OSSE
Student Hearing Office
April 17, 2013

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

[Parent], on behalf of
[Student],[1]

Petitioner,

v

Respondent.

Date Issued: April 16, 2013

Hearing Officer: Jim Mortenson

Case No: 2013-0144

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 15, 2013. The Petitioner is represented by Chike Ijeabuonwu, Esq., and the Respondent is represented by Matthew Bogin, Esq. A resolution meeting was convened on March 22, 2013, and resulted in no agreements. A timely response to the complaint was filed on March 25, 2013. A prehearing was also convened on March 25, 2013 and a prehearing order was issued on that date.

The due process hearing was required to be held within 20 school days of the complaint (no later than April 11, 2013), and was convened and timely held on April 9, 2013, in room 2009 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is April 23, 2013 (10 school days following the hearing). This HOD is issued on April 16, 2013.

[1] Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) were:

1. Whether the Respondent denied the Student a free appropriate public education (FAPE) and placement in the least restrictive environment (LRE) because the Student's current individualized education program (IEP) and placement is not a highly structured program with a low student to teacher ratio where teachers are experienced working with students who have learning, attention, and emotional delays; and the IEP lacks goals and services to address the Student's academic and functional needs and provides only 30 minutes per week of behavioral support services on a consultative basis?

2. Whether the Respondent convened a meeting to determine whether the behaviors for which the Student was suspended for on both February 19, 2013, and March 5, 2013, were manifestations of the Student's disability, and if such meetings were held, whether any determination that the behavior was not a manifestation of the Student's disability was correct?

3. Whether the Respondent denied the Student a FAPE because it has not convened a meeting, including the Petitioner, to determine the Student's educational placement?

The parties have agreed the Student requires a full-time structured special education placement with therapeutic counseling available throughout the school day, as requested by the Petitioner. The Petitioner is seeking assignment to the non-public school. However, because the Office of the State Superintendent of Education (OSSE) makes location assignments for charter schools that do not have facilities for certain placements, and the Petitioner "will not be satisfied with whatever OSSE proposes," the parties have not settled this issue. The Petitioner wants a ruling on the location. The Respondent argues that there is nothing

for the IHO to determine since the parties agree on the need for the increased services and more restrictive placement, and that the IHO lacks the authority to make a location assignment. For the reasons stated in the conclusions of law, Issue 1 does not reflect a current dispute between the Parties and is dismissed. The location of services is in the process of being determined by OSSE, pursuant to D.C. Mun. Regs. 5-E3019.8(b), and OSSE is not a party to this hearing. The Petitioner is also seeking an occupational therapy (OT) assessment and a functional behavioral assessment (FBA) with a subsequent meeting to review the assessments within 30 days of completion.

As noted supra, the Parties have agreed the Student requires a more restrictive placement as described in the issue. OSSE has been contacted to make the location assignment and this process is underway. Because there is no dispute between the parties as to services and the placement the Student requires Issue 1 is dismissed. The Student's behavior for which he was disciplined on March 5, 2013, was correctly determined to not be a manifestation of his disability. The Petitioner was involved in the November 2012 IEP team meeting where the Student's placement was determined. Thus, Issues 2 and 3 are also dismissed on the merits.

IV. EVIDENCE

Seven witnesses testified at the hearing, three for the Petitioner and four for the Respondent. The Petitioner's witnesses were:

1) Petitioner, Student's Mother (P)
2) Student (S)
3) Erica Wingate, Behavior Coordinator for Village Academy (E.W.)

The Respondent's witnesses were:

1) Charlene Roach-Glymph, Director of Student Support Services (C.R.)

2) Clarissa Wright, Special Education Teacher (C.W.)

3) Travis Bouldin, Principal (T.B.)

4) Lauren Madlock, Associate Director of Special Education (L.M.)

Four of the Petitioner's 13 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. 11 of the Respondent's 12 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The witnesses all testified credibly. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is an eleven year old learner with a disability, enrolled at the Respondent's Trinidad Campus, where his mother enrolled him in August 2012.[2]
2. The Student suffers from multiple disabilities including a learning disorder, attention-deficit hyper activity disorder – combined type, developmental coordination disorder, and

[2] Testimony (T) of P, P 5/R 7.

dysthymic disorder.[3] One of the ways the Student's disabilities impact him is by creating a challenge to managing his behavior, anger, and frustration, in positive ways, resulting in inappropriate and disruptive behaviors in the classroom.[4] He displays negative behaviors in order to avoid classes and work in which he feels he cannot be successful with.[5] He has demonstrated significant deficits in attention and impulse control, which has impacted his ability to access the curriculum and results in inappropriate manners including verbal and physical aggression and outbursts.[6]

3. On November 2, 2012, the Petitioner was invited to an IEP team meeting which was held on November 20, 2012, and at which she participated in.[7] The IEP from that meeting reflects the Student's educational placement in the general education setting with specialized instruction for 10 hours per week and outside of the general education setting with specialized instruction for 10 hours per week, as well as behavioral support services outside of the general education setting for two hours per month and speech-language pathology outside of the general education setting for one hour per week.[8] The IEP includes reasons why services are taking place outside of the general education setting in the section titled "Least Restrictive Environment."[9]
4. The Student was suspended for a total of nine days during the school year as of the end of February 2013.[10] He was suspended four days in November for repeatedly disrespecting instructions, walking out of class, and screaming and kicking things in the hallway.[11] He was

[3] P 5/R 7, P 7.
[4] P 5/R 7, R 6.
[5] R 6.
[6] P 7.
[7] P 5/R 7, T of P
[8] P 5/R 7.
[9] P 5/R 7.
[10] P 4, R 10, T of L.M.
[11] P 4, R 10.

suspended two days in December for fighting, cursing, and endangering others.[12] He was suspended three days in February for choking a younger student in the bathroom.[13]

5. On February 28, 2013, the Student was on the playground and ran off-campus into a busy street.[14] He was redirected by school staff to return and advised he could "take a break," and he returned only to stop and tell the staff to watch him as he ran back into the street where cars were passing.[15] After approximately three minutes he then returned again to the school grounds and was brought into the school where he smirked and told his teacher, C.W., he was going to do what it takes to go home.[16] He told the Principal that he was just playing around and was going to come back.[17] C.W. had previously witnessed the Student's angry and impulsive behaviors and noted that in this case he was calm and in control of himself.[18] The Principal also noted the Student was calm and in control of himself.[19]
6. The Student was suspended for five days for insubordination by leaving campus and refusing to stay on campus, and so a meeting was held to determine whether the Student's behavior was a manifestation of his disability.[20] The meeting was held on March 5, 2013, and the Petitioner participated.[21] There was considerable discussion about the incident and the Student's past behaviors and his positive responses to redirection or to "take a break."[22] Ultimately, the school staff all agreed the Student's behavior was not consistent with the patterns of behavior they had seen before, that the Student was at all times calm and in

[12] P 4, R 10.
[13] P 4, R 10.
[14] P 4, R 5, T of P, T of L.M., T of T.B., T of C.W., T of C.R., T of S.
[15] P 4, R 5, T of P, T of L.M., T of T.B., T of C.W., T of C.R., T of S.
[16] T of C.W
[17] T of T.B.
[18] T of C.W.
[19] T of T.B.
[20] T of L.M., R 4.
[21] T of P, R 4.
[22] T of L.M., T of C.W., T of T.B., R 4.

control of himself, that he was seeking attention when he ran out into the street in defiance of redirection and telling staff to watch him, and that therefore this was not a manifestation of his disability.[23] The Petitioner disagreed with the rest of the team, believing the behavior was related to the Student's attention-deficit hyperactivity disorder and that the Respondent was not implementing the Student's IEP because the Student was "being suspended for everything."[24]

7. Following the filing of the complaint in this matter, the Respondent agreed with the Petitioner that the Student required a more restrictive placement as a result of his behaviors.[25] The Petitioner does not want the OSSE to make the location assignment, even though she wants the Student removed from the Respondent's school.[26] The Respondent erroneously advised OSSE it was seeking a change in placement, when in fact the placement had already been changed at the resolution meeting held March 22, 2013, and the Respondent wanted the OSSE to make a location assignment, resulting in some confusion of behalf of OSSE staff who advised the Respondent to have another IEP team meeting to discuss placement.[27] There is no evidence a location assignment had been made at the time of hearing.[28]

[23] T of L.M., T of T.B., T of C.R., R 4.
[24] T of P, R 4.
[25] T of P, R 1. (The Respondent argued that R 1 was not an offer of settlement, as required pursuant to 34 C.F.R. § 300.517(c)(2)(i), which is cited in the document, but rather an offer of judgment pursuant to Rule 68 of the Rules of Civil Procedure. However, the Respondent rejected its own "offer of judgment" as a resolution to the matter, further necessitating litigation. It is noted that the Federal Rules of Civil Procedure do not apply to administrative hearings under the IDEA.
[26] T of P, (It is noted that under D.C. Mun. Regs. 5-E3019.8(b)(7) the Parent must have the opportunity to provide input into the location assignment.)
[27] R 2, R 3.
[28] Counsels both advised that the assignment was still pending as of the date of the hearing.

VI. 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:

1. Generally, the burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3). Concerning an appeal of a manifestation determination, D.C. law provides specifically that "the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability." D.C. Mun. Regs. 5-E2510.16. The Respondent argued that since it is a charter school, not DCPS, this rule did not apply to it. Given the evidence was clear in this case, there was not a question of whether one side or the other met a burden of persuasion, so the question of whether D.C. Mun. Regs. 5-E2510.16 applies to the charter school need not be addressed here. (*See* Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005), explaining effect of "the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced[.]")
2. The parties here agreed, following the filing of the complaint, that the Student required a more restrictive and supportive placement and corresponding IEP. The Respondent, as a public charter school, lacks the type of placement the Student requires, and so followed District of Colombia law and informed the OSSE of the need to find a location that met the

Student's placement needs. *See* D.C. Mun. Regs. 5-E3019.8(b)(5) "[I]f the IEP team for a child enrolled in the LEA Charter makes a placement decision that cannot be implemented within the LEA Charter, the OSSE shall make a location assignment for the placement of the child;" and D.C. Mun. Regs. 5-E3019.8(b)(7) "The OSSE shall be responsible for making the final decision regarding the location assignment." The location assignment is pending and if there is a dispute over the location assignment, that dispute would be with OSSE, not the Respondent. Most importantly, however, is the fact that the issue of placement was resolved and should not have been further litigated. Both parties, however, contributed to the unnecessary litigation. The Petitioner continued to litigate after the issue was effectively resolved, and the Respondent refused to have its self-described "offer of judgment" entered as a judgment at hearing.

3. When a child with a disability under IDEA engages in behavior that results in discipline that will change the Student's educational placement, a manifestation determination must be made. 34C.F.R. § 300.530(e). A change in educational placement occurs if the disciplinary removal is for more than 10 consecutive school days, or the child has been subject to a series of removals that constitute a pattern because the series of removals total more than 10 school days in the school year, the behavior resulting in the removals is substantially similar, and because of consideration of such 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 C.F.R. § 300.536(a).
4. In this case the Respondent determined that a manifestation determination was warranted when the Student was suspended for a period that would result in a removal from school for more than 10 days during the school year. The team met, including the Petitioner, and

discussed the Student's behavior for which he was to be suspended. The Student had left school grounds and was redirected to return. The Student did so, and then decided to leave the grounds again, this time taunting the staff and engaging in extremely dangerous behavior that involved playing in traffic. It was the taunting of staff following being successfully redirected, and being calm and in control of himself, that convinced the staff that the Student's behavior was intentional and calculated, not merely impulsive or otherwise caused by or having a direct and substantial relationship to his disability. *See* 34 C.F.R. § 300.530(e)(1)(i). When the Student is impulsive and is redirected, he typically responds to the redirection positively. Furthermore, the fact that the Student was suspended for nine days prior to the suspension March 5, 2013, does not support the Petitioner's contention at the manifestation meeting that the IEP as not being implemented, since the Student was not suspended excessively and was suspended for specific instances of misbehavior. *See* 34 C.F.R. § 300.530(e)(1)(ii). The evidence is clear that Respondent's position on the determination was correct.

5. Parents are to be "members of any group that makes decisions on the educational placement of their child." 34 C.F.R. § 300.327, *See also* 34 C.F.R. § 300.116 & D.C. Mun. Regs. 5-E3013.1. In the District of Columbia this group is the IEP team. *See* D.C. Mun. Regs. 5-E3001.1.
6. The IEP team, including the Petitioner, met on November 20, 2012, and reviewed the IEP and made a placement determination, as evidenced by the section of the IEP explaining the reasons for the Student's placement. It is not clear why the Petitioner alleged she was not involved the in the IEP team meeting as she presented the IEP resulting from that meeting as

evidence and provided no evidence that she was not excluded from any meeting to determine educational placement.

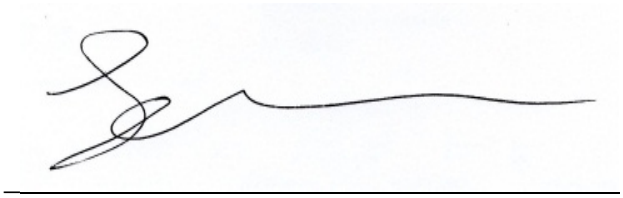
VII. DECISON

1. There is no dispute that the Student requires not a highly structured program with a low student to teacher ratio where teachers are experienced working with students who have learning, attention, and emotional delays, and that the IEP must be revised to address the Student's academic and functional needs and continual behavior supports. Thus, Issue 1 is dismissed.
2. A manifestation determination was made following behavior that could have resulted in a change of educational placement and Respondent's position that the behavior was not a manifestation of the Student's disability was correct.
3. The Parent participated in the November 2012 IEP team meeting where the Student's placement was determined at that time.

VIII. ORDER

The complaint is dismissed, in its entirety, with prejudice.

IT IS SO ORDERED.



Date: April 16, 2013

Independent 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).