

District of Columbia
 Office of the State Superintendent of Education
 Office of Review and Compliance
 Student Hearing Office
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OSSE
 Student Hearing Office
 June 03, 2013

Confidential

Parent on behalf of the Student ¹ , Petitioners, v. District of Columbia Public Schools (“DCPS”) And Public Charter School (“School A”) Respondent. Case #	HEARING OFFICER’S DETERMINATION Hearing Date: May 16, 2013 <u>Representatives:</u> Counsel for Petitioner: Shaw Ullman, Esq. et al ² University Legal Services 220 I Street, NE Washington, DC. 20002 Counsel for DCPS: Tanya Joan Chor, Esq. Assistant Attorney General 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

² Emily B. Read Esq., Julia Graff, Esq., Todd Rubin, Esq. from The Judge David L. Bazelon Center for Mental Health Law 1101 15th St. NW, Suite 1212 Washington, DC 20005, Laurel Pyke Malson, Esq. Jennifer G. Knight, Esq., Luke van Houweling; Esq., Adam R. Teitelbaum, Esq. Crowell & Moring L.L.P.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on May 16, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ in _____ grade at a District of Columbia Public Charter School (“School A”) where he has attended since September 2012 until School A suspended him on April 11, 2013, and announced its intention to expel him. DCPS serves as the Local Educational Agency (“LEA”) for School A for IDEA matters.

The student resides with his parent in the District of Columbia and has been determined to be a child with a disability under IDEA with a disability classification of emotional disability (“ED”).

The student has been diagnosed with anxiety disorder NOS (not otherwise specified), depression NOS, attention deficit hyperactivity disorder (“ADHD”), and oppositional defiant disorder (ODD). According to the student’s April 2012 Woodcock-Johnson III assessment, his academic skills are within the high average range and his broad mathematic scores are superior. (Respondent’s Exhibit

The student’s individualized educational program (“IEP”) when the complaint was filed prescribed 3 hours per day of specialized instruction outside general education and 2 hours per month of behavioral support services outside general education. The student’s least restrictive environment (“LRE”) is an inclusion setting where he spends the school day in general education with non-disabled peers.

Since he began attending School A at the start of school year (“SY”) 2012-2013, the student has displayed behavioral difficulties including fighting and physical aggression toward peers that have resulted in disciplinary action by School A including suspensions.

On February 15, 2013, Petitioner formally requested that School A conduct a functional behavior assessment (“FBA”) and create a behavior intervention plan (“BIP”). School A indicated that a FBA and BIP had already been completed in January 2013. Petitioner asserts that the FBA and the BIP were untimely and inadequate because neither were developed in consultation with the student’s IEP team or the student as required by 34 C.F.R. § 300.530(f)(1).

On April 11, 2013, the student engaged in a physical assault on another student in the hallway of the school. Following this incident School A sent the student’s parent a notice of the school’s intent to expel the student for the April 11, 2013, incident. The student wrote an account of the incident in which he described being derided by the other student and became angry and grabbed

the student and threw him to the floor. The other student then got up and walked away.

On April 17, 2013, School A convened a MDR regarding the April 11, 2013, incident. The student's parent participated in the meeting along with her legal representatives. The team determined the student's behavior in assaulting the student on April 11, 2013, was not a manifestation of his disability. Following the April 17, 2013, MDR meeting School A moved forward with expelling the student.

On April 19, 2013, Petitioner filed the current complaint alleging, inter alia, that that MDR determination was inappropriate and that the team should have concluded the student's behavior was a manifestation of his disability and DCPS and School A did not timely conduct a FBA and BIP as is mandated after the school's determination that the student's behavior was a manifestation of his disability.

Petitioner seeks as relief: An order from the Hearing Officer directing DCPS to: (1) reinstate the student permanently as a student at School A; (2) Allow the student's independent consultant to assist respondents and the IEP team in developing and implementing a new IEP for the student including by completing a comprehensive FBA, helping to develop and implement an effective BIP, and training School A staff and Petitioner to implement the plan.

DCPS counsel filed a response to the complaint on April 29, 2013. DCPS denied all alleged denials of a FAPE to the student. DCPS asserted the following: The IEP team agreed to conduct a revised FBA/BIP. The school engaged in reevaluation of the student in November 2012 and DCPS made attempts in March 2013 to observe the student at school and conduct the FBA; however, the student was absent from school due to his hospitalization. Observations were attempted on April 8, 2013. However, on that day the student was released from school to his mother because of disruptive behaviors.

DCPS asserts that the April 17, 2013, MDR determination was proper and as of April 17, 2013, School A decided that it was proceeding with an expulsion hearing for the student. DCPS is of the opinion that since April 2013 the student may require a more restrictive IEP and potentially another location of service.

On April 29, 2013, and May 7, 2013, the Hearing Officer convened a pre-hearing conference. On May 8, 2013, the Hearing Officer issued a pre-hearing conference order in which among other things the issues to be adjudicated were certified.

The resolution meeting was held May 9, 2013. The resolution meeting was not successful in resolving the disputes. The issue(s) in this case are subject to expedited hearing that was held within twenty (20) calendar days of the date the complaint was filed. A decision must be rendered within ten (10) school days of the date of the hearing. Thus, the decision is due by May 31, 2013.

THE ISSUES ADJUDICATED:

1. Whether DCPS/School A inappropriately determined at the April 17, 2013, MDR that the

student's behavior that occurred April 11, 2013, and was the basis for the proposed disciplinary action, was not a manifestation of the disability.

2. Whether DCPS/School A violated 34 C.F.R. § 300.530(f) and denied the student a free and appropriate public education ("FAPE") by failing to timely conduct a FBA and BIP after the determination that the student's behavior was a manifestation of his disability following the December 14, 2012, MDR.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-68 and Respondent's Exhibit 1-65) that were all admitted into the record and are listed in Appendix A. The witnesses are listed in Appendix B.

FINDINGS OF FACT:³

1. The student is age _____ in _____ grade at a District of Columbia Public Charter School, School A, where he has attended since September 2012 until School A suspended him on April 11, 2013, and announced its intention to expel him. (Petitioner's Exhibit 55)
2. The student resides with his parent in the District of Columbia and has been determined to be a child with a disability under IDEA with a disability classification of ED. (Respondent's Exhibit 27-2)
3. The student has been diagnosed with anxiety disorder NOS, depression NOS, ADHD and ODD. (Petitioner's Exhibit 2-2)
4. According to the student's April 2012 Woodcock-Johnson III assessment, his academic skills are within the high average range and his broad mathematic scores are superior. (Respondent's Exhibit 23-2)
5. The student's IEP when the complaint was filed prescribed 3 hours per day of specialized instruction outside general education and 2 hours per month of behavioral support services outside general education. (Petitioner's Exhibit 23-6)
6. The student's LRE is an inclusion setting where he spends the school day in general education with non-disabled peers. (Petitioner's Exhibit 23-7)
7. Since he began attending School A at the start of SY 2012-2013, the student has displayed behavioral difficulties including fighting and physical aggression toward peers that have resulted in disciplinary action by School A including suspension from school.

³ The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

(Petitioner's Exhibits 27-1, 28-1, 29-1)

8. On October 4, 2012, School A held a MDR to consider whether the student's behavior of fighting on September 26, 2012, was a manifestation of his disability. The MDR team determined the behavior was a manifestation of his disability and was not the result of School A's failure to implement the student's IEP. (Petitioner's Exhibit 30-1)
9. The student was suspended again on December 4, 2012, for "arranging for others to assault a student." A MDR was held for that incident and the team determined the behavior was a manifestation of his disability and was not the result of School A's failure to implement the student's IEP. (Petitioner's Exhibits 35-1, 36-1)
10. On February 21, 2013, School A for the first time provided the parent, through counsel, with an FBA and a BIP dated January 7, 2013. (Parent's testimony, Petitioner's Exhibit 44-1)
11. School A did not consult with the IEP team, including the parent or the student in developing the FBA and BIP. (Parent's testimony)
12. The student continued to experience behavior problems following the creation of the BIP, and yet no changes were made to the BIP. (Petitioner's Exhibits 45; 47; 51; 52; 55)
13. On March 21, 2013, School A held another MDR for an incident that occurred on March 20, 2013 for the student's failure to comply with school rules and staff instructions. The student's behavior was determined by the team to be a manifestation of his disability and not the result of School A's failure to implement the student's IEP. (Petitioner's Exhibit 52-1)
14. On April 11, 2013, the student engaged in a physical assault on another student in the hallway of the school. Following this incident School A sent the student's parent a notice of the school's intent to expel the student for this April 11, 2013, incident. (Petitioner's Exhibit 55)
15. The student wrote an account of the incident in which he described being derided by the other student and becoming angry and grabbing the student and throwing him to the floor. The other student then got up and walked away. (Petitioner's Exhibit 66)
16. On April 17, 2013, School A convened a MDR regarding the April 11, 2013, incident. The student's parent participated in the meeting along with her legal representatives. The team determined the student's behavior in assaulting the student on April 11, 2013, was not a manifestation of his disability. In addition to the parent, the participants included the student, the student's regular education teacher, his special education teacher, two DCPS psychologists, the school social worker, the parent's counsel, an independent psychologist participated by telephone, and the school's vice principal for discipline. The team members were split on whether the student's behavior

was a manifestation of this disability and the decision came down to the vice principal making the final decision that the student's behavior was not a manifestation of his disability. (Parent's testimony, Petitioner's Exhibits 58-2, 59-1)

17. An in-school video monitor captured video of the incident showing the student grabbing and throwing the other student and the actions of a number of students in the hallway in the moments prior and after the incident occurred. The video was available to and viewed by the MDR team when it made its determination. (Parent's testimony, Respondent's Exhibit 55)
18. On the afternoon of April 11, 2013, the student felt teased by a student with whom he had had conflict earlier that day. Unable to control his emotions, the student "grabbed [the other student and] threw him" against a wall. (Parent's testimony, Petitioner's Exhibits 66; Respondent's Exhibit 55)
19. At the meeting the parent presented the team with a letter from the student's psychiatrist explaining that as a result of recent changes to his medication. The letter stated that student "may continue to have difficulties managing stress, teasing by peers, and other triggers for behavioral problems." (Petitioner's Exhibit 57).
20. Following the April 17, 2013, MDR meeting School A moved forward with expelling the student. (Respondent's Exhibit 56)
21. A psychologist who interviewed the student and reviewed his records gave the following assessment of the student: the student's has a hostility bias, which means that he misperceives innocent actions as hostile and reacts according to that misperception. The student also has mood lability, which means he can go from being calm to upset in a short period of time. The student's disability manifests itself, inter alia, through peer aggression and hostility to authority figures. (Parent's testimony, Dr. s testimony⁴, Petitioner's Exhibit 2)
22. As he did during previous school years the student has struggled with peer conflict at School A. In response to the student's in school behaviors, School A staff continued to discipline the student for his behaviors rather than conduct the FBA and create the BIP and repeatedly called the student's parent to come to school to handle the student's behaviors at school. (Parent's testimony, Petitioner's Exhibits 32-1; 35-1; 38-1, 13-7; 17-2, 26-2, 5, 10, 13, 15; 27; 28; 29; 31; 32; 38; 45)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

⁴ This witness was designated an expert.

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS/School A inappropriately determined at the April 17, 2013, MDR that the student's behavior that occurred April 11, 2013, and was the basis for the proposed disciplinary action, was not a manifestation of the disability.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's conduct on April 11, 2013, that was the basis of the disciplinary action and the MDR held April 17, 2013, was a manifestation of his disability and the April 1, 2013, MDR determination is hereby reversed.

Petitioner presented credible expert testimony from Dr. _____ that the student has a hostility bias, which means that he misperceives innocent actions as hostile and reacts according to that misperception. The student can go from being calm to upset in a short period of time. The student's disability manifests itself, inter alia, through peer aggression and hostility to

⁵ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

authority figures.⁶ The student's own written statement further supports that he was responding with aggression to his annoyance at the behaviors of another student. These were clearly actions and behaviors that are reflected in student's medical profile and the types of behaviors that in previous incidents had been determined to be manifestations of his disability. DCPS and/or School A presented no testimony to refute the expert testimony, and the documentary evidence⁷ that supported a finding that the student's behavior on April 11, 2013, was a manifestation of his disability. Consequently, the Hearing Officer concludes that the April 17, 2013, MDR determination regarding the student's behavior was in error and is reversed.

ISSUE 2: Whether DCPS/School A violated 34 C.F.R. § 300.530(f) and denied the student a free and appropriate public education ("FAPE") by failing to timely conduct a FBA and BIP after the determination that the student's behavior was a manifestation of his disability following the December 14, 2012, MDR.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failure to timely conduct an appropriate FBA and BIP was a denial of a FAPE to the student.

34 C.F.R. § 300.530(f) provides:

- If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--
- (1) Either--
 - (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
 - (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
 - (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

The evidence demonstrates that on December 4, 2012, a MDR was held at which it was determined the student's behavior was a manifestation of his disability. It appears from the evidence that School A conducted a FBA and a BIP but not immediately following that MDR and evidence demonstrates⁸ based on the parent's testimony that she did not participate in the development of the FBA or BIP as is required. DCPS presented no evidence, particularly, no testimony to refute this. It appears that the student continued to engage in behaviors following the development of that FBA/BIP that resulted in his suspensions and this is sufficient evidence of harm to the student and a violation of substantive rights that rise to the level of a denial of a FAPE. Consequently, the Hearing Officer will also order that DCPS/School A fund and independent FBA for the student and thereafter develop a BIP.

⁶ FOF #17

⁷ FOF #s 17, 25 & Petitioner's Exhibit 2)

⁸ FOF # 10, 11, 12, 13

ORDER:

1. The April 17, 2013, MDR determination regarding the student's April 11, 2013, behavior is hereby reversed and DCPS/School A shall, within five (5) school days of issuance of this Order return the student to School A (Middle School).
2. DCPS/School A shall within fifteen (15) school days of the issuance of this Order provide and fund an independent FBA at the OSSE approved rate and within fifteen (15) school days of its receipt of the independent FBA convene an IEP meeting for the student and develop an updated BIP for the student.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 31, 2013