

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

Student Hearing Office  
810 First Street, N.E.  
Washington, DC 20002

OSSE  
Student Hearing Office  
October 7, 2013

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PARENT, on behalf of  
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

This is a case involving a 13 year old student who is currently attending School A on a stay-put basis. He has been determined to be eligible for services as a student with multiple disabilities.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 22, 2013 in regard to the Student. This Complaint contains allegations which must be characterized as expedited claims pursuant to 34 CFR Sect. 300.532. This Hearing Officer was appointed to preside over this case on August 23, 2013.

A response was filed by Respondent denying this contention on September 10, 2013. This response was untimely pursuant to the regulations. A resolution meeting was held on September 3, 2013. This meeting was not timely pursuant to the applicable regulations.

On September 4, 2013, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on September 9, 2013, summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date followed on September 20, 2013. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-18; Respondent entered into evidence exhibits 1-14. Petitioner presented as witnesses: Petitioner; Witness A, Psychologist (expert in clinical and school psychology); Witness B, parent; Witness C, Educational Advocate. Respondent presented as witnesses: Witness D, Principal, School A; Witness E, Special Education Coordinator, School E.

### **JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **BACKGROUND**

The Complaint involves claims implicating 34 CFR 300.507(a) and 34 CFR Sect. 300.532. The Complaint alleges that DCPS failed to comply with disciplinary procedures when the Student was constructively expelled from School A. The Complaint also alleges that DCPS failed to provide the Student with an appropriate placement for the 2013-2014 school year.

### **ISSUES**

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Did DCPS “constructively” expel the Student from School A prior to the start of the 2013-2014 school year? If so, was DCPS required to comply with disciplinary rules in this connection, including providing the Student a manifestation determination review, an alternative placement, and a Functional Behavior Assessment and Behavior Intervention Plan? If so, did DCPS deny the Student a FAPE by failing to provide such disciplinary protections?

2. Did DCPS fail to provide the Student with an appropriate location of services for the 2013-2014 school year? If so, did DCPS deny the Student a FAPE?

### **FINDINGS OF FACT**

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

1. The Student is a 13 year old who is eligible for services as a student with multiple disabilities. (P-8-1)

2. Among the Student’s emotional, social and behavioral issues are a lack of self-control, a lack of on-task behaviors, a failure to accept responsibility, and a lack of self-awareness in the classroom. (P-8-5)

3. When the Student is redirected, he often becomes defensive and engages in power struggles. He is defensive when getting negative feedback. (P-8-5; Testimony of Witness A)

4. The Student frequently displays disrespectful behavior, especially to staff, including angry, inappropriate responses to redirection, disregard for directions, refusal to follow directions. (P-8-5)

5. The Student is hyperactive and inattentive. The Student has difficulty modulating his emotions due to his Attention Deficit Hyperactivity Disorder (ADHD). (Testimony of Witness A)
6. The Student will engage in outbursts on minimal provocation. (Testimony of Witness A)
7. The Student lacks basic resources to achieve his goals in terms of attendance and tardiness. (Testimony of Witness A)
8. The Student tries to escape when the work is too hard for him. (Testimony of Witness A)
9. The Student has been diagnosed with a specific learning disability, ADHD Combined Type, Learning Disorder NOS. (P-10-12)
10. The Student lacks executive functioning capability and has difficulty planning ahead. (Testimony of Witness A)
11. The Student has a problem with tardiness and absences. (P-8-5)
12. The Student's difficulties in school, including his refusal to follow commands, are related to his ADHD. (Testimony of Witness A)
13. The Student exhibits disrespect in part because he wants to cover up his difficulties. (Testimony of Witness A)
14. The Student has difficulty getting his work started and difficulty completing his assignments. (Testimony of Witness A)
15. It is "not a good idea" for the Student to use public transportation. (Testimony of Witness D)

16. The Student does not want to ride on a yellow school bus. This has a negative connotation for him. (Testimony of Witness A)
17. The Student dislikes reading, social studies and history but likes math. (P-10-2)
18. The Student is able to complete basic math, including single digit addition, subtraction, multiplication and division. He is able to identify the first step in multi-step equations. He has difficulty recognizing fraction lines. (P-8-2)
19. The Student reads independently at about a fourth grade level, with literal comprehension stronger than inferential abilities. He has a low level vocabulary and he struggles with common sight words. (P-8-3)
20. The Student is able to construct simple sentences that follow the conventions of standard written English. He follows rules of capitalization and punctuation. (P-8-4)
21. The Student needs work in regard to verb-tense agreement, spelling of common words, elaboration beyond single sentence replies, and supporting sentences with evidence. He has difficulty with multi-paragraph fictional and non-fictional pieces at grade level. (P-8-4)
22. The Student did not have a history of absences, tardiness or suspensions as of July, 2011. (P-10-4)
23. WISC-IV testing conducted on May 17, 2011 revealed a score of 83, which is low average, at the 13<sup>th</sup> percentile. (P-10-5)
24. WIAT-III testing conducted on July 6, 2011 revealed a standard score of 77 in oral language (6<sup>th</sup> percentile), 79 in listening comprehension (2.7 grade level equivalent), 57 in broad reading (.2 percentile rank), and 52 in written expression (.1 percentile rank). In math, the standard score was 78 (7<sup>th</sup> percentile rank). In math fluency, the standard score was 64 (1<sup>st</sup> percentile rank). (P-10-7-8)

25. BASC-2 testing conducted on July 6, 2011 revealed scores in the clinically significant range according to his teacher in regard to externalizing problems, hyperactivity, aggression, somatization, and school problems. The Student scored in the at-risk range in conduct problems, internalizing problems, attention problems, behavioral symptoms, withdrawal, adaptive skills, study skills, and functional communication. (P-10-8-9)

26. ADHD Testing on July 6, 2011 revealed that the Student scored in the high range in hyperactivity according to his teacher. (P-10-11)

27. Projective testing on July 6, 2011 revealed drawings that were “grotesque” and inappropriate for his age. (P-10-11)

28. An FBA was created for the Student on September 28, 2011. The FBA indicates that the Student engages in off-task behaviors to avoid participating in tasks/activities that he does not enjoy. It indicates that he is off-task when there are warm-up activities, when he does not comprehend the material, when there is a moderate to high writing component, a moderate to high decoding component, if he is partnered with friends, if he is partnered with someone that he is unfamiliar with, and in small group activities in math and reading workshop. It indicates that the function of his behaviors are to escape academic difficulty, to obtain power or control, to escape responsibility, and to escape embarrassment. (P-11-3-6)

29. The FBA seeks to address these issues by clear expectations, modified assignments, a neutral tone of voice, providing options emphasizing pro-social choices, group counseling, intervention with immediate consequence, and a token economy system. (P-11-8)

30. An HOD found that the Student’s current DCPS middle school (School D) was unable to provide the Student with 15 hours of pull-out resource room services based on a finding that the school offered either a resource room

setting with ID students or a co-taught setting in general education. IHO Massey then ordered the Student to receive, inter alia, placement at a middle school that could provide the Student with 15 hours of pullout instruction per week. (P-12-9-11)

31. An IEP was created for the Student by DCPS on February 1, 2012. This IEP identifies issues in math, reading, written expression and emotional, social and behavioral development, and motor skills/physical development. In regard to emotional, social and behavioral development, the Student was considered off-task, defensive, distracted by peers, and apt to engage in a power struggle. He was considered to be hyperactive. He needed redirection, counseling, and preferential seating. (P-9-2-5)

32. The IEP recommended reading, written expression and mathematics instruction for 5 hours per week each outside general education. The IEP also recommended behavioral support services for 120 minutes per month outside of general education, with 60 minutes of occupational therapy per month. The IEP also recommends access to a computer, word processor and/or laptop, a spell-checker, open book quizzes and tests, less “crowded” worksheets, modified projects, access to a list of commonly misspelled words, hand manipulatives, graphic organizers, and fill-in the blank notes. He is recommended for a daily checklist for events and behaviors. (P-9-8)

33. The Student started the 2012-2013 school year at School B and then transferred to School C. (Testimony of Petitioner)

34. The Student took the Metro bus to school for 2012-2013. (Testimony of Petitioner)

35. An IEP was created for the Student on November 16, 2012. This IEP was created by the LEA associated with School C. (P-8-1)

36. The IEP identified issues in math, reading, written expression, emotional, social, and behavioral issues, and motor skills/physical development. The IEP indicated that the Student has been tardy to school almost daily and absent one to two days a week on average, missing critical learning time. The Student's emotional, social and behavioral issues also consisted of a lack of self-control, a lack of on-task behaviors, a failure to accept responsibility, and a lack of self-awareness in the classroom. It was noted that when he is redirected, he often becomes defensive and engages in power struggles. It was also noted that the Student frequently displays disrespectful behavior, especially to staff, including angry, inappropriate responses to redirection, disregard for directions, and a refusal to follow directions. (P-8-5)

37. The IEP recommended reading, written expression and mathematics instruction for 5 hours per week each outside general education. The IEP also recommended behavioral support services for 120 minutes per month outside of general education, with 60 minutes of occupational therapy per month. The IEP also recommends access to a computer, word processor and/or laptop, a spell-checker, open book quizzes and tests, less "crowded" worksheets, modified projects, access to a list of commonly misspelled words, hand manipulatives, graphic organizers, and fill-in the blank notes. He is recommended for a daily checklist for events and behaviors. Repetition of directions, reading of test questions, preferential seating, small group testing, extended time on subtests, and breaks between subtests are recommended. (P-8-8-10)

38. A second HOD by IHO Kimm Massey on November 24, 2012 ordered that the Student be offered three locations of services to implement the IEP. (P-13-10)

39. DCPS offered three placement options to the Student on December 5, 2012. (P-7-2)

40. The parent opted to send the Student to School A. (P-7-2)

41. The Student started at School A in January, 2013. (Testimony of Petitioner)

42. School A's protocol for "out of boundary" students is that, if there are 10 or more absences or 20 or more tardies, the student can be asked to go to the neighborhood school.

(Testimony of Witness D)

43. After the Student had difficulty with tardiness, DCPS offered the Student a school bus but this offer was declined. (Testimony of Witness D)

44. The Student was marked with unexcused absences during 2012-2013 for 59 days. (R-1-1-3)

45. The Student was marked tardy during 2012-2013 for 20 days. (R-1-1-3)

46. The Student was suspended for two days on June 19-20, 2013, for four days on May 21-24, 2013, and for two days on September 11-12, 2013. There were also numerous removals and short-term suspensions. (R-3-1-6)

47. At School A, the Student's grades ranged from D to F in academic subjects, with F in mathematics, science, and world history. (R-4-1)

48. On July 23, 2013, the Student was told that he would be ineligible for enrollment at School A because of poor academic performance, frequent absences and late arrivals, and repeated incidences of poor behavior/gross misconduct. (R-7-1)

49. The Student has been attending School A for the current school year on a stay-put basis. The Student currently receives 15-17 hours of support in the general education setting. The school uses the last DCPS IEP. (Testimony of Witness D; P-4-1)

50. There was a meeting between the parent and School A on the first week of school where the principal at School A indicated that School D was an option for the Student. This meeting was after the filing of the Complaint. This was during the week of August 26. At the

meeting were the principal, the SEC at School A, and the Student's attorney. Out of boundary protocol was discussed. At this point, the principal did not know that School D had been deemed inappropriate for the Student. (Testimony of Petitioner, Witness D; P-4-1)

51. On September 3, 2013, DCPS offered the Student a placement at School E. (R-10-1)

52. School E offers self-contained classes, inclusion classes, pullout classes, and behavioral support classroom. (Testimony of Witness E)

53. The maximum amount of children in the general education classroom at School E is 25. (Testimony of Witness E)

54. The behavioral support classrooms at School E are taught with 10 to 12 students, with a teacher and a paraprofessional. (Testimony of Witness E)

55. At School E, the Student would be in a "mixed" setting, with inclusion for part of the day, with 15 hours of pull-out. The pull-out has up to 12 students. This would be following the School C IEP. In the inclusion classes, there are up to 30 students (usually about 25) with up to 10 special education students. (Testimony of Witness E)

56. School E is a large school, a combined middle school and high school. (Testimony of Witness C)

57. I found all the witnesses credible in this proceeding.

### **CONCLUSIONS OF LAW**

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The 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.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, 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; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

If a child with a disability who is removed from the child’s current placement for 10 consecutive school days, disciplinary protections apply. 34 CFR Sect. 300.530(b)(2); 34 CFR

Sect. 300.536. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability and if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR Sect. 300.530(d)

The District of Columbia also requires, pursuant to 5 D.C.M.R. Sect. 2510.12. that the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team first considers all relevant information, including evaluation and diagnostic and results, or other relevant information supplied by the parents of the child; (2) observations of the child; (3) the child's IEP and placement; and (4) any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel. The IEP team must also determine that, in relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

These provisions are premised on a removal from placement, or a “change in placement.” A change in placement does not necessarily result from a change in school setting. Aikens v.

District of Columbia, 2013 WL 3119303 (D.D.C. 2013)(no change in placement where student moved from Transition Academy to Ballou Senior High School between school years). Rather, a change in placement results from "a fundamental change in, or elimination of, a basic element of the educational program." Lunceford v. District of Columbia, 745 F.2d 1577, 1582 (D.C. Cir. 1984). In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) called the issue of determining change of educational placement a "very fact-specific inquiry." Letter to Fisher, 21 IDELR 992 (OSEP 1994). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program."

Petitioner contends that the proposed change from School A to School D constitutes a change in placement that triggers the disciplinary protections of the IDEA and the DCMR. However, Petitioner has presented little testimony or evidence to indicate that the proposed change in school setting from School A to School D was a "change in placement." Instead, Petitioner points to an HOD issued by \_\_\_\_\_, which found that School D could not implement the Student's IEP in or about January, 2012. However, IHO \_\_\_\_\_ is not binding on this hearing officer. Moreover, \_\_\_\_\_ HOD does not establish that School D would be inappropriate for the Student for the 2013-2014 school year. Rather, \_\_\_\_\_ found that School D could not provide the pull-out classes that were then recommended on the Student's IEP in January, 2012. In fact, \_\_\_\_\_ is written in such a way that suggests that pull-out instruction might well change at School D in the future. \_\_\_\_\_ indicated, pointing to testimony of the Special Education Coordinator, that "(a)t present, the only pullout services offered are for a History class." (emphasis added) As a result, Petitioner has not met his burden of showing that Respondent proposed a change of

placement when it proposed changing the Student's location of services to School D at or about the beginning of the 2013-2014 school year. Accordingly, I find that the Student was not entitled to the disciplinary protections of the IDEA and the DCMR when Respondent proposed changing the Student's location of services from School A to School D.

It is noted that Respondent quickly offered the Student another location of services, School E, near the start of the 2013-2014 school year. Petitioner did not show that School E would have constituted a change in placement for this Student. On the contrary, the record indicates that School E would be able to provide the services listed in the IEP. In particular, the Student would have received his pull-out services at School D. In his closing argument, Petitioner points out that the testimony from Witness E indicated that School E would provide the Student with some "inclusion" classes rather than all general education classes. However, the record does not establish that any such difference "substantially or materially alters" the placement or fundamentally changes or eliminates a basic element of the educational program.<sup>1</sup> There is nothing in the record to establish that the actual instruction provided to the Student, or the Student's access to that instruction, would be different at School D.

Petitioner's second argument is that an inappropriate location of services was offered to the Student for the 2013-2014 school year. Again, Petitioner relies on HOD, which found that School D was unable to implement the Student's IEP in or about January, 2012.

"Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented.

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<sup>1</sup> These facts are similar to the facts before the court in Aikens, where the student's school setting was changed to a school housed in a different kind of building, with different crisis intervention services, and different amounts of classroom programming. Still, Judge Collyer upheld the IHO's ruling that there was no change of placement. 2013 WL 3119303 at \*4-\*6.

Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

Petitioner's argument here is again premised on HOD. As noted previously, HOD is not binding on another IHO. Moreover, I cannot find that School D is unable to implement the Student's IEP merely because of a ruling of another IHO that relates to a separate school year. There is no probative evidence or testimony in this record to establish that School D could not implement the Student's IEP for 2013-2014 or was otherwise inappropriate for the Student for 2013-2014. Additionally, I must again point out that Respondent quickly provided Petitioner with an alternate location of services, School E, which can provide the Student with the pull-out services that are outlined in the IEP and other appropriate interventions. While School E would have provided the Student with some inclusion classes, there is nothing in the record to establish that such classes would result in any FAPE deprivation to the Student.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, this matter is hereby dismissed with prejudice.

Dated: October 4, 2013

*Michael Lazan*  
Impartial 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 USC §1415(i).

Date: October 4, 2013

*Michael Lazan*  
Impartial Hearing Officer