional-behavioral impediments, the IEP team continued Student's services and placement unchanged from the unsuccessful May 18, 2012 IEP. Even the statements of Present Levels of Performance and most Annual Goals were continued, essentially unchanged, from the prior IEP. I find that the March 20, 2013 IEP team failed in its duty to revise Student's IEP to address her documented lack of educational and behavioral progress, the results of the February 7, 2013 FBA and the other factors which the IDEA required the IEP team to consider when reviewing Student's IEP. The March 20, 2013 IEP cannot be deemed to have been reasonably calculated to provide Student education benefits.

Petitioner also contends that the IEP is inappropriate because it does not identify Student's alleged ED/OHI disabilities. Student's last psychological evaluation, dated April 12, 2011, supported continuation of Student's SLD disability classification and did not endorse additional ED or OHI disabilities. I find that the evidence does not establish, what, if any, additional IDEA covered disabilities Student may have.[2] Petitioner has therefore not shown that the March 20, 2013 IEP is deficient for failure to identify Student's other alleged disabilities.

3. IS THE MARCH 20, 2013 IEP INAPPROPRIATE FOR STUDENT BECAUSE DCPS HAS NOT CONDUCTED A VOCATIONAL EVALUATION AND THE IEP DOES NOT INCLUDE AN APPROPRIATE TRANSITION PLAN?

Petitioner also complains that the March 20, 2013 lacks an appropriate transition plan.

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[2] So long as Student is eligible for special education services, whether or not her disability is classified as ED/OHI in the IEP is immaterial. A child's entitlement under the IDEA is to FAPE and not to a particular label. The child's identified needs, not the child's disability category, determine the services that must be provided to her. *See Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). *See, also*, *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.)

The IDEA requires that beginning not later than the first IEP to be in effect when the child turns 16, the IEP must include—

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

34 CFR § 300.320(b). Student is AGE. Her March 20, 2013 IEP was required, therefore, to include a transition plan. The IEP does, in fact, contain a post-secondary transition plan for Student based upon a March 19, 2013 Educational and Vocational Assessment of Student. The assessment tools included C.I.T.E. Learning Styles Instrument and Interest Inventory and Self-Directed Search. Petitioner adduced no evidence at the due process hearing that the transition plan is inappropriate or that it is not based upon appropriate assessments. Petitioner has not met her burden of proof on this issue.

4. DID DCPS DENY STUDENT A FAPE BY FAILING TO UPDATE HER FUNCTIONAL BEHAVIORAL ASSESSMENT WHICH HAS ALLEGEDLY NOT BEEN EFFECTIVE IN IMPROVING STUDENT'S BEHAVIORS?

DCPS Social Worker conducted a detailed and comprehensive functional behavioral assessment ("FBA") of Student in February 2013. Under the IDEA regulations, a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303(b). The February 2013 FBA was reviewed at the March 20, 2013 IEP meeting. Whether an FBA is current and valid is a decision best left to the school district, the parent, and relevant members of the IEP Team. *See Analysis and Comments to the Regulations, supra*, Page 46721. *Cf. Id.* at 46683 (The IDEA focuses on interventions and strategies, not assessments, to address the needs of a child whose behavior impedes the child's learning or that of others.) In this case, Petitioner adduced no evidence at the due process hearing that the

February 2013 FBA was not valid or that it does not continue to be current.

Remedy

In this decision, I have found that Student was denied a FAPE by DCPS' March 20, 2013 IEP which was not reasonably calculated to provide educational benefits. For her requested remedy, Petitioner seeks an order for DCPS to fund Student's placement at Private School and an award of compensatory education.

i. Private School Placement

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005) (citations omitted).

Placement awards, must be tailored to meet the child's specific needs. *Branham, supra.* To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has a SLD in reading. She is functioning below grade level and age expectations in all academic areas. During the 2012-2013 school year, Student has exhibited emotional and behavioral issues which have manifested, notably, in nonattendance and oppositional behaviors. She failed almost all her classes.

b. Student's Specialized Educational Needs

According to Psychology Resident, Student would benefit from a highly structured academic setting where she can have assistance from a special education teacher and one-to-one tutoring would also be beneficial. However, Psychology Resident's evaluation was conducted in April 2011 before Student transferred to City High School. The evidence in this case leaves no doubt that City High School is not meeting Student's educational needs. However, the evidence, unfortunately, does not establish what are Student's current specialized educational needs or what type of placement would meet those needs.

c. Link between Student's Needs and the Services Offered by Private School

Private School is a full-time special education day program. It serves students with various disabilities, including children with Student's disability classification, SLD. At Private School, Student would be placed in a small class of 8 students with a 3:1 student to teacher ratio. While this setting may be beneficial for Student, due to the lack of competent evidence or reliable information on Student's current specialized educational needs, no link has been shown between Student's needs and the services offered by Private School.

d. Cost of Placement at Private School

The cost of tuition at Private School is $47,000 to $50,000 per year. DCPS offered no evidence that tuition expenses at Private School are higher than costs at other local private schools serving students with disabilities.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.* (citing 34 C.F.R. § 300.552(d)). There was no evidence in this case that Private School, where Student would have no interaction with non-disabled peers, is the least restrictive environment possible for Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 n.3 (D.D.C.2012) (Hearing Officer could consider whether private school was the least restrictive environment in evaluating whether private placement was the proper remedy.)

Considering all of the above factors, I conclude that Petitioner has not shown that Private School is an appropriate placement for Student. *Cf. Branham, supra*, 427 F.3d at 12-13 (Where record provided no insight about the precise types of educational services student needed to progress or whether the private school's services would meet those needs.)

ii. Compensatory Education

Petitioner also seeks an award of compensatory education to compensate for Student's not receiving FAPE under the March 20, 2013 IEP. In her decision in *Gill v. District of Columbia*, 770 F.Supp.2d 112, (D.D.C.2011), *aff'd., Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011), U.S. District Judge Collyer restated the standards for an award of compensatory education, set out in *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005).

> Under the theory of compensatory education, courts and hearing officers may award educational services . . . to be provided prospectively to compensate for a past deficient program. Remedying the deprivation of FAPE carries a qualitative

> rather than quantitative focus. [A]wards compensating past violations [must] rely on individualized assessments. In every case . . . , the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. In addition, whereas ordinary Individual Education Plans need only provide some benefit, compensatory awards must do more — they must compensate.

Gill, supra, 770 F.Supp.2d at 116-117 (Citations and internal quotations omitted.)

In my June 26, 2013 Revised Prehearing Order in this case, I alerted the parties that to establish a basis for a compensatory education award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony "the correct amount or form of compensatory education necessary to create educational benefit" to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. I informed the parties that if an adequate record were not established, the Hearing Officer may be obliged to deny a compensatory education award or to continue the hearing for the Petitioner to offer additional evidence sufficient to support the claim for compensatory education.

At the due process hearing in this case, Petitioner did not offer competent evidence to project the progress Student might have made after March 2013 under an appropriate IEP or what would constitute an appropriate compensatory education award. Petitioner did offer a compensatory education plan prepared by Educational Advocate 1. This plan did not purport to quantify the harm resulting from DCPS' inappropriate March 20, 2013 IEP. Moreover, Educational Advocate 1's proposed relief, placement "at a fulltime therapeutic environment," is a placement recommendation, not a compensatory education remedy. I find, therefore, that Petitioner has failed to support her claim for compensatory education. *See, Gill, supra*, 770 F.Supp.2d at 118. (Due to the lack of evidentiary support, the Court is compelled to find that

Plaintiffs have failed to support their claim for compensatory education.) While a Court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C.2010), *aff'd.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011), under the DCMR I am constrained to issue my final Hearing Officer Determination no later than July 17, 2012. See DCMR tit. 5-E, § 3030.11. Therefore, I will deny, without prejudice, Petitioner's request for a compensatory education award.

iii. Other Equitable Relief.

Special Education Hearing Officers have broad discretion in ordering relief for a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 8 (D.D.C. Feb. 20, 2013) (Once a court holds that the public placement violated the IDEA, the court enjoys broad discretion in granting such relief as it determines is appropriate.) The IDEA requires that a child with a disability must be reevaluated if the public agency determines that the educational or related services needs of the child warrant a reevaluation. *See* 34 CFR § 300.303(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46648 (August 14, 2006). The March 20, 2013 IEP reports that Student acts similarly to adolescents diagnosed with Conduct disorder including, *inter alia*, getting into physical altercations, struggling with managing her temper and physical outbursts; struggling with aggression, externalizing her problems, atypicality, and adaptability. I find that the evidence in this case, notably the behavioral-emotional concerns reported in the February 2013 FBA and the present levels of Students' Emotional, Social and Behavioral Development described in Student's IEP, warrant an updated psychological evaluation. Moreover, the March 20, 2013 IEP lacks current educational achievement data. Therefore, I will order DCPS to fund an independent comprehensive psycho-educational assessment of Student and to reconvene

Student's IEP team to develop an appropriate revised IEP based upon the new assessment as well as the other relevant data. I recommend, but will not require, that when Student's IEP team reconvenes to develop an appropriate revised IEP, it also consider whether Student should receive compensatory education for educational harm resulting from the inappropriate March 20, 2013 IEP.

ORDER

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

1. Within 5 business days of this order, DCPS shall issue authorization to Petitioner for a DCPS-funded independent comprehensive psycho-educational evaluation of Student to assess her learning problems as well as any behavioral/emotional and medical issues which may need to be addressed in her IEP and to recommend what additions or modifications to Student's educational program may be needed to enable her to receive educational benefits;

2. Within 10 business days of receipt of the psycho-educational evaluation report, DCPS shall convene Student's IEP team to review the new evaluation, collect and review any other needed data, and revise and update her IEP. The IEP team shall review, and as appropriate, revise all sections of Student's IEP, notably the IEP's present levels of performance, Annual Goals, Least Restrictive Environment and Special Education and Related Services. The IEP team shall consider the full continuum of alternative placements, *see* 34 CFR § 300.115, in determining Student's ongoing educational placement. The revised IEP shall include an appropriate Behavior Intervention Plan to address Student's attendance and behavior issues;

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

4. DCPS' motion to a directed finding is denied; and

5. All other relief requested by the parties in this matter is denied.

Date: July 5, 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).