

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

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

OSSE
Student Hearing Office
May 15, 2013

THERESA SULE,
on behalf of NAJEEM SULE

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year old male, who currently attends a DCPS middle school. On March 26, 2013, Petitioner filed a Complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by (1) incorrectly determining that Student’s behavior was not a manifestation of his behavior and failing to provide a functional behavior assessment (“FBA”) and behavior intervention plan (“BIP”); (2) failing to provide an appropriate placement; and (3) failing to reevaluate all triennials (sic) and conduct an appropriate IEP review. As relief for these alleged denial of FAPE, Petitioner requested a determination that Student’s behavior that led to his expulsion was a manifestation of his disability; independent evaluations, to include a comprehensive psychological with clinical components, an FBA, and a BIP; an IEP meeting to address Parent’s concerns; an appropriate placement; and compensatory education.

On April 4, 2013, DCPS filed its Response to the Complaint. Therein, DCPS asserted that because Student carried a dangerous weapon onto school grounds, the charter school he was attending could have moved Student to an interim alternative setting regardless of whether his behavior was a manifestation of his disability, but the charter school held a manifestation determination review (“MDR”) within 10 days, Parent participated, and the IEP team made a reasoned decision; (ii) Parent received a copy of the procedural safeguards but failed to contact DCPS’s Office of Youth Engagement regarding community services following Student’s expulsion; (iii) Student enrolled in his neighborhood DCPS middle school on March 26th

although DCPS did not propose the middle school as a location of services; and (iv) All evaluations have been timely conducted and there has been no request for evaluations that DCPS denied.

The parties concluded the Resolution Meeting process by participating in a resolution session on April 12, 2013. No agreement was reached, but the parties agreed not to shorten the 15-day resolution period. This is an expedited matter; therefore, the HOD deadline is May 17, 2013, which is 20 school days after the scheduled due process hearing.

On April 22, 2013, the hearing officer the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on April 22, 2013.

By their respective letters dated April 30, 2013, DCPS disclosed sixteen documents (Respondent's Exhibits 1-16), and Petitioner disclosed thirty documents (Petitioner's Exhibits 1-30).

The hearing officer convened the due process hearing on May 3, 2013.¹ All documents disclosed by the parties were admitted into the record without objection. Thereafter the hearing officer received opening statements, testimonial evidence, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS deny Student a FAPE by making an incorrect manifestation determination that Student's behavior resulting in his expulsion from a charter school was not a manifestation of his disability and failing to provide an FBA and BIP?
2. Did DCPS deny Student a FAPE by failing to provide Student an appropriate placement from February 25, 2013 through March 26, 2013?
3. Did DCPS deny Student a FAPE by failing to conduct triennials and consider Student's existing 5/20/09 psychological evaluation at the 5/10/12 IEP meeting?

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

FINDINGS OF FACT²

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

1. Student is currently years old, and he attends a DCPS middle school.³
2. Student's current IEP is dated April 19, 2013. The IEP identifies Student's primary disability as Other Health Impairment ("OHI") and requires Student to receive 2.50 hours per week of specialized instruction outside of general education with no related services. The IEP contains seven annual goals in the academic area of reading and 1 annual goal in the academic area of written expression.⁴
3. Student's May 10, 2012 IEP also identifies Student's primary disability as OHI. Pursuant to that IEP, Student was required to receive 4 hours per week of specialized instruction in general education, with four annual goals in the academic area of reading, and 1 annual goal in the academic area of written expression. The IEP includes present levels of educational performance based on a Woodcock-Johnson III ("WJ III") educational assessment that was administered to Student on March 13, 2012.⁵
4. Student's May 10, 2012 meeting was an eligibility meeting, which was attended by Parent and the DCPS school psychologist, among other team members. The team discussed Student's progress in writing, as well as the negative effects of Student's attention issues on his writing, Student's considerable gains in reading and his improved focus in that academic area, Student's most recent NWEA (a reading test) and JW III evaluations, and Parent's report of Student's academic progress and difficulties with organization and changing classes. The team ultimately determined that Student continued to be eligible under the OHI disability classification, and the team discussed Student's goals, accommodations and modifications.⁶
5. On May 5, 2012, prior to the May 10, 2012 eligibility meeting for Student, Student's IEP team, including Parent, participated in a meeting and determined to order an Evaluation Review and an educational evaluation for Student in preparation for his upcoming IEP meeting. The team determined not to order a new psychological because there was no anticipated change in eligibility.⁷

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ See Complaint at 2; testimony of Parent.

⁴ Respondent's Exhibit 1.

⁵ Respondent's Exhibit 4; Petitioner's Exhibit 14.

⁶ Respondent's Exhibit 5.

⁷ Testimony of charter school SEC.

6. On May 8, 2012, DCPS's certified school psychologist conducted a data evaluation review, which included a review of Student's cognitive testing from his May 2009 psychological evaluation, his history of academic difficulty and impulsive tendencies, his previous ADHD diagnosis and absence of a medication regimen, as well as his performance in class as reflected by grades, teacher reports, an observation, and a reading assessment.⁸
7. Student's May 26, 2009 psychological evaluation is his most recent psychological evaluation. The evaluation included cognitive, educational, visual motor, and behavioral and attention-deficit assessments. The evaluator noted that the information in the evaluation report is time sensitive and may become invalid over time.⁹
8. Prior to attending the current DCPS middle school, Student attended a charter school in the District of Columbia.¹⁰
9. During SY 2011/12 at the charter school, Student's main issues were organization and some homework problems, not calling out in class and staying focused. Also, Student would occasionally get frustrated and talk back to a teacher or refuse to follow directions. However, these incidents were not very frequent.¹¹
10. During SY 2012/13 at the charter school, Student had no suspensions at all and he had made a lot of progress.¹²
11. On February 22, 2013, a charter school staff member discovered that Student had brought a pocket knife into the school building. Student stated that he had found the knife on his way to school and put it in his pocket.¹³
12. On February 25, 2013, the charter school held an expulsion meeting, at which Student stated that he did not know why he brought the knife into the school building. Student indicated that he did not think about giving the knife to an adult because he wanted his peers to be afraid of him so that they would stop messing with him.¹⁴
13. On February 28, 2013, the charter school held a Manifestation Determination Review for Student, and Parent attended by phone. The team determined that Student's IEP was appropriate and was being appropriately implemented by the charter school. The team also reviewed Student's grades and attendance report, received oral reports/statements from Student's special education teacher and Parent, reviewed the behavioral characteristics of Student's OHI disability, as well as Student's behavior history, and considered potential contributing factors and whether Student had an

⁸ Respondent's Exhibit 7.

⁹ See Respondent's Exhibit 15; Petitioner's Exhibit 16.

¹⁰ Testimony of Parent; testimony of advocate.

¹¹ Testimony of charter school SEC.

¹² Testimony of charter school SEC.

¹³ Petitioner's Exhibit 2; Respondent's Exhibit 8.

¹⁴ Petitioner's Exhibit 1.

- FBA/BIP. Ultimately, the team determined that the February 22, 2013 incident was not a manifestation of Student's disability. Instead, it was an isolated incident.¹⁵
14. On February 28, 2013, the charter school issued a document entitled, Hearing Notification: Expulsion, advising that Student was being expelled for the weapon incident, effective February 22, 2013.¹⁶
 15. Between February 22 and 28, 2013, Parent called the neighborhood DCPS middle school to determine whether Student could be enrolled there. The staff advised Parent that Student normally could just be enrolled, but the process would be different if Student had gotten expelled.¹⁷
 16. On March 15, 2013, DCPS's LEA Representative who attended the MDR called parent and told her to contact DCPS's Office of Youth Engagement to make an appointment. Parent did so on March 17, 2013 and received an appointment for the following week. Parent and Student attended the scheduled meeting in person, and Parent's attorney attended by telephone. During the meeting, an employee from the Office of Youth Engagement reviewed Student's data from the charter school and talked to Parent and Student, then the employee stated that she would call Parent to indicate Student's assigned school.¹⁸
 17. On March 21, 2013, Parent received a call from DCPS's Office of Youth Engagement and was advised to enroll Student at the neighborhood DCPS middle school. On March 25, 2013, Student began attending the DCPS middle school.¹⁹
 18. The hearing officer takes judicial notice of the fact that the period from February 22, 2013 through March 22, 2013 consisted of four weeks. Hence, Student missed four weeks of IEP services between February 22, 2013 through March 22, 2013.
 19. On April 19, 2013, DCPS convened an IEP meeting for Student. Student's IEP was revised to require that Student receive 2.5 hours per week of specialized instruction outside of general education and no related services. Student's disability classification was not changed. During the meeting, Student's current homeroom/math teacher reported that Student was doing well at the DCPS middle school and there had not been any behavior concerns. The special education coordinator agreed to meet again and modify Student's IEP if necessary.²⁰
 20. Petitioner's proposed compensatory education plan requests a comprehensive psychological assessment with a clinical component, an FBA and BIP, 24 hours of independent tutoring with a certified teacher, and an IEP that provides 10 hours of

¹⁵ Respondent's Exhibit 10; Petitioner's Exhibit 3; testimony of charter school SEC.

¹⁶ Respondent's Exhibit 11.

¹⁷ Testimony of Parent.

¹⁸ Testimony of Parent.

¹⁹ Testimony of Parent.

²⁰ Testimony of Parent; testimony of DCPS middle school SEC.

services in the general education environment and provides behavior support. These items have been requested to compensate Student for the alleged educational harm resulting from the denials of FAPE alleged in this case.²¹

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 an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of each of Petitioner's claims in turn:

1. Manifestation Determination Review and FBA/BIP

IDEA requires 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 LEA, the parent, and relevant members of the child's IEP team 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 (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (ii) if the conduct was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1). If either of these two conditions is met, then the conduct must be determined to be a manifestation of the child's disability, and the IEP team must, *inter alia*, conduct an FBA if one does not exist and implement a BIP, or review and modify as necessary any existing BIP. *See* 34 C.F.R. § 300.530(e)(3) & (f)(1).

IDEA further provides that for disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply relevant disciplinary procedures to disabled children in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that the disabled child must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP, and must receive as appropriate an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(c)-(d)(1). For purposes of removals of a disabled child from the child's current educational placement under §§ 300.530 – 300.535, a change in placement occurs if, *inter alia*, the removal is for more than 10 consecutive school days. 34 C.F.R. § 300.536(a)(1).

²¹ Petitioner's Exhibit 28; testimony of advocate.

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to determine that Student's conduct on February 22, 2013 was a manifestation of his disability, because there was evidence in Student's file that he has ADHD, is impulsive and has poor decision-making skills. DCPS disagrees, arguing that the team properly determined that the incident was an isolated incident and not a manifestation of Student's OHI.

The evidence in this case reveals that, as required by the applicable regulations, the team at Student's MDR, which included Parent, determined whether Student's IEP was appropriate and was being appropriately implemented by the charter school, reviewed Student's grades and attendance report, received oral reports/statements from Student's special education teacher and Parent, reviewed the behavioral characteristics of Student's OHI disability, as well as Student's behavior history, and considered potential contributing factors and whether Student had an FBA/BIP before ultimately determining that the February 22, 2013 incident was an isolated incident that was not a manifestation of Student's disability. Moreover, based upon the hearing officer's review of the evidence in the record and the factors considered by the team at Student's MDR, the hearing officer is not convinced that the team incorrectly determined that Student's behavior on February 22, 2013 was not a manifestation of his disability. As a result, Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to determine that Student's conduct on February 22, 2013 was a manifestation of his disability.

With respect to Petitioner's contention that DCPS denied Student a FAPE by to provide Student with an FBA and BIP, a review of the record indicates that Student's expulsion on February 22, 2013 resulted in Student missing school for more than 10 days because DCPS did not notify Parent of Student's new school assignment until March 21, 2013. As the removal was for more than 10 consecutive school days, it qualifies as a change in placement under IDEA, and since DCPS determined that the behavior which led to the suspension was not a manifestation of Student's disability, Student was entitled to receive as appropriate, *inter alia*, an FBA and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur. In this case, while the evidence demonstrates that the MDR team considered whether Student had an existing FBA or BIP at the time of the MDR, there is no evidence that the team considered whether, and to what extent, Student may have required an FBA and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur as required by 34 C.F.R. § 300.530(d)(1)(ii). Therefore, the hearing officer will order DCPS to reconvene Student's IEP team for a discussion and determination of whether, and to what extent, Student may require an FBA and behavioral intervention services and modifications designed to address Student's behavior violation on February 22, 2013 so that it does not recur. *See* 34 C.F.R. § 300.513(a)(3) (the requirement that a hearing officer's determination be based on substantive grounds unless a procedural violation rises to the level of a denial of FAPE shall not preclude a hearing officer from ordering an LEA to comply with the procedural requirements of §§ 300.500 through 300.536).

2. Alleged Failure to Provide a Placement

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this

regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate preschool, elementary or secondary school education and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Moreover, as noted above, for disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply relevant disciplinary procedures to disabled children in the same manner and for the same duration as the procedures would be applied to children without disabilities, except, *inter alia*, that the disabled child must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. § 300.530(c)-(d)(1)(i).

In the instant case, Petitioner argues that Student missed four weeks of school following his expulsion, during which time Student missed all of his general education and special education services. A review of the evidence in this case reveals that DCPS may reasonably be held responsible for Student's removal from school beginning on February 22, 2013, when Student was expelled from the charter school, through March 22, 2013, the day after DCPS called to advise Parent to enroll Student in the neighborhood DCPS middle school. As the removal constituted a change in placement because it exceeded 10 days, and because the behavior that led to the change in placement was determined not to be a manifestation of Student's disability, DCPS was required to ensure that Student continued to receive educational services so as to enable him to continue to participate in the general education curriculum and to progress toward meeting the goals set out in his IEP. However, there is no dispute here that during the one month time period at issue Student did not receive any educational services at all. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by failing to provide him with an educational placement from February 22, 2013 through March 22, 2013. *See* 34 C.F.R. § 300.513(a)(2) (procedural violation may constitute denial of FAPE where procedural inadequacy causes a deprivation of educational benefit).

During the four-week period between February 22, 2013 and March 22, 2013, Student's May 10, 2012 IEP called for Student to receive 4 hours per week of specialized instruction in general education. Hence, Student missed a total of 16 hours of inclusion services during his change in placement as a result of his February 22, 2013 expulsion. To compensate Student for these lost services and the resulting deprivation of educational benefit, the hearing officer will award Student 24 hours of independent tutoring, to be used during Summer 2013 to help prepare Student for the start of SY 2013/14. *See Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. 2005) (compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA).

3. Triennials and Alleged Failure to Consider Existing Evaluations

Under IDEA, each disabled child must be reevaluated at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). As part of any reevaluation, the IEP team must review existing data on the child

and identify what additional data, if any, are needed to determine whether the child continues to have a disability and the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed. 34 C.F.R. § 300.305(a).

In the instant case, Petitioner argues that DCPS failed to conduct a full and complete triennial reevaluation of Student because Student's most recent psychological evaluation was conducted in May 2009, which is more than three years ago. However, a review of the evidence in this case reveals that in preparation for Student's May 10, 2012 eligibility meeting, DCPS convened a meeting of Student's IEP team, including Parent, and ordered an Evaluation Review and an educational evaluation for Student in preparation for his upcoming IEP meeting, but the team determined not to order a new psychological because there was no anticipated change in eligibility. Thereafter, on May 8, 2012, a DCPS certified school psychologist conducted a data evaluation review, which included a review of Student's cognitive testing from his May 2009 psychological evaluation, his history of academic difficulty and impulsive tendencies, his previous ADHD diagnosis and absence of a medication regimen, as well as his performance in class as reflected by grades, teacher reports, an observation, and a reading assessment. Then, on May 10, 2012, DCPS convened an eligibility meeting for Student, which was attended by Parent and the DCPS school psychologist, among other team members, and during which the team discussed Student's progress, attention issues, most recent assessments, and Parent's report of Student's academic progress and difficulties before determining that Student continued to be eligible under the OHI disability classification and discussing Student's IEP goals, accommodations and modifications. Based on this evidence, the hearing officer concludes that DCPS satisfied its obligations under IDEA to conduct a full reevaluation of Student, even though the IEP team determined not to conduct a psychological reassessment of Student as part of the reevaluation process. Hence, Petitioner has failed to meet its burden of proof in connection with this portion of its claim.

Petitioner further asserts that DCPS denied Student a FAPE by failing to consider Student's May 2009 psychological evaluation at the May 10, 2012 IEP meeting for Student. However, as noted above, the evidence in this case demonstrates that Student's May 2009 psychological evaluation was considered as part of the May 8, 2012 data evaluation review conducted by the DCPS certified school psychologist who participated as a team member in Student's May 10, 2012 IEP/eligibility meeting. Based on this evidence, the hearing officer further concludes that Petitioner has failed to meet its burden of proof in connection with this portion of its claim as well.

ORDER

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

1. Within 15 school days of the issuance of this Order, DCPS shall reconvene Student's IEP team for a discussion and determination of whether, and to what extent, Student may

require an FBA and behavioral intervention services and modifications designed to address Student's behavior violation on February 22, 2013 so that it does not recur.

2. DCPS shall provide Petitioner with funding for 24 hours of independent tutoring for Student. Said tutoring services shall be used during Summer 2013 to help prepare Student for the start of SY 2013/14.
3. All remaining claims and requests for relief in Petitioner's March 26, 2013 Complaint are **DENIED and DISMISSED WITH PREJUDICE.**

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).

Date: 5/15/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer