

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
1150 5th Street, S.E.
Washington, D.C. 20003
202-698-3819; 202-698-3825 (Fax)

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)
)
DOB) **DATE OF HEARING**
) April 21, 2009
Student I.D.)
Petitioner) **DATE OF COMPLAINT**
) March 17, 2009
)
V.)
)
The District of Columbia) **ATTENDING SCHOOL:**
Public Schools,)
Respondent)

COUNSEL FOR PARENT/STUDENT: **Chike Ijeabunwu**
6495 New Hampshire Avenue
Hyattsville, MD-20783

COUNSEL FOR DCPS: **Nia Fripp**
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

2009 MAY -4 AM 9:35
STUDENT HEARING OFFICE
OSSSE

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student presently in the grade and eligible for special education under the classification of Other Health Impaired (OHI). The student's most recent IEP dated April 9, 2009, provides him with 10 hours of specialized instruction in a general education setting and 1 hour of psychological services per week. The parent refused to sign the IEP. The student's previous IEP, dated September 9, 2007, provided him with 10 hours of specialized instruction in a resource classroom and 1 hour of psychological services per week.

On July 9, 2008, Petitioner and DCPS entered into a settlement agreement concerning a previous due process complaint, in which DCPS agreed to fund independent clinical psychological, psycho-educational, and FBA evaluations to be completed within 45 calendar days of the executed agreement. DCPS agreed to convene an MDT/IEP meeting within 20 business days of receipt of the final evaluations to review the evaluations, review and revise the IEP, discuss and determine placement, and discuss and determine compensatory education. The evaluations were not received by DCPS until December 29, 2008. An MDT/IEP meeting to review the evaluations was held on April 9, 2009.

This due process complaint was filed on March 17, 2009 alleging that DCPS had failed to convene an MDT/IEP meeting upon receipt of the independent evaluations, failed timely to revise the student's IEP, failed to provide an appropriate IEP, failed to implement the IEP, failed to provide an appropriate placement, and failed to convene a manifestation determination meeting.

A pre-hearing conference was held on March 31, 2009, and a pre-hearing order was issued on April 13, 2009.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to convene an MDT/IEP meeting following the receipt of the independent evaluations pursuant to the July 8, 2008 settlement agreement and the requests of the parent.
2. Failing to provide an appropriate IEP because the student's IEP had expired in September 2008, and because per the findings and recommendations of the independent evaluations the student should have been classified as ED and LD in addition to OHI and was in need of additional hours of specialized instruction and related services.
3. Failing to provide an appropriate placement as the student is in need of a full time therapeutic out of general education placement.
4. Failing to convene a manifestation determination meeting following suspensions initiated on January 30, 2009, February 5, 2009, February 18, 2009, and February 24, 2009.

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter submitted on April 14, 2009², containing a list of witnesses with attachments P 1-14. Petitioner also submitted a supplemental disclosure dated April 15, 2009 with attachments P 15 and 16. The supplemental disclosure was filed one day late and DCPS objected to its admission. The disclosure consisted of notices of disciplinary action and were first requested and promised by DCPS on April 9, 2009. DCPS did not provide Petitioner with the documents until April 15, 2009 and they were immediately submitted as a supplemental disclosure the same day. The Hearing Officer denied DCPS' motion and ruled that the documents would be admitted because their late submission was due to DCPS' failure timely to provide the documents and their admission in no way prejudiced DCPS. The April 14, 2009 disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's father, the student's educational advocate, a clinical psychologist, and the Admission Director at Schools of DC.

DCPS submitted a five day disclosure letter dated April 13, 2009, containing a list of witnesses with attachments DCPS 1-8. The disclosure was admitted in its entirety. DCPS called as a witness the student's special education teacher.

V. FINDINGS OF FACT

1. This is a year old student presently in the grade and eligible for special education under the classification of Other Health Impaired (OHI). The student's most recent IEP dated April 9, 2009, provides him with 10 hours of specialized instruction in a general education setting and 1 hour of psychological services per week. The parent refused to sign the IEP. The student's previous IEP, dated September 9, 2007, provided him with 10

² The disclosure cover letter is incorrectly dated July 9, 2008, but was in fact written and submitted on April 14, 2009.

hours of specialized instruction in a resource classroom and 1 hour of psychological services per week. (DCPS 8, P 13).

2. On July 9, 2008, Petitioner and DCPS entered into a settlement agreement concerning a previous due process complaint, in which DCPS agreed to fund independent clinical psychological, psycho-educational, and FBA evaluations to be completed within 45 calendar days of the executed agreement. DCPS agreed to convene an MDT/IEP meeting within 20 business days of receipt of the final evaluations to review the evaluations, review and revise the IEP, discuss and determine placement, and discuss and determine compensatory education. (DCPS 1).

3. The evaluations were not received by DCPS until December 29, 2008, over 5 months following the July 9, 2008 settlement agreement. An MDT/IEP meeting to review the evaluations was held on April 9, 2009, over 3 months after DCPS' receipt of the evaluations. (DCPS 2, 3, P 4).

4. The student has a long history of severe inappropriate behavior at school, extending back at least as far as pre-school. In kindergarten he fought with his peers, did not pay attention to his teacher, and was suspended several times for fighting, being disrespectful to teachers and touching other students inappropriately. The student was retained in first grade as a result of his behavior. At the start of 3rd grade at _____ the student was suspended for two months for _____. The school unsuccessfully attempted to expel the student. He was retained in 3rd grade because his behavior interfered with his school performance. The student was suspended again in _____ grade for _____. There may have been additional suspensions during the student's time at _____ which extended through the 2007-2008sy, but there are no records in the record concerning disciplinary actions. During the remainder of the student's time at _____ the student roamed the halls, fought with peers, cursed, and was disrespectful to teachers and peers. Additionally, the student frequently steals things, including food, phones, and money. He was caught one time stealing from a store. (Testimony of student's mother, father).

5. During the 2008-2009sy, the student has been suspended on numerous occasions. The student was suspended from September 24 to December 3 for inappropriate sexual behavior (to be addressed further in finding of fact # 7 *infra.*). For approximately 2 months of the time the student was provided an alternative placement at _____ Academy. For at least 2-3 weeks the student was home and did not receive an educational packet from his school. He may have been suspended from _____ near the end of his alternative placement there.

From February 2-4, 2009, the student was suspended for assaulting another student. From February 6-12, 2009, the student was suspended for fighting in the classroom. From February 19-23, 2009, the student was suspended for profanity. From February 25-March 11, 2009, the student was suspended for failure to report to his assigned classes. The student was suspended for 3 days near the end of March 2009. The student received a 2 week in-house suspension starting April 9, 2009 for _____ and _____

two girls at school. During the suspension the student is confined to the principal's office where he watches videos and helps with office work. (P 16, Testimony of student's mother and father).

No manifestation determination meetings were held for any of the suspensions except the suspension on September 24, 2009.

6. In addition to the suspensions, the student received at least 11 Student Discipline Referrals from September 2, 2008 through February 17, 2009, for infractions ranging from leaving the classroom, (P 16). The student's special education teacher testified that the student has

(Testimony of SE Teacher). The special education teacher sent a note home to the parents on February 5, 2009, concerning an incident where the student stole the teacher's timer. The special education teacher documented two occasions when she and/or the entire MDT Team spoke with the parents, and one occasion when she sent a letter home to the parents. She indicated that the parents said that the student has been like this for years and they have tried everything. The student told the (P 5, 14).

7. In addition to the above described behaviors, the student has had a number of incidents starting at age 6 in which he has At age 6 his mother found the student On numerous occasions he tried to

When the student was

At age
When the

On September 23,
On

April 8, 2009 the student had an incident with a girl, and on April 9, 2009, the student was given in-school suspension for (Testimony of mother, father, P 7-10).

The student's special education teacher testified that the student does not understand not (Testimony of SET).

8. A manifestation meeting was held on October 1, 2008, concerning the September 23rd sexual assault. The parents and/or their representative were not present at the meeting. The MDT Team determined that the student's actions were not a manifestation of his disability. (P 10).

9. The student has attended and been kicked out of several mental health programs because of his behavior. The student has been prescribed medication for his ADHD but refuses to take it. (Testimony of mother, P 7, 8)

10. A clinical evaluation and report of the student was completed on December 3, 2008, by Interdynamics, Inc. The evaluators were Greg Adelstein, MA, under the supervision of Natasha Durant, PhD, a licensed clinical psychologist. The basis for the report included a clinical interview with the student's mother, a clinical interview with the student, a review of the student's September 9, 2007 IEP, a BASC-SDH, completed by the student's mother, a BASC-2, PRS-C parent report, a BASC-2, SRP-C self report by the student, a Devereux Scales of Mental Disorder-Adolescent Form (DSMD) completed by the mother, a Children's Depression Inventory (CDI), an ADHD Test, a Conners' Continuous Performance Test II (CPT-II), a house, tree, female person, male person test, and a Millon Pre-Adolescent Clinical Inventory (M-PACI).

The evaluation concluded that:

[The student] has a long history of inappropriate sexual behavior in school and at home....In addition, [the student] has an extensive history of oppositional and defiant behaviors in school, home, and in the community....[The student] has participated in two different mental health programs due to his behavior problems. He was removed from [both programs] after a few weeks because of his disrespectful and defiant behaviors.

Test findings and results indicate that [the student] exhibits a repetitive and persistent pattern of behavior in which the basic rights of others or rules are violated, as well as, oppositional and defiant behaviors, severe attention problems, and inappropriate sexual behaviors.

The student was given a diagnosis of Conduct Disorder, Child-Onset Type, Severe, and ADHD, Predominantly Inattentive Type. He was found to have academic problems, insufficient mental health care services, severe acting out behaviors, and inappropriate sexual action out behaviors.

Based on the results of the evaluation and the student's educational history, the student was found to meet the classification of Emotional Disturbance (ED), in addition to LD and OHI.

The report made extensive recommendations, including intensive individual therapy to identify all known motivations for his inappropriate , behavioral management therapy, an FBA and BIP, family therapy, possible medication, and a agreement. (P 7).

11. A Functional Behavior Assessment and report were completed by interdynamics on December 1, 2008. The evaluation was conducted by Tyler Calabrese, MA, under the supervision of James Moses Ballard, PhD, a licensed clinical psychologist. The FBA was conducted while the student was attending Academy pursuant to his September 24, 2008, suspension. Academy serves students with behavior problems who have been suspended from their regular schools. The school has a very small teacher/student

ratio, 45 minute classes, group and art therapy, and strict behavior plans. The teachers in the school are experienced at dealing with students with behavior problems.

The evaluator conducted classroom observations, interviews with current school staff, an interview with the student, and an interview with the mother. The evaluator administered a Reinforcement Inventory (RI), a Problem Behavior Questionnaire (PBQ), a Motivation Assessment Scale (MAS), and an A-B-C-D Chart. The evaluator did not conduct a classroom observation at . nor did he interview anyone employed at

The assessment concluded that the student "is a relatively friendly and good student, however, some behavior problems exist that may impair his ability to fully benefit from his educational experience. In the wrong settings or with greater intensity, even seemingly benign behaviors can be highly disruptive to others and himself." The FAB recommends that the student be placed in an academic setting with a low student to teacher ration. The student thrives on the positive attention and support from teachers and a smaller class size would better allow that. The assessment also recommended *inter alia*, a social skills group, individual therapy, a "stop Behavior" technique, a BIP, and scheduled movement breaks.

(P 8)

12. The student's observed behavior at Academy was far superior to his reported behavior at

13. The student received a psycho-educational evaluation and a report dated November 25, 2008. The evaluation was conducted at Interdynamics by Roberta Allison, a Psychology Associate, under the supervision of James Moses Ballard, PhD, Licensed Clinical Psychologist. The student was administered the WISC-IV, the WIAT-II, and the VMI. Additionally the parent and student were interviewed.

The student's FSIQ on the WISC-IV was 79, in the borderline range. The student's verbal reasoning abilities were in the borderline range. The student's nonverbal reasoning abilities were in the average range.

The student's academic achievement was measured by the WIAT-II. The student's reading comprehension subtest score was in the average range. His overall math skills were in the low average range. His oral language skills were in the low average range. His written language skills were in the average range.

The student achieved better than anticipated in reading, writing, and oral skills.

The report concluded that because of the student's extremely discrepant abilities in verbal vs. nonverbal reasoning, the FSIQ may not best represent his general cognitive abilities.

The evaluation diagnosed the student with Learning Disorder by history, in partial remission. The report indicated that the student is showing progress in previous discrepancies between his cognitive and achievement scores but it is recommended that the student continue to receive special education services because they are benefiting him.

The report recommends that the student be placed in an academic, therapeutic day setting to address his mental health issues and that improvement in his behavior will positively affect his academics.

(P 9).

14. [redacted] PhD, clinical psychologist testified. [redacted] is a licensed clinical psychologist at Interdynamics. She has never met the student and did not conduct or supervise any of the student's evaluations. She was not specifically listed on Petitioner's witness list, nor was her cv provided in advance. She testified as the designee of the Executive Director of Interdynamics. DCPS objected to her testimony arguing that she was not a proper designee of the Executive Director. The Hearing Officer ruled that she was a proper designee since she reports to Dr. James Ballard, Chief Psychologist at Interdynamics, who himself reports directly to the Executive Director. She was designated an expert in clinical psychology as it applies to special education students. Because [redacted] was not involved with the student or the evaluation process, her testimony was of limited usefulness. However, she had reviewed all of the evaluations. Based on her review, it was her opinion that the student's level of sexual activity was not normal and expected, and that it was a major concern.

[redacted] testified that the only discrepancy in the psycho-educational evaluation that suggested a learning disability was the discrepancy between the student's verbal and performance IQ. She also noted that the student's attention problems impacted on his performance. (Testimony of [redacted])

15. The admissions director of [redacted] School of Washington DC, [redacted] testified that the student has been accepted at [redacted] The student and his parents visited the school on March 9, 2009. [redacted] reviewed the student's 2007 IEP, the recent Psycho-educational, clinical and FBA evaluations, and at least one of the student's report cards. The school can address the student's behavior problems, including his sexual behavior. [redacted] has 5 clinical licensed social workers on staff for a student body in the middle school of 46 students. Teachers are trained in de-escalation methods, there is a behavioral modification plan based on the point sheet method whereby students gain rewards for good behavior. [redacted] agreed that the student's academic levels varied and that most were behind, but that students were grouped by their academic level. [redacted] School is an appropriate placement, although it should be noted that the student's behavioral problems suggest that a more restrictive placement may be necessary in the future. (Testimony of [redacted])

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child....” 20 U.S.C. ¶ 1414(d)(1)(A).

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).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Failure to Convene an MDT Meeting Following Receipt of the Independent Evaluations

Petitioner argues that the July 9, 2008 settlement agreement requires DCPS to convene an MDT meeting within 20 business days of receipt of the evaluations. DCPS argues that Petitioner violated the agreement by not providing the evaluations within the 45 business days required by the settlement agreement. Petitioner seriously violated the agreement as well as his duty to his client by failing to provide the independent evaluations until over 5 months after the agreement was signed. Petitioner’s violation constitutes a material breach of the agreement and relieves DCPS from its obligations under the agreement.

That said, DCPS remains obligated to review evaluations within a reasonable time. This is especially true when dealing with a student whose IEP expired in September 2008.

The IDEA and its implementing regulations require that a child's IEP must be reviewed at least annually to determine whether annual goals are being achieved and to revise the IEP as appropriate. 34 C.F.R. § 300.324 (b) (1) (i) and (ii). DCPS failed to comply with the IDEA. The student's IEP expired in September 2008. No effort was made to review and revise the IEP until March 16, 2009, when an IEP meeting was convened without the presence of the parent or a representative. There is nothing in the record indicating that any efforts were made to contact the parent or her representative. An IEP meeting with the parents and their advocate was finally held on April 9, 2009. This is also the first time DCPS reviewed the student's independent evaluations, some 3 ½ months after they were provided to the school. As will be discussed later in this decision, it is the Hearing Officer's belief that the review of the evaluations as well as the student's conduct during the school year should have led to a classification of ED and a change in the level of services the student was receiving.

Thus, the failure timely to review and revise the student's IEP and review the independent evaluations was both a procedural denial of FAPE because it impeded the parents' opportunity to participate in their child's education, and a substantive denial of FAPE because the evaluations and the student's behavior suggested that he required a higher level of services than that provided in the September 2007 IEP.

B. Manifestation Determination

The IDEA and its implementing regulations provide detailed procedures which must be followed if a school is seeking a change in placement for a child with a disability due to that child's violation of a code of student conduct. *See*, 20 U.S.C. § 1415(k), 34 C.F.R. § 300.530. A disabled child who is suspended from school for ten days or less is subject to the same disciplinary procedures as a child who is not disabled. 20 U.S.C. § 1415(k) (1) (B).

However, if the suspension exceeds 10 school days a Manifestation Determination must be made. Within ten school days of a decision to change the placement of a disabled child because of a violation of a code of student conduct, the LEA, parent and IEP team are required to review the student's file 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 in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k) (1) (E)(i).

If it is determined that the conduct was a manifestation of the child's disability, the child must be returned to her original placement. 34 C.F.R. Sec. 300.530(e). Further, The primary purpose of 1415 (k) is to ensure that special education children who are temporarily or permanently placed in another educational setting because of disciplinary problems continue to receive educational services. The IDEA at 20 U.S.C. § 1415 (k)(1)(D) states that

A child with a disability who is removed from the child's current placement ... shall—

(i) 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....

If a determination is made that the conduct was a manifestation of the child's disability, the IEP team is to conduct a functional behavioral assessment and implement a behavioral intervention plan for the child. Where a behavioral intervention plan is already in place, the plan is to be reviewed and modified as necessary. 20 U.S.C. § 1415(k) (1)(F). Also, school personnel may

Remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(iii) has inflicted serious bodily injury upon another person while at school, on school premises....

20 U.S.C. § 1415(k) (1)(G).

The student was initially suspended from _____ from September 24, 2008, to December 3, 2008. A manifestation review was held on October 1, 2008. Petitioner has not challenged the results of that meeting. However, the student was at home for at least 2 weeks at the beginning of the suspension before being sent to _____ Academy. During that time the student did not receive any educational packet. It is possible that the period in which the student received no educational services exceeded ten days. However, Petitioner has failed to put on evidence supporting this possibility. Therefore, the initial suspension was not in violation of the IDEA.

The student was suspended at least 5 additional times for a total of at least 21 days. Because the student had already been suspended for more than ten days in September 2008, a manifestation review should have occurred for each of the 5 suspensions. No such manifestation review occurred for any of them. Further, the school was obligated to continue to provide educational services to the student. It did not. DCPS clearly violated the IDEA and denied the student FAPE by failing to conduct required manifestation reviews and failing to provide educational services during the student's suspensions.

At the time of this hearing, the student was on a 2 week in-house suspension. The uncontradicted testimony of the parents was that the student was not being provided with educational services during the suspension but was instead watching videos and helping with office work. The failure to continue to provide educational services is a violation of FAPE. 20 U.S.C. § 1415 (k)(1)(D)

C. Appropriateness of the IEP

First, Petitioner argues that the student should be classified as LD and should be receiving additional hours of specialized instruction. The November 2008 psycho-educational evaluation supports a finding that the student may have mild LD problems. However, the student's primary problems involve his ADHD and behavior and their effect on his ability to learn. The specialized instruction the student requires is primarily as a result of his OHI and ED problems. Petitioner has failed to sustain her burden of proof concerning the need for the student to receive the classification of LD.

Second, Petitioner argues that the student should be classified as ED on the basis of his long and continuous history of behavior, including his inappropriate sexual behavior. DCPS argues that the student's behavior is not an emotional disturbance but social maladjustment.

The crux of the dispute is over whether the student is merely socially maladjusted or whether he is emotionally disturbed. In order to be eligible for specialized instruction or related services directed at his behavioral problems, it is necessary to find that his behavior constitutes a disability.

Social maladjustment has been defined as a persistent pattern of violating social norms. *Springer v. The Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998). The IDEA and its regulations state that emotional disturbance does not apply to children who are socially maladjusted, unless they otherwise have an emotional disturbance. 34 CFR ¶ 300.8 (c)(4)(ii).

Emotional Disturbance, on the other hand is defined by the IDEA as

...a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance ...

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

.... *Id.* at 300.8©(4)(i).

There is a fine line between ED and social maladjustment, a line which is often impossible to discern. However, in this case the line clearly falls on the side of an emotional disturbance. The clinical evaluation that was conducted in this case was extremely thorough, as was the FBA. Both evaluations find that the student is ED. Further, this is not a case of adolescent juvenile delinquency. This is a case of a student who has been exhibiting extreme behaviors, including sexual behaviors since he was in pre-school. A child cannot have absorbed enough of the social culture around him by age 4 to have become socially maladjusted. Nor can abnormal sexual behavior in a child that young be ignored as anything other than a manifestation of an emotional disturbance. Perhaps most troubling is that DCPS is turning a blind eye to a student whose sexual conduct may be a danger to the school community. This student should be classified as ED and failing to do so has denied the student a FAPE for a number of reasons.

First, by refusing to classify the student as ED, DCPS has been able to suspend him by claiming that his behavior has not been a manifestation of his disability. His behavior has clearly been a manifestation of his ED. Second, by not finding that the student is ED DCPS has not been obligated to provide the student with the educational support that he needs.

In any case, the student has not even been provided with the 10 hours of specialized instruction to which he is entitled. As testified to by his special education teacher, she is in the inclusion classroom for at most 3 hours a week and provides resource services for perhaps another 3 hours a week. She does not provide 10 hours of specialized instruction even if the student was compliant in attending the pull out services, which he is not.

The student clearly needs additional services. It is patently clear on the face of this record that [redacted] is unable to provide educational benefit to this student. When not at [redacted] Academy, the student has been suspended from school for over ½ the school year. He comes back from one suspension and is immediately placed on another suspension. The independent evaluations recommend that the student be placed in a therapeutic environment with small classes and a behavioral support system. DCPS has provided absolutely no testimony contesting this recommendation or suggesting how [redacted] is able to educate this student. He is entitled to a full time out of general education IEP.

D. Placement

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. "[T]he education must be sufficient to confer some educational benefit upon the handicapped child." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 200-01 (1982). A free and appropriate education (FAPE) does not require the best possible education. It does require that the IEP and placement must confer a meaningful educational benefit gauged to the child's potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000). The burden of proving that [redacted] is not providing the student with a

meaningful educational benefit lies with petitioner. *Shaffer ex rel. Shaffer v. Weast*, 546 U.S. 49 (2005).

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b). If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). Moreover, the IDEA requires school districts to place special education children in the least restrictive environment possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114.

In this case, the student should have a full time ED/OHI IEP. In conformity with that IEP the student should be placed in a full time therapeutic school for ED students. What is most telling in this record is how much better the student performed during his time at Academy. is the equivalent of a full time ED school with small classes and a serious behavioral system and teachers trained to deal with seriously ED students. Unfortunately, it is not a full time placement. DCPS has not offered up any placement meeting the student's needs. On the other hand, Petitioner has presented sufficient evidence that School of DC can provide the kind of specialized instruction and emotional support services this student needs. is an appropriate educational setting for the student.

E. Compensatory Education

Petitioner has failed to present any evidence in support of compensatory education. Therefore, compensatory education is denied.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to convene an MDT meeting to update the student's IEP and review independent evaluations, failing to classify him as ED, failing to provide an appropriate IEP and placement, and failing to conduct at least 5 manifestation reviews. Petitioner has not met his burden of proof for the provision of compensatory education.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at _____ School of DC with transportation, all at DCPS expense, within 10 business days of the issuance of this HOD.
2. Within 30 days of the student's enrollment at _____ an MDT/IEP meeting shall be convened to review and revise the student's IEP, including the addition of an ED classification and the provision of a full time IEP with appropriate specialized instruction and related services for the student's OHI and ED classifications.
3. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

 /s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: May 1, 2009