

**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
May 06, 2013

PETITIONER,¹
on behalf of STUDENT,

Date Issued: May 3, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2013-0205

v.

Hearing Date: April 29, 2013

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

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

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This expedited matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (“Petitioner” or “Mother”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-B, Chapter 5-B25 and Title 5-E, Chapter 5-E30. In her Due Process Complaint, Petitioner appeals DCPS’ March 2012 Manifestation Determination that Student’s March 12, 2013 code of conduct violation was not a manifestation of her disability. Petitioner also alleges that DCPS denied Student a FAPE by suspending her

¹ Personal identification information is provided in Appendix A.

from school for more than 10 days, without providing an alternative interim educational placement and that DCPS' October 18, 2012 Individualized Education Program ("IEP") was not reasonably calculated to provide Student educational benefit.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 4, 2013, named DCPS as respondent. The case was originally assigned to Impartial Hearing Officer Frances Raskin and was re-assigned to the undersigned Hearing Officer on April 19, 2013. The parties met for a resolution session on April 19, 2013 and did not reach a resolution agreement. On April 19, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The 10-school day deadline for issuance of this Hearing Officer Determination began on April 29, 2013.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on April 29, 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. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses, Student, ADMISSIONS COORDINATOR, and EDUCATIONAL ADVOCATE. DCPS called as witnesses, CASE MANAGER, SPECIAL EDUCATION COORDINATOR and SOCIAL WORKER. Petitioner's Exhibits P-1 through P-18 were admitted into evidence without objection, with the exception of Exhibits P-5 and P-16, which were admitted over DCPS' objections and P-14 which was withdrawn. DCPS' Exhibits R-1 through R-14 were admitted without objection, with the exception of Exhibit R-12, which was not offered by DCPS, but was offered and admitted as

Petitioner's Exhibit P-19, over DCPS' objection.

Counsel for both parties made opening and closing statements. There was no request for post-hearing briefing.

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

- Whether DCPS denied Student a FAPE by suspending her for more than 10 school days during the 2012-2013 school year, without providing an alternative interim educational placement;
- Whether DCPS denied Student a FAPE by convening a Manifestation Determination Review meeting in March 2013 at a time when Petitioner was not available to attend;
- Whether DCPS denied Student a FAPE by making an incorrect determination that the Student's behavior which resulted in the March 2013 suspension was not a manifestation of her disability; and
- Whether DCPS' October 2012 IEP for Student is inappropriate because it does not meet Student's requirement for full-time, therapeutic, special education programming in an outside of general education setting.

For relief, the Petitioner requests that DCPS be ordered to fund Student's placement at NON-PUBLIC SCHOOL for the remainder of the 2012-2013 school year and that Student's IEP be revised to provide for full-time placement in an outside of general education setting.

Petitioner also seeks an award of compensatory education to compensate Student for educational harm resulting from her long-term suspension from CITY HIGH SCHOOL in March 2013.

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 is an AGE resident of 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 P-2. She was first found eligible for special education and related services when she was at CITY ELEMENTARY SCHOOL. Testimony of Mother, Exhibit P-10.
3. Student is currently enrolled in GRADE at CITY HIGH SCHOOL. Prior to enrolling at City High School, Student attended a number of public schools, public charter schools and a special education private school in the District of Columbia. For school year 2010-2011, she attended NEIGHBORHOOD HIGH SCHOOL. At the beginning of the 2011-2012 school year, she received an involuntary transfer for safety reasons to City High School. Testimony of Mother.
4. Student has a significant history of mild hearing impairment since infancy. As a 4th grade student, Student was identified as eligible for special education and related services for Speech and Language Impairments. Exhibit R-4. In a March 21, 2011 Educational Evaluation, it was reported that Student had been prescribed hearing aids but refused to wear them. Exhibit P-10.
5. Student has a long history of disruptive behavior at school. At a February 2006 Multidisciplinary Team (“MDT) meeting, Student’s teacher described her as displaying disruptive behavior at school that consisted of poor anger control and disrespect toward teachers. In 7th and 8th grades at PRIVATE SCHOOL, the frequency of Student’s aggressive behaviors increased and served as the primary precipitant of out-of-school and in-school suspensions. At Neighborhood High School, Student’s academic record for the 2010-2011 school year showed multiple school suspensions. Exhibit P-10.

6. An April 2011 independent Functional Behavioral Assessment (“FBA”) identified Student’s problem behaviors as including minimal to no participation in classes, argumentativeness toward peers and teachers and physical aggression. As of April 2011 when the FBA was conducted, Student had exhibited improvement in some classes over the preceding 2-3 months. The evaluator recommended, *inter alia*, that Student be considered for small group activities, one to one assistance and after school tutoring. In addition, the evaluator recommended that Student receive long-term individual therapy at a minimum of once-weekly and that Student participate in group therapy to enhance her social skills. Exhibit P-14.

7. Student’s January 29, 2010 IEP, developed when Student attended Private School, reportedly identified her primary disability classification as Emotional Disturbance (“ED”). Exhibit P-14.

8. In a March 21, 2011 Educational Evaluation report requested to obtain Student’s then-current level of academic functioning, an independent evaluator reported that on previous cognitive testing (WISC-IV 2007), Student obtained scores that indicated even cognitive development that was classified in the Low Average range. On the Woodcock-Johnson Tests of Achievement (WJ-III), administered in 2011, Student presented with academic skills that ranged from Average to Very Low. The WJ-III achievement testing indicated that mathematics and written expression were significant areas of weakness for Student and that Student required intensive instructional support. The evaluator concluded that Student continued to meet criteria for special education services under the Learning Disabled (“LD”) classification. Exhibit P-10.

9. Student’s 2011-2012 school year IEP at City High School identified her primary disability as SLD. Development of this IEP was completed at an IEP team meeting on October 20, 2011, attended by Mother and an educational advocate from Petitioner’s Counsel’s office.

The IEP provided 17.5 hours per week of Specialized Instruction in the General Education setting, 1.5 hours per week of Behavioral Support Services outside the General Education setting and 120 minutes per month of Speech-Language pathology. Exhibits P-3, P-4. Mother now thinks she agreed with the October 20, 2011 IEP. Mother recalls that Student did “OK” that school year after going through a little transition. Testimony of Mother.

10. At the beginning of the 2012-2013 school year at City High School, Student was doing “OK”. Testimony of Mother. Student was not promoted from the 2011-2012 school year because she had to repeat a mathematics course. Testimony of Student.

11. In September 2012, City High School staff administered the Brigance Transition assessment to Student and the Ohio Youth Problem, Functioning, and Satisfaction Scales to Student and Mother. The Ohio Youth Problem scales showed that the overall pattern of Student’s level of social emotional functioning was in the mild range. Exhibit R-8.

12. Student’s IEP team met at City High School on October 18, 2012 to revise and update her IEP. Mother attended by telephone. She informed the IEP team that Student had recently enrolled in a program to give her support in her behavioral goals. Exhibit R-9.

13. Student’s October 18, 2012 IEP included annual goals for mathematics, reading, written expression and emotional, social and behavioral development. This IEP provided 17.5 hours per week of Specialized Instruction in the General Education setting, 240 minutes per month of Behavioral Support Services outside the General Education setting and 30 minutes per month of Speech-Language Pathology. (In a typographical error, the IEP states “240 hr per mon” as Time/Frequency for Behavioral Support Services.) Exhibit R-8. Mother thinks that the October 18, 2012 IEP was “somewhat appropriate.” Testimony of Mother.

14. At the time the October 18, 2012 IEP was developed, Student was participating in

her general education classes. She seemed to be adjusting well to her classes and her behavior had not been a problem. She seemed able to control her emotions and stay focused in class. She seemed to be a well adjusted young lady. Testimony of Case Manager. Based upon teachers' comments on Student's September 27, 2012 report card, Student's in-school behavior had improved dramatically. Testimony of Social Worker.

15. Earlier in the 2012-2013 school year, Student was doing very, very well. At the present time, Student is not doing well, looking at her progress, attendance and related service trackers. Testimony of Special Education Coordinator. Over the last couple of months, Student's behavior has regressed. Testimony of Social Worker.

16. On her January 25, 2013 City High School progress report, Student received F's and D's. Her teachers reported poor test scores, excessive absences, non-completion of assignments and poor behavior. Exhibit P-6.

17. During the 2012-2013 School Year, Student has received multiple "short-term" disciplinary suspensions. She was suspended for five days on December 13, 2012 for causing disruption on school properties or at any DCPS-sponsored or supervised activity. Exhibit P-7. On March 7, 2013 Student was suspended, off-site for three days for the same cause. Exhibit P-8. Student's DCPS Attendance Summary indicates additional off-site suspensions on October 2 and October 4, 2012, October 25, 2012, November 14, 2012 and January 24, 2013. Exhibit P-19. The evidence at the due process hearing did not establish the causes for these suspensions. I find, from the preponderance of the evidence, that the cumulative duration of these short-term suspensions was 13 school days. No Manifestation Determination Review was conducted in connection with these short-term suspensions, and Student was not provided education services during these removals. Testimony of Mother.

18. Following a disciplinary incident off school grounds on March 12, 2013, a recommendation was made that Student be suspended for 45 days beginning March 14, 2013. Exhibit P-9. In the precipitating incident, Student, with a group of female students, allegedly assaulted another female student who was walking home from school. City High School provided Mother a Notice of Proposed Disciplinary Action proposing the Off-Site Long-Term Suspension of 45 Days. Exhibit R-11. The Notice stated that Student should continue to attend school until the DCPS Instructional Superintendent reviewed the matter and either authorized or modified the disciplinary action. This notice was unsigned and did not identify the authorizing school official or his/her contact information. Mother denied receiving this notice until March 28, 2013. Testimony of Mother. The evidence does not establish whether, or when, the DCPS Instructional Superintendent acted on the disciplinary action.

19. An MDR meeting was convened for Student at City High School on March 22, 2013. One or two days after the March 12, 2013 incident, Case Manager contacted Mother by telephone to invite her to the MDR meeting. After telling Case Manager that her attorney would talk to him, Mother hung up on him. Case Manager contacted Mother again about one week later. Mother again hung up on Case Manager, after she repeated that her attorney would talk to him. Mother's attorney did not contact Case Manager. DCPS made no further attempts to ensure that Mother or her representative attended the MDR meeting. Testimony of Case Manager. I found Case Manager to be a credible witness.

20. Mother testified that she was not made aware of 45-day suspension and that she was not told why Student was suspended. She testified that Case Manager telephoned her to give her notice that the MDR meeting would be held the following day, that she told Case Manager that she would not go to the meeting without her lawyer and that she would call Case

Manager back. However, she also acknowledged that Case Manager contacted her twice – in telephone calls about one week apart – about the MDR meeting, and that she made no effort to contact City High School between those calls. Testimony of Mother. I do not find Mother’s testimony, that she was not made aware of the 45-day suspension or that she was not provided timely notice of the MDR meeting, to be credible.

21. The MDR meeting was convened as scheduled on March 22, 2013. Case Manager, LEA SCHOOL REPRESENTATIVE and SCHOOL PSYCHOLOGIST attended the meeting. The MDR team concluded that Student’s March 12, 2013 conduct was not caused by and did not have a direct and substantial relationship to her disability and that the conduct was not a direct result of DCPS’ failure to implement Student’s IEP. The MDR team decided that Student’s March 12, 2013 behavior was not a manifestation of her disability. Social Worker communicated afterwards that she agreed with this MDR determination. DCPS’ March 26, 2013 MDR Form (Exhibit R-10) states erroneously that Social Worker attended the MDR meeting and that the MDR team determined affirmatively that Student’s behavior “IS” a manifestation of her disability. Testimony of Case Manager.

22. DCPS did not inform Mother of the outcome of the MDR meeting. Testimony of Case Manager.

23. No one from City High School or DCPS contacted Mother about an alternative placement for Student during her suspension or about providing a take-home packets of school work. Student stayed at home and did not receive educational services during this suspension. Testimony of Mother.

24. The City High School Dean of Students informed Mother that Student could return to school on April 22, 2013. Testimony of Mother. Student has returned to classes at City

High School. Student was out of school, due to the suspension, from March 14 through April 19, 2013. Testimony of Student. During this time period, school was closed from April 1 through 5, 2013 for spring break. There was no school for students on April 15, 2013 (Professional Development Day) and April 16, 2013 (Emancipation Day). IHO Notice of DCPS Calendar. I find that Student actually missed 17 days of school due to the March 12, 2013 incident suspension.

25. Non-Public School serves exclusively special education students at its suburban Maryland facilities. Approximately 75 students are enrolled in the high school program. Students at Non-Public School have no in-school interaction with non-disabled peers. Testimony of Admissions Coordinator.

26. Classes at Non-Public School have a maximum of 12 students, taught by two adults. All teachers are dual-certified in special education and the subject content area. The school follows DCPS curriculum requirements for students from the District. There are approximately 7 therapists on school staff. The school provides individual counseling, group therapy, SL and Occupational Therapy (“OT”) services. Testimony of Admissions Coordinator.

27. Non-Public School holds a current Certificate of Approval (“COA”) issued by the D.C. Office of the State Superintendent of Education (“OSSE”) to nonpublic schools and programs that meet federal and state standards. Non-Public School’s tuition cost is approximately \$40,000 per year. Testimony of Admissions Coordinator.

28. Student has visited Non-Public School and has been accepted for admission for the current school year. Testimony of Admissions Coordinator. Student liked Non-Public School because she found it provided the same setting as Private School, which she attended for 7th and 8th grades. Testimony of Student.

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. *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). Under District of Columbia regulations, in reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of her disability. *See* DCMR tit. 5-B § 2510.16.

ANALYSIS

1. Did DCPS deny Student a FAPE by suspending her for more than 10 school days during the 2012-2013 School Year, without providing an Alternative Interim Educational Placement?

The IDEA requires that when a child with a disability is removed from her current educational placement for more than 10 consecutive school days for violation of a code of student conduct, the child must continue to receive educational services, so as to enable her to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in her IEP. *See* 34 CFR § 300.530(d). The Act permits children with disabilities to be removed from their current educational placement for not more than 10 consecutive school days at a time. Additional removals of 10 consecutive school days or less, in the same school year, would be permissible, provided any removal does not constitute "a change in placement." *See* Assistance to States for the Education of Children with

Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46714 (August 14, 2006). A change in placement occurs if,

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 CFR § 300.536(a).

The evidence at the due process hearing establishes that Student was suspended from City High School, in a series of short-term removals, not consecutive, for a total of 13 days prior to the March 12, 2013 disciplinary incident. The nature of Student's behavior was identified for only two of the short-term removals. Mother and Student both testified that they did not remember what the suspensions were about. I find that it was not shown that the series of short-term suspensions constituted a "change in placement," although they totaled more than 10 school days, because it was not established that Student's behavior was substantially similar in these incidents. Therefore, the series of short-term suspensions did not trigger a requirement for DCPS to provide alternative interim services under 34 CFR § 300.530(d).

After the March 12, 2013 incident, Student was ordered suspended for 45 days, from March 14, 2013 to May 28, 2013. (The suspension was curtailed after 17 school days.). Because this suspension was for more than 10 consecutive school days, DCPS was required to continue to provide Student the Specialized Instruction and related services specified in her October 18, 2012 IEP. Petitioner's evidence establishes that DCPS did not provide Student any

educational services during this 17 school day suspension. I find, therefore, that DCPS denied Student a FAPE by failing to provide her educational services for this 17-day period.

2. Did DCPS deny Student a FAPE by convening the March 22, 2013 Manifestation Determination Review meeting at a time when Petitioner was not available to attend?

The IDEA mandates 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 child's IEP team, including the child's parent, must review all relevant information in the child's file, to determine if the child's conduct was a manifestation of the child's disability. *See* 34 CFR § 300.530(e). For all IEP team meetings, the IDEA expressly requires that the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a). A meeting may be conducted without a parent in attendance only if the education agency is unable to convince the parent that she should attend. In such a case, the education agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 CFR § 300.322(d). The IDEA's requirement that DCPS ensure the parent's participation is no different for an MDR meeting than for other IEP team meetings. *See Fitzgerald v. Fairfax*

County School Bd. 556 F.Supp.2d 543, 554 (E.D.Va.2008) (Nothing in the text of 20 U.S.C. § 1415 suggests an intent by Congress to change the manner in which the IEP team's members are selected when they are to conduct an MDR hearing rather than a review of the child's IEP.)

In the present case, Mother contends that DCPS did not meet its obligation to ensure her attendance at the March 22, 2013 MDR IEP meeting. I agree. DCPS' attempt to ensure Mother's attendance was limited to two telephone calls by Case Manager to Mother to invite her to participate. Both times, Mother told Case Manager that her attorney would call and hung up on him. Whatever conclusions may be drawn about Mother's behavior, the IDEA did not permit DCPS to so readily give up its efforts to convince Mother to attend. DCPS did not send Mother written notice of the meeting date, did not visit her home or place of employment and did not contact her attorney. I find, therefore, that holding the March 22, 2013 MDR meeting without Mother's participation was a procedural violation of the IDEA.

Not every procedural violation of the IDEA results in a denial of FAPE. Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *citing C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (per curiam). *C.f., e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005) (noting that procedural violations that seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE.) In this case, Student's IEP team determined at the MDR meeting that Student's March 12, 2013 misconduct was not a manifestation of her disability without obtaining Mother's input or information. This seriously infringed upon Mother's opportunity to participate in the MDR determination and was, consequently, a denial of FAPE. *See School Bd. of the City of*

Norfolk v. Brown, 769 F.Supp.2d 928, 948-949 (E.D.Va.2010) (Parent was denied parental participation in MDR meeting and no meaningful discussion took place.)

3. Did DCPS deny Student a FAPE by making an incorrect determination that Student's behavior which resulted in the March 2013 suspension was not a manifestation of her disability?

As noted in the above discussion of the burden of proof, on an MDR appeal, the DCMR places the burden on DCPS to demonstrate that Student's conduct was not a manifestation of her disability. If I were to find that DCPS had not met that burden in this case,² my "authority" as hearing officer would be limited to returning Student to the placement from which she was removed. *See* 34 CFR § 300.532(b). DCPS voluntarily returned Student to that placement, at City High School, effective April 22, 2013. Therefore I dismiss this issue for failure to state a claim for which the Hearing Officer may grant relief.

4. Is DCPS' October 18, 2012 IEP inappropriate for Student because it does not meet her requirement for full-time, therapeutic, special education programming in an outside of general education setting?

Independent of her school discipline claims discussed above, Petitioner contends that Student is entitled to public funding for a private placement, because DCPS' October 18, 2012 IEP does meet Student's alleged requirement for full-time specialized instruction, in an outside

² The evidence at the hearing showed that Student was allegedly part of a group of female students who, on March 12, 2013 assaulted another female student who was walking home from school. The incident occurred after school hours and off school grounds. Nothing in the hearing evidence casts doubt on the IEP team's determination that Student's behavior was not a manifestation of her Specific Learning Disability or her Emotional, Social and Behavioral Development area of concern. In closing argument, Petitioner's counsel argued that under the DCMR, a child's code of conduct violation must be considered a manifestation of the child's disability if DCPS failed to implement the child's IEP. This is a misreading of the DCMR. The applicable part provides that the conduct must be determined to be a manifestation, if the conduct was caused by, or had a direct and substantial relationship to the child's disability or "was the direct result of DCPS' failure to implement the IEP." *See* DCMR tit. 5-B, §§ 2510.9, 2510.10. Although there was evidence in this case that City High School did not provide Student all of the hours of Specialized Instruction required by her October 18, 2012 IEP, there was no evidence that Student's conduct on March 12, 2013 was the direct result of this failure to implement the IEP.

of general education, therapeutic, setting. The IDEA ensures that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). If no suitable public school is available to fulfill the child’s IEP needs, DCPS must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Id.* (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

“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)). Petitioner has not alleged that DCPS failed to comply with the IDEA’s procedural requirements when it developed the October 18, 2012 IEP. Therefore, I proceed directly to the second prong of the inquiry.

DCPS’ witnesses, Case Manager, Special Education Coordinator and Social Worker all testified that the October 18, 2012 IEP was appropriate for Student. Case Manager testified that the IEP was based on current math, reading and writing assessments as well as the Student’s

transcript, progress reports and work samples. At the time the IEP was being developed, Case Manager had communicated with Student's teachers. Student seemed to be a "well-adjusted young lady" and able to control her emotions in class and focus on her work. Social Worker testified that at the time the IEP was drafted, Student's behavior had improved dramatically over prior school terms. Special Education Coordinator testified that earlier in the school year, Student had been doing "very, very well." Mother also testified that for the first couple of months of the current school year, Student was doing "OK" and that she thought the October 18, 2012 IEP was "somewhat appropriate."

Petitioner's evidence that the October 18, 2012 IEP was inappropriate was limited to the opinion of Educational Advocate, who testified that the October 18, 2012 IEP was inappropriate largely because the IEP did not increase the Specialized Instruction services from what Student had received in the 2011-2012 school year and because the IEP did not sufficiently identify Student's emotional-behavioral needs. I accord little weight to this aspect of Educational Advocate's testimony.³ This witness did not observe Student in the school setting and did not interview any of Student's teachers or related service providers. She represented in her testimony that Student had not been evaluated since 2007, even though Petitioner's disclosures included an independent educational evaluation (including the WJ-III achievement tests), an independent vocational assessment, an independent Speech and Language assessment and an independent FBA, all conducted in spring 2011. Educational Advocate also ignored the Brigance assessments and the Ohio Youth Scale assessments of Student conducted by DCPS at

³ At the hearing, counsel for DCPS objected to this witness' being qualified as an expert because she is an employee of Petitioner's legal counsel. As with DCPS' witnesses, this expert's employment status bears on the weight of her evidence, not on her qualification as an expert. *See, e.g., Den Norske Bank AS v. First Nat. Bank of Boston*, 75 F.3d 49, 58 (1st Cir. 1996) (Experts' employment by party may bear heavily on witness credibility, bias, and the weight of the evidence.)

the beginning of the 2012-2013 school year. Further, Educational Advocate's testimony focused on Student's poor grades and excessive absences shown on Student's January 25, 2013 progress report. However, the appropriateness of an IEP is reviewed prospectively – not in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (Measure and adequacy of an IEP can only be determined as of the time it is offered to the student.)

REMEDY

In this decision, I have found that Student was denied a FAPE because DCPS did not continue to provide her special education and other educational services for the 17 school day period she was suspended after the March 12, 2013 disciplinary incident. I have also found that DCPS' inadequate efforts to ensure Mother's participation in the March 22, 2013 MDR meeting resulted in denial of FAPE. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those services that will compensate the student for that denial. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005); *see also Stanton ex rel. K.T. v. District of Columbia*, 680 F.Supp.2d 201, 207 (D.D.C.2010); *Phillips ex rel. T.P. v. District of Columbia*, 736 F.Supp.2d 240, 247 (D.D.C.2010). *Walker v. District of Columbia*, 786 F.Supp.2d 232, 239 (D.D.C.2011).

Petitioner's expert, Educational Advocate made compensatory education recommendations in her Compensatory Education Plan (Exhibit P-17). I find those recommendations unpersuasive because they are premised, largely, on alleged IDEA violations which were not proven or were not at issue in this case, including that Student's 2011-2012 and 2012-2013 IEPs were inappropriate and that DCPS failed to properly evaluate Student. At the

hearing, Educational Advocate was asked for her recommendation as to compensation for the days that Student missed because of the March 2013 suspension. She opined, based on a study she cited, that 16 hours of tutoring would be appropriate for 30 days of missed education. Crediting that unrebutted testimony, I find that an appropriate equitable remedy to compensate Student for 17 days of missed education would be 10 hours of 1:1 tutoring. As to DCPS' not ensuring Mother's attendance at the March 22, 2013 MDR meeting, I find that no additional compensatory education is warranted because no increased educational deficit was shown from this IDEA violation. *See Reid, supra* at 241. (Compensatory education involves relief crafted to remedy what might be termed an educational deficit created by an educational agency's failure to provide a FAPE.)

Lastly, in her request for relief in the due process complaint, Petitioner requested that DCPS be ordered to develop an appropriate IEP for Student. The evidence at the due process hearing established that Student has not progressed under her October 18, 2012 IEP and, in fact, DCPS' witnesses testified to an increase in Student's problem behaviors since the IEP was developed. Accordingly, I find it appropriate to order DCPS to convene Student's IEP team to revise her IEP, as appropriate, to address her lack of expected progress.

ORDER

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

1. DCPS shall provide Student, during the current school year, 10 hours of 1:1 academic tutoring at City High School or another location as may be agreed by the parties, as compensatory education for DCPS' failure to provide special education and related services to Student during her suspension from school after the March 12, 2013 disciplinary incident. The tutoring may be provided in multiple sessions and in those academic subject areas as may be

reasonably designed to enable Student to benefit from the services;

2. Within 20 school days of entry of this order, DCPS shall convene Student's IEP team to review, and, as appropriate, revise her IEP to address her lack of expected progress under the October 18, 2012 IEP;

3. Petitioner's appeal of the March 22, 2013 Manifestation Determination Review determination that Student's behavior was not a manifestation of her disability is dismissed; and

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

Date: May 3, 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).