

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: April 6, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2015-0036

v.

Hearing Date: March 18, 2016

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2006
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner appeals the determination of the Manifestation Determination Review (MDR) team at CITY SCHOOL that Student's February 9, 2016 code of conduct violation was not a manifestation of her IDEA disability. The Petitioner also alleges that Respondent District of Columbia Public Schools failed to timely evaluate Student, offered her inappropriate IEPs and failed to

¹ Personal identification information is provided in Appendix A.

implement her IEPs during intervals when Student was hospitalized or suspended from school.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 22, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on February 23, 2016. The parties met for a resolution session on March 4, 2016. No settlement agreement was reached. On March 2, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on March 18, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses DEAN OF STUDENTS, SCHOOL SOCIAL WORKER and RESOLUTION SPECIALIST. Petitioner's Exhibits P-1 through P-36 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-7 were admitted into evidence, including Exhibit R-7 admitted over Petitioner's objection. Counsel for the respective parties made opening and closing statements. At the request of Petitioner, the parties were granted leave until March 21, 2016 to file citations to additional authority. On March 21, 2016, Petitioner's counsel filed additional citations by email.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUE AND RELIEF SOUGHT

The issue(s) to be resolved in this case, and relief requested, as set forth in my March 2, 2016 Prehearing Order are:

1. Whether DCPS denied Student a FAPE by failing to determine that her code of conduct violation behavior on February 9, 2016 was a manifestation of her disability;
2. Whether prior to December 2014, DCPS failed to comply with its “Child Find” obligations under the IDEA to timely locate and evaluate and/or identify the student as eligible for special education services, develop an Individualized Educational Program (IEP) for Student and make services available in a timely manner;
3. Whether DCPS denied the student a FAPE when it failed to timely conduct a Functional Behavioral Assessment despite agreeing to do the evaluation in November of 2014;
4. Whether DCPS denied Student a FAPE by providing the student with inappropriate December 16, 2014 and December 10, 2015 IEPs that did not adequately address Student’s bipolar disorder and anxiety, or her lack of progress academically, behaviorally and socially² and
5. Whether DCPS failed to implement Student’s 2014 and 2015 IEPs by not providing her with specialized instruction and or related services during Student’s hospitalizations at PSYCHIATRIC HOSPITAL and during her removals from the school setting due to behavior incidents related to her disability.

For relief, Petitioner requests that DCPS be ordered to fund reasonable compensatory education for the denials of FAPE alleged in the complaint; that DCPS be ordered to conduct a Functional Behavior Assessment (FBA) and develop a Behavior Intervention Plan (BIP) based on the FBA within 30 days of the issuance of this decision; that DCPS be ordered to convene an IEP meeting within 15 days of the decision to amend

² By email of March 16, 2016, I granted the request of Petitioner’s Counsel to expand the inappropriate IEP claim to include the December 16, 2014 IEP.

Student's IEP to reflect the full extent of Student's disability more clearly and to revise the level of services currently on her IEP, including the appropriate LRE setting; and that the Hearing Officer determine that Student's behaviors resulting in her 25 day suspension were a manifestation of her disability.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where she resides with Mother. Testimony of Mother.
2. Student is eligible for special education and related services under the disability classification Other Health Impairment - Attention Deficit or Attention Deficit Hyperactivity Disorder (OHI-ADHD). Her last special education eligibility meeting date was December 16, 2014. Exhibit P-1.
3. Since the 2013-2014 school year, Student has been enrolled in City School. Exhibit P-13.
4. In April 2014, Mother requested that Student be evaluated for special education eligibility. Testimony of Mother, Exhibit P-3. Mother was told that she would have to wait for the next school year for Student to be evaluated. Testimony of Mother.
5. By letter of October 21, 2014, an attorney for Mother requested that Student be evaluated for special education eligibility. On October 23, 2014, Mother filed a prior due process complaint alleging that DCPS had not complied with its child find obligations under the IDEA and had not timely evaluated Student. Exhibit P-3. The case was settled and the complaint was dismissed without prejudice. Representation of Counsel.

6. Student has a history of suspensions from school. On October 4, 2014, Student allegedly engaged in a verbal altercation with another Student which led to her allegedly assaulting a school administrator and police officers summoned to intervene. Following the incident, Student was suspended from school. Mother had Student admitted to Psychiatric Hospital, where she was hospitalized from October 8 to October 23, 2014. Student returned to school on October 28, 2014. Exhibit P-13.

7. Student's October 2014 hospitalization records were provided to City School. Her discharge diagnoses were Mood Disorder, NOS, Generalized Anxiety Disorder and ADHD. Exhibit P-13.

8. SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student in late November and early December 2014. In her December 9, 2014 Comprehensive Psychological Evaluation report, School Psychologist reported that Student's intellectual functioning reflected cognitive abilities ranging from Below Average to Average. Educational testing indicated that Student's reading, math and written language skills were average for her age and grade level. An analysis of behavioral data suggested that Student frequently engaged in behaviors that were considered strange or odd and she disconnected from her surroundings in the school environment. School Psychologist reported that Student's tendency to perseverate on negative peer interaction affected her level of engagement in class. The assessments for ADHD suggested that Student's levels of inattention depended on the class but were not Clinically Significant. School Psychologist did not endorse a determination that Student had a qualifying special education disability. Exhibit P-13.

9. At an eligibility meeting on December 16, 2014, Student was determined eligible for special education and related services under the OHI - ADHD disability

classification. Exhibit P-2. (No meeting notes or other records were offered into evidence to explain the affirmative determination of the eligibility team.)

10. Student's initial IEP was developed at an IEP team meeting on December 16, 2014. The IEP identified Mathematics, Reading, Written Expression, and Emotional, Social and Behavioral Development as areas of concern. The IEP provided for eight hours per week of Specialized Instruction Services, outside general education. The IEP team and Mother agreed that Student would receive one hour per month of school counseling (Behavioral Support Services) as additional support. Exhibit P-2.

11. Student's final grades for core courses for the 2014-2015 school year were D in History/Geography, D in French, C- in Physical Science, C- in Geometry and B- in English. Student failed Psychology. Exhibit P-21.

12. Student was hospitalized at Psychiatric Hospital for about two weeks in February or March 2015. Student was diagnosed then with bipolar disorder. After the hospitalization there was a meeting at City School with school special education staff, where Mother requested that Student's new bipolar disorder diagnosis be included in her IEP. Mother signed a release for the school to obtain Student's hospital records. No further evaluations were conducted by the school. Testimony of Mother.

13. Student was hospitalized again at Psychiatric Hospital around May 2015 and in the summer of 2015. Testimony of Mother. On December 26, 2015, Student was again admitted to Psychiatric Hospital, as "in need of psychiatric stabilization," for an estimated stay of 5-7 days. According to a nursing staff report, Student was acting psychotic and paranoid on the unit, refusing to take her medications. She was also being disruptive in the milieu and loud and defiant about having to stand in line. Exhibit P-9. (Exhibit P-9 is a Master Treatment Plan from Psychiatric Hospital. No discharge

summary or other hospital records were offered into evidence.)

14. Each time Student was hospitalized, Mother informed City School staff and requested that Student be provided school work make-up packets. With a few exceptions, the school did not provide Student work packets during these medical absences. Testimony of Mother. On this point, I found Mother's testimony more credible than the testimony of Dean of Students. Dean of Students volunteered that he was responsible for hundreds of students and he had difficult recalling the details of this Student's make-up work situation.

15. Student's grades as of October 27, 2015 in core subjects were B in U.S. History and Geography, D in Mathematics, F in English, and A in World History and Geography. Exhibit P-16.

16. Student's IEP team convened on December 10, 2015 for her first annual IEP review. Mother, Student, Petitioner's Counsel and Educational Advocate 1 attended the meeting. Mother requested that Student's IEP be revised to reflect her Bipolar and Anxiety disorders. Educational Advocate questioned whether Student's Behavioral Support Services should be increased. Exhibit P-6. Student's disability classification, OHI-ADHD was not changed on the IEP. Her Specialized Instruction Services were continued at 8 hours per week, but only 4 hours were to be provided outside general education. Student's Behavioral Support Services were increased from 60 minutes to 90 minutes per month. Student's reported Bipolar and Anxiety disorder diagnoses were not mentioned in the IEP. Exhibit P-1.

17. The December 2015 IEP team repeated, verbatim, the present levels of performance, baselines and annual goals from the December 16, 2014 IEP for Student's Emotional, Social and Behavioral Development Area of Concern. Exhibits P-1, P-2.

18. On February 9, 2015, Student was involved in an alleged assault upon another student, which resulted in Student's long-term, out-of-school, suspension. That day Student had gone to the Assistant Principal's office because she was upset. She told the Assistant Principal that she wanted to fight a girl in the physical education class, who Student believed had been involved in a fighting incident which Student had observed the day before. The Assistant Principal spoke to Student, told her that the other student was not involved in the prior incident. The Assistant Principal kept Student in her office for a while to calm down and eventually directed Student to return to her classroom. Instead of returning to her classroom, Student went to the school gymnasium and, without provocation, allegedly repeatedly assaulted the other Student. The gym teacher attempted, without success, to redirect Student out of the gymnasium. Testimony of Dean of Student, School Social Worker, Exhibit P-7. As a consequence of the incident, Student was placed on a 25 day, out-of-school, suspension. Testimony of Mother, Exhibit P-7.

19. A Manifestation Determination Review meeting was convened on February 16, 2016 to determine whether the February 9, 2016 alleged assault incident was a manifestation of Student's disability. The School Psychologist discussed Student's ADHD disability classification. Most of the school representatives felt the incident was not a manifestation of Student's disability. Dean of Students reasoned that on past occasions, Student had shown the ability to pull back from conflicts. Mother and Educational Advocate 1 stated that Student had difficulty regulating herself due to her Bipolar and Anxiety Disorders as well as her ADHD disability. Although the MDR team was aware of Student's multiple hospitalization at Psychiatric Hospital, at the MDR meeting the team did not have access to the hospital records. The MDR team

determined that the February 9, 2016 code of conduct violation was not a manifestation of Student's disability. Mother, her representatives and one of the teachers disagreed with the determination. After the meeting, School Social Worker obtained a written consent from Mother and went to Psychiatric Hospital to obtain a copy of Student's records, but the hospital would not release the records because School Social Worker did not present the records release form used by the hospital. Exhibit P-7, Testimony of Dean of Students, Testimony of School Social Worker.

20. City School staff decided that Student would be allowed to return to school beginning on March 3, 2016 and complete her suspension in the school In-School Suspension room. Mother was notified of this decision on March 1, 2016. Exhibit P-14. Mother has declined to send Student back to school because she is not confident that Student will be "protected." As of the due process hearing date, Student had not returned to school since the February 9, 2016 incident. Testimony of Mother.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006). For student discipline appeals, the DCMR, 5B DCMR § 2510.16, places the burden of proof on DCPS to demonstrate that the student's behavior was not a manifestation of her disability.

Analysis

A.

Did DCPS deny Student a FAPE by failing to determine that her code of conduct violation behavior on February 9, 2016 was a manifestation of her disability?

On February 9, 2016, Student allegedly assaulted another student. That day Student had gone to the Assistant Principal's office because she was upset. She told the Assistant Principal that she wanted to fight a girl in the physical education class, who Student believed had been involved in a fighting incident which Student had observed the day before. The Assistant Principal kept Student in her office for a while to calm her down and eventually directed Student to return to her classroom. Instead of returning to her classroom, Student went to the school gymnasium and without provocation, allegedly repeatedly assaulted the other student. As a consequence of the incident, Student was placed on a long-term, 25 day, out-of-school suspension. On February 16, 2016, the City School Manifestation Determination Review (MDR) team determined that Student's alleged assault on the other student, was not a manifestation of her IDEA disability. DCPS maintains that the MDR team's determination was correct. Petitioner contends that the February 9, 2016 incident was caused by Student's disability.

The IDEA prohibits the punishment of a student with a disability for misbehavior that is a manifestation of the disability. Prior to suspending a student with a disability for more than 10 school days, the school must conduct a "manifestation determination" during which the student's parents and educators consider the relevant information in the student's file, as well as information provided by teacher observations and the parents, to determine whether the conduct at issue "was caused by, or had a direct and substantial relationship to, the child's disability" or "was the direct result of the local

educational agency's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E).³ If the student's behavior is determined to be a manifestation of her disability, the student must be restored to her regular education program. *See* 20 U.S.C. § 1415(k)(1)(F). If not, then the school may discipline the student as it would any other non-disabled student, provided that the student continues to receive FAPE. 20 U.S.C. §§ 1415(k)(1)(C), 1415(k)(5)(D)(i).

For children with disabilities in the District of Columbia, the IDEA discipline regulations are supplemented by regulations issued under District of Columbia law. Title 5-B, Chapter 5B-25 of the DCMR provides, in relevant part:

2510.12 In carrying out a review, the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team:

(a) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including:

(1) Evaluation and diagnostic and results, or other relevant information supplied by the parents of the child;

(2) Observations of the child;

³

FN8. Section 1415(k)(1)(E) provides in full:

Except as provided in subparagraph (B), 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 in question was the direct result of the local educational agency's failure to implement the IEP.

Id.

(3) The child's IEP and placement; and

(4) Any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel; and

(b) Then determines that:

(1) In relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(2) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

Id.

In this case, DCPS did not ensure that City School complied with the requirements of 5-B DCMR § 2510.12, when the MDR team determined that Student's alleged assault behavior on February 9, 2016 was not a manifestation of her disability. It appears that the team based its decision only on Student's OHI-ADHD disability classification, as described to them by the school psychologist and case manager, without considering how Student's reported bipolar and anxiety disorders may have impaired her "ability . . . to control the behavior subject to disciplinary action." *See* 5B DCMR § 2510.12(b)(3). The school had previously been provided a copy of Psychiatric Hospital's records concerning Student's October 2014 admission for depression and anxiety, but those records were not considered by the MDR team. Moreover school staff were aware that Student had been repeatedly readmitted to Psychiatric Hospital, most recently on December 26, 2015, and that Mother had reported that Student had been diagnosed with Bipolar and Anxiety

Disorders. Although Mother had executed a release for the school to obtain the more recent hospital records, the MDR team did not have those records either

The IDEA does not allow an MDR team to make its determination without a careful and complete consideration of all relevant information. *See, e.g.,* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46720 (August 14, 2006). (“[The [Congressional] Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented.”) As School Social Worker acknowledged at the due process hearing, the Psychiatric Hospital information would have helpful to the MDR team. (To his credit, School Social Worker attempted to obtain the records from the hospital, but only after the MDR determination had already been made.) I conclude that by not considering Student’s recent mental health records, the MDR team failed to consider all relevant information before reaching its determination. Therefore, DCPS has not met its burden of proof to demonstrate that Student’s behavior on February 9, 2016 was not a manifestation of her disability.⁴

B.

Prior to December 2014, did DCPS fail to comply with its “Child Find” obligations under the IDEA to timely locate and evaluate and/or identify the student as eligible for special education services, develop an IEP for Student and make services available in a timely manner?

⁴ At the due process hearing, no Psychiatric Hospital or other outside mental health records for Student, except for a December 2015 Treatment Plan, were offered into evidence. The hearing evidence was not sufficient for me to make a finding as to whether Student’s February 9, 2015 behavior “was caused by, or had a direct and substantial relationship to, the child’s disability.” I overturn the MDR determination because the MDR team did not consider critical relevant information in making its decision, namely the Psychiatric Hospital records.

Mother had filed a prior due process complaint on October 23, 2014 (Case No. 2014-0445), alleging that DCPS had failed to comply with its child find obligation to evaluate Student for special education eligibility. That complaint was withdrawn without prejudice after DCPS agreed to evaluate Student. Mother's original evaluation request was made in April 2014. Her request triggered the D.C. Code's 120-day deadline to complete Student's initial eligibility evaluation. "DCPS must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.' D.C. Code § 38–2561.02(a)." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C. 2011). Therefore, Student's initial eligibility evaluation should have been completed by August 2014. The City School eligibility team did not complete the initial evaluation and determine that Student was eligible for special education and related services until December 16, 2014. Student's initial IEP was also developed that day.

The courts in this jurisdiction have held that the failure to complete an initial IDEA eligibility evaluation within the 120–day period required by D.C. Code § 38–2561.02(a) may constitute a denial of FAPE. *See, e.g., Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). In *Gersten*, the parents of a child diagnosed with Asperger Syndrome referred the child for an initial DCPS eligibility evaluation on June 13, 2011, triggering the 120-day evaluation period. Citing 34 CFR § 300.323(c)(1)⁵, a special education hearing officer concluded that DCPS had until November 11, 2011 (30 days after the 120-day evaluation period) to develop an IEP for the child. The U.S. District Court rejected the hearing officer's conclusion as "illogical,"

⁵ Each public agency must ensure that— A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services. 34 CFR § 300.323(c)(1).

reasoning that no IEP was going to be completed, or even begun, until an evaluation was completed and an eligibility determination made. “[B]ecause an evaluation and eligibility determination is a prerequisite to preparing an IEP, the District’s failure to timely evaluate G.G. or determine his eligibility by the October 11 deadline ensured that he would not receive a timely IEP, thus, denying him a FAPE.” *Gersten, supra* at 230. Following the reasoning in *Gersten*, I find here that DCPS’ 8 month delay in completing Student’s evaluation ensured that she would not receive a timely initial IEP. Had DCPS timely proceeded with evaluating Student when it received Mother’s request in April 2014, Student’s eligibility should have been determined and her first IEP developed by the start of the 2014-2015 school year.⁶ I conclude, therefore, that DCPS’ failure to complete Student’s initial eligibility determination within 120 days of Mother’s April 2014 evaluation request was a denial of FAPE.

C.

Did DCPS deny the student a FAPE when it failed to timely conduct a Functional Behavioral Assessment despite agreeing to do the evaluation in November of 2014?

At the November 6, 2014 Resolution Session Meeting in Case No. 2014-0445, School Social Worker agreed that a Functional Behavioral Assessment (FBA) of Student was warranted. He stated that an FBA of Student would be conducted and a Behavior Intervention Plan (BIP) developed for her. As of the due process hearing date in the present case, the FBA had yet been conducted, although on February 16, 2016, DCPS

⁶ Technically, DCPS would have had 30 days to develop the IEP following the initial eligibility determination. See 34 CFR § 300.323(c)(1). However, it is logical to assume that had DCPS completed Student’s initial evaluation within 120 days, the IEP team would have proceeded directly with developing the IEP so that Student would benefit from special education services from the start of the school year. (DCPS did, in fact, develop Student’s initial December 16, 2014 IEP on the same day she was determined eligible for services.)

notified the parent that it would proceed with the assessment. The parent contends that DCPS' failure to conduct the FBA after the November 2014 resolution meeting was a denial of FAPE. DCPS argues that the claim is moot since it has now undertaken to conduct the FBA.

The IDEA requires, in the case of a student whose behavior impedes the student's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). An FBA is "essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C.2008). Here the record is replete with evidence that Student's behavior impeded her learning. For example, School Psychologist reported in the December 9, 2014 comprehensive psychological evaluation report that in September 2014, Student's teachers reported she was frequently tardy and refused to engage in class, she distracted other students by talking and engaging in emotional outbursts, and that she wandered around the classroom using foul language and talking excessively. I find that an FBA should have been conducted in conjunction with developing Student's initial IEP. Student has continued to exhibit severe behavior problems in school. DCPS' failure to timely conduct an FBA of Student "has certainly compromised the effectiveness of the IDEA as applied to [Student], and it thereby constitutes a deprivation of FAPE." *See Harris, supra*, 561 F. Supp. 2d at 69.

DCPS' argument that Petitioner's FBA claim is moot, because it has now agreed to conduct the assessment, is incorrect. Student may still be entitled to a compensatory education remedy for DCPS' 15 month delay in conducting the assessment. *See, e.g., Fullmore v. District of Columbia*, 40 F. Supp. 3d 174, 180-81 (D.D.C.2014) (Claim not

moot were Student may be entitled to compensatory education when DCPS declined to provide an independent psychiatric evaluation until months after parent's original request.)

D.

Did DCPS deny Student a FAPE by providing the student with inappropriate December 16, 2014 and December 10, 2015 IEPs that did not adequately address Student's bipolar disorder and anxiety, or her lack of progress academically, behaviorally and socially?

Petitioner contends that both DCPS' initial December 16, 2014 IEP and the revised December 10, 2015 IEP were inappropriate for Student because neither IEP adequately addressed Student's bipolar disorder and anxiety and because the 2015 IEP failed to account for Student's low Scholastic Reading Inventory (SRI) grade and her failing grades in class. DCPS responds that both IEPs were appropriate for Student.

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine "[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more." *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

December 19, 2014 IEP

With regard to development of the initial December 19, 2014 IEP, Petitioner has not alleged any procedural violations by DCPS. Turning to the second, substantive,

prong, Petitioner alleges that the IEP's provision of 1 hour per month of behavioral support services was inadequate to address Student's behavior problems which were known to City School. In determining Student's needs, the December 19, 2014 IEP team considered both a recent Psychiatric Admission Assessment from Psychiatric Hospital and DCPS' December 9, 2014 Comprehensive Psychological Evaluation report. At the due process hearing, Petitioner offered no competent evidence that when the December 19, 2014 IEP was offered, it was not reasonably calculated to enable Student to receive educational benefits or that at the time, Student required more hours of behavioral support services. "[B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . ." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008). I find with respect to the December 19, 2014 IEP, that Petitioner has not met her burden of proof to show that the initial IEP was not adequate to provide a FAPE.

December 10, 2015 IEP

Subsequent to the development of Student's initial December 16, 2014 IEP, Student was hospitalized on three occasions at Psychiatric Hospital in the spring and summer of 2015. Mother reported to the school that Student had been given new psychiatric diagnoses of Bipolar and Anxiety Disorders. At the December 2015 IEP meeting, Mother requested that the revised IEP reflect Student's Bipolar and Anxiety Disorders as well as her ADHD, or at least that Student be fully tested for these conditions. However, although Mother signed a consent at the IEP meeting for DCPS to obtain Student's medical records, the IEP team finalized the IEP without either reviewing the Psychiatric Hospital records or obtaining an updated psychological assessment of

Student.

The federal IDEA regulations require that in developing every initial and revised IEP, the IEP Team must consider (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. 34 CFR § 300.324(a). In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must also consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR § 300.324(a)(2)(i). The District must administer such assessments and other evaluation measures as may be needed to produce the data needed by the IEP team to appropriately revise the IEP. *See* 34 CFR § 300.305(c).

Despite Mother's request that the IEP team consider Student's recent mental health history and diagnoses, the December 2015 IEP team left Student's IEP disability classification as OHI-ADHD and repeated, verbatim, the December 16, 2014 IEP present levels of performance, baselines and annual goals for the Emotional, Social and Behavioral Development Area of Concern. I find that by not considering Student's recent mental health records or requesting an updated psychological evaluation, the IEP team did not appropriately consider the needs of Student and the concerns of the parent in the development of the December 10, 2015 IEP.

This was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations of the IDEA do not necessarily mean a child

was denied a FAPE. *See, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). “[P]rocedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of education benefits.” *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990) (*en banc*), *quoted in Lesesne ex rel. B.F. v. D.C.*, 447 F.3d 828, 834 (D.C. Cir. 2006). Here, I find Petitioner has established that DCPS’ failure to ensure that Student’s IEP team considered the records from Student’s repeated hospitalizations at Psychiatric Hospital and her new mental health diagnoses hampered Mother’s opportunity to participate in the formulation of the revised December 2015 IEP and compromised Student’s right to an appropriate education. This was a denial of FAPE and the IEP must be set aside. *See Gersten, supra*.

Having determined that the December 10, 2015 IEP must be set aside for procedural violations, I need not reach the second prong of the *Rowley* inquiry – whether the IEP was reasonably calculated to enable Student to receive educational benefits. *Cf. Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001) (“Having concluded that, under the first prong of *Rowley*, Bexley denied Justin a FAPE by virtue of its procedural violation of the IDEA, we need not determine whether the draft IEP proposed by Bexley offered Justin an appropriate program.” *Id.* at 767.) Until Student’s IEP team reviews Student’s recent mental health records and updates Student’s present levels of performance and annual goals for emotional, behavioral and social development, it would be speculative to predict what special education and related services and supplementary aids and services Student now requires to receive

educational benefits from her IEP. Accordingly, I will order DCPS to ensure that Student's IEP team reviews and revises, as appropriate, the December 10, 2015 IEP, informed by Student's recent hospitalization and other mental health records, together with any reevaluations and other data needed by the team to determine Student's educational requirements.

E.

Did DCPS fail to implement Student's 2014 and 2015 IEPs by not providing her with specialized instruction and/or related services during Student's hospitalizations at Psychiatric Hospital and during her removals from the school setting due to behavior incidents related to her disability?

Following development of Student's initial IEP in December 2014, Student was hospitalized at Psychiatric Hospital for about two weeks in February or March 2015. Student was hospitalized again at Psychiatric Hospital around May 2015 and in the summer of 2015. Most recently Student was again admitted to Psychiatric Hospital on December 26, 2016 for an estimated stay of 5-7 days. Mother informed City School staff when Student was hospitalized and requested that she be provided school work make-up packets. For the most part, the school did not provide Student work packets during these absences. Mother contends that this was a failure to implement Student's IEPs. Dean of Students testified that the school was able to provide make-up work to Student when she returned to school.

Petitioner has not cited, and I have not found, any requirement in the IDEA for an LEA to provide IEP services to students with disabilities during short-term hospitalizations. The Fourth Circuit Court of Appeals has held to the contrary in *dicta*. "We certainly do not hold that the Act imposes a duty on the public schools to always provide special education services to handicapped children who are subject to short-term

medical hospitalizations. In many cases, it would be a reasonable educational decision to suspend educational services until a child is released from such a hospitalization.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1208 n.10 (4thCir. 1990). DCPS offers a Home and Hospital Instruction Program (HHIP) for students whose instruction has been interrupted by confinement to a hospital or home for three weeks or more. See <http://dcps.dc.gov/service/home-and-hospital-instruction>. Petitioner offered no evidence at the due process hearing that Student was eligible for the HHIP program. I conclude, therefore, that Petitioner has not established that DCPS denied Student a FAPE by not providing IEP services during the periods of her hospitalizations.

Petitioner also alleges that DCPS denied Student a FAPE by not providing her IEP services during the periods of her disciplinary suspensions from school. The IDEA protects disabled students from being removed from the classroom because of their disability. 34 CFR §§ 300.530, 300.536. Since the December 19, 2014 IEP was developed, the only disciplinary removal of Student for more than 10 school days, proven by Petitioner, was the 25 day suspension following the February 9, 2016 assault incident. I have already determined that the February 16, 2016 MDR determination, that Student’s February 9, 2016 conduct was not a manifestation of Student’s disability, was not supported by the evidence. Therefore, DCPS’ failure to restore Student to her regular educational placement on February 16, 2016 was a denial of FAPE. See 34 CFR § 300.530(f)(2).

When a code of conduct violation is not a manifestation of a student’s disability, the IDEA requires that, when the student is removed from her current educational placement for more than ten consecutive school days for the violation, the student must continue to receive educational services, alternative interim services, so as to enable her

to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in her IEP. *See* 34 CFR § 300.530(d). Because in this decision, I overturn the MDR team's determination that Student's February 9, 2016 violation was not a manifestation of her disability, the IDEA's provision for alternative interim services is not applicable.

Remedy

In this decision, I have found that DCPS failed to demonstrate that Student's February 9, 2016 code of conduct violation was not a manifestation of her disability and I overturn the MDR team's determination. In addition, I have found that Student was denied a FAPE by DCPS' not timely completing her initial eligibility determination, by DCPS' not timely conducting Student's FBA and by the IEP team's not appropriately considering the needs of the Student and the concerns of the parent in the development of the December 10, 2015 IEP. As relief for the December 10, 2015 IEP procedural violations, I will order DCPS to ensure that Student's evaluations are appropriately updated as needed. At minimum, DCPS shall ensure that a qualified DCPS psychologist reviews Student's recent Psychiatric Hospital and related mental health records in order to provide appropriate written guidance to Student's IEP team. In addition, DCPS must ensure that an FBA and any other assessments needed by Student's IEP team are conducted in order for the IEP team to review and revise Student's IEP, fully informed of Student's needs and the extent of her disability.

Petitioner also requests that DCPS be ordered to provide reasonable compensatory education for the denials of FAPE proven in this case. The D.C. Circuit recently discussed the compensatory education remedy in *B.D. v. District of Columbia*, 2016 WL 1104846 (D.C.Cir. Mar. 22, 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has 'broad discretion to fashion an appropriate remedy,' which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As [this Court] held in *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir.2005), an award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. In other words, compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial.

B.D., 2016 WL 1104846, at 4.

Student is entitled to compensatory education for the denials of FAPE in this case, namely DCPS' delay in determining Student's initial eligibility, DCPS' delay in conducting an FBA of Student, the failure of the December 10, 2015 IEP team to consider and address Student's recent mental health records and hospitalizations in updating her IEP and City School's disciplinary suspension of Student based upon inadequate MDR procedures. Educational Advocate 2 recommended, *inter alia*, an award of 80 hours of specialized tutoring as compensatory education. This recommendation lacks credibility because it does not track the denials of FAPE in this case. For example, one of the violations upon which the recommendation was based was the alleged inappropriateness of the December 16, 2014 IEP, which was not established by the Petitioner.

In *B.D.*, the D.C. Circuit Court encouraged the use of assessments to inform the crafting of a compensatory education remedy. "In carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment. . . . If further assessments are needed . . . the district court or Hearing Officer should not hesitate to order them" *B.D.* at 7. From the evidence before me, it cannot be discerned what position Student would be in, absent the denials

of FAPE in this case. *See B.D., supra*. Several things need to happen first. DCPS must obtain Student's hospitalization and mental health records and conduct any needed evaluations to enable Student's IEP team to determine her current IEP needs. Next, DCPS must ensure that the IEP team meets promptly to review this information and revise her IEP. Then, Student must be offered compensatory education "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *See Reid, supra*, 401 F.3d at 524. If DCPS and Petitioner are unable to reach agreement on what would constitute appropriate compensatory education for Student, I will require DCPS to obtain an independent assessment to discern Student's needs and recommend an appropriate compensatory education program.

ORDER

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

ORDERED:

1. The City School February 16, 2016 MDR determination is set aside as erroneous. Student's disciplinary suspension from City School, for the February 9, 2016 incident is annulled. DCPS shall ensure that Student is allowed, forthwith, to return to her classes and IEP program at City School and that all references to Student's suspension from City School, because of the February 9, 2016 incident, are expunged from Student's education records;
2. Subject to Petitioner's executing any needed consents, DCPS shall ensure that Student's complete mental health records from Psychiatric Hospital and other outside providers are promptly obtained and reviewed by a DCPS psychologist. The DCPS psychologist shall prepare a written report summarizing the findings, diagnoses, recommendations and other relevant content for consideration by Student's IEP team;
3. DCPS shall ensure that the FBA of Student, and all other assessments and evaluations needed by the IEP team to consider Student's educational and related services needs, be promptly conducted. Upon receipt of Student's hospital and mental health records, the FBA and any additional evaluations

and assessments deemed needed, DCPS shall promptly convene Student's IEP team to review and revise Student's IEP in accordance with 34 CFR § 300.324(b). Without knowing how much time will be needed to obtain Student's hospital and mental health records and to conduct any additional assessments, it is not appropriate to set a time limit for completion of the revision of Student's IEP. However, I require that DCPS ensure that the IEP revision is completed expeditiously;

4. Petitioner's request for a compensatory education award is denied without prejudice. Following the revision of Student's IEP, if DCPS and Petitioner are unable to agree upon an appropriate compensatory education program to compensate for the denials of FAPE found in this decision, DCPS shall, without delay, engage a qualified independent evaluator, who is neither an employee of DCPS nor an individual who regularly testifies for parents at due process hearings, to assess Student and discern her needs resulting from the denials of FAPE found in this decision and to recommend an appropriate compensatory education program. If necessary, Petitioner may request another expedited due process hearing to seek compensatory education relief, informed by the recommendations of the independent evaluator and
5. All other relief requested by the Petitioner herein is denied.

Date: April 6, 2016

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(i).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team