

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Student Hearing Office
December 19, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION ON EXPEDITED ISSUE</p> <p>Hearing Dates: December 2 & 4, 2013</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on December 2, 2013, and concluded on December 4, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ at a DCPS school (“School A”). She has attended School A since school year (“SY”) 2012-2013. Prior to attending School A the student attended a District of Columbia public charter school, where during SY 2009-2010 she was evaluated and determined ineligible under IDEA. Although found ineligible, the student was provided a 504 plan for social/emotional issues while at the charter school.

The student’s academic performance at School A has been varied. During SY 2012-2013 she earned high grades in a number of classes but failed or nearly failed others. As result she attended summer school during Summer 2013 and barely passed two make-up classes. During the first advisory of SY 2013-2014 the student was performing poorly, excessively absent and exhibiting poor behavior in all of her classes.

In April 2013 the student became the subject of a D.C. Superior Court neglect case and the Court appointed the student a Guardian ad litem (“GAL”) and an educational attorney. The Court also ordered a psycho-educational evaluation conducted by a D.C. Department of Mental Health psychologist on June 24, 2013. The evaluation found the student has average intellectual functioning but academic deficits in math. The evaluator diagnosed the student with Mood Disorder, and a Mathematics Disorder and a “Rule out” diagnosis for a number of other clinical disorders.

DCPS reviewed the evaluation and scheduled an eligibility meeting for October 16, 2013. Prior to the eligibility meeting, on October 8, 2013, the student engaged in conduct at school that resulted in disciplinary action. As a result she received a long-term suspension.

On October 16, 2013, DCPS held both an eligibility meeting and a manifestation determination review (“MDR”). The student’s parent, GAL and educational attorney participated in the meeting. The DCPS personnel included two school psychologists, the school social worker a special education teacher and an assistant principal.

DCPS first found the student ineligible under both the emotional disturbance (“ED”) and specific learning disability (“SLD”) classifications. DCPS concluded, however, the student was eligible for a 504 plan and developed a plan. DCPS concluded the student would receive interventions through the student support team (“SST”) process to determine if interventions would

successfully address her academic performance, attendance and behavioral difficulties. The student's representatives at the meeting disagreed with the finding of ineligibility.

The October 16, 2013, team concluded the student's behavior of October 8, 2013, (allegedly lighting a fire in the school along with two other students) was not a manifestation of a suspected disability. Thus, the student's long-term suspension at an alternative placement ("School B") was instituted. The student began attending School B on October 26, 2013.

Petitioner filed this complaint on November 1, 2013. Petitioner asserted that DCPS should have found the student eligible under the SLD and/or ED classifications and should have found that the student's behavior was a manifestation of her disability. Petitioner sought as relief a finding by the Hearing Officer that the student is eligible under ED and/or SLD classifications, and ordering DCPS to develop an IEP for the student and determine an appropriate school placement. As to the MDR issue Petitioner requested that the student be immediately returned to School A and the Hearing Officer order tutoring services to allow the student to make up any missed work from the courses she was not able to continue at school B.

DCPS filed a response to the complaint on November 13, 2013. DCPS denied any alleged denial of a FAPE and specifically asserted the student was properly found ineligible and not entitled to protections under IDEA; nonetheless the student's behavior was not the manifestation of any suspected disability.

A resolution meeting was held on November 18, 2013. The issues were not resolved. Evidence on all issues was presented in a single hearing. The Hearing Officer's Determination ("HOD") on Petitioner's challenge to the manifestation determination (cited as the only issue below in this HOD) is due within ten (10) school days of the hearing,² thus a decision is due on that single issue on or before December 19, 2013. A decision and HOD on the remaining two issues is due and will be issued on or before January 15, 2014.

A pre-hearing conference was held on November 18, 2013, and a pre-hearing conference order was issued outlining, inter alia, the issues to be adjudicated.

² Pursuant to 34 C.F.R. 300.532(c) a hearing challenging a MDR decision must be held within twenty (20) school days of date the complaint was filed and a decision on that matter must be rendered within ten (10) school days of the hearing. The hearing was conducted on two days: December 2, 2013, and December 4, 2013. The Hearing Officer originally considered the ten school days to be measured from the first day of hearing and originally anticipated the decision should be rendered by December 16, 2013. However, the Hearing Officer has determined that because the second day of hearing was within the twenty school day requirement for the hearing, the ten school days for the decision is measured from the second day of hearing. In addition, because there was one less school day subsequent to the hearing due to snow (December 10, 2013) the decision on the MDR issue is not required until December 19, 2013.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to find on October 16, 2013, that the student's behavior (lighting a fire at school/arson/attempted arson) on October 8, 2013, was a manifestation of her suspected ED disability.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 19 and Respondent's Exhibits 1 through 25) that were admitted into the record and are listed in Appendix A

FINDINGS OF FACT: ⁴

1. The student is _____ at School A. She has attended School A since SY 2012-2013. Prior to attending School A the student attended a District of Columbia public charter school, where during SY 2009-2010 she was evaluated and determined ineligible under IDEA. Although found ineligible, the student was provided a 504 plan for social/emotional issues while at the charter school. (Petitioner's Exhibits 10, 18-3, 18-4, 18-5)
2. The student's academic performance at School A has been varied. During SY 2012-2013 she earned high grades in a number of classes but failed or nearly failed others. As a result she attended summer school during Summer 2013 and barely passed the two make-up classes. During the first advisory of SY 2013-2014 the student was performing poorly, excessively absent and exhibiting poor behavior in all of her classes. (Petitioner's Exhibit 10, Respondent's Exhibit 17-6, 17-7, 17-8, 17-9)
3. In April 2013 the student became the subject of a D.C. Superior Court neglect case and the Court appointed a GAL and an educational attorney. The Court also ordered a psycho-educational evaluation that was conducted by a D.C. Department of Mental Health psychologist on June 24, 2013. The evaluation report is dated July 18, 2013. The evaluation found the student has average intellectual functioning but academic deficits in

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. This HOD dated October 19, 2013, addresses the single expedited issue related to the MDR. A subsequent HOD to be issued on or before January 15, 2013, that will contain additional findings of fact and conclusions of law and shall address the remaining two issues that were adjudicated at the December 2 & 4, 2013, hearing.

⁴ The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

math. The evaluator diagnosed the student with Mood Disorder, and a Mathematics Disorder and a “Rule Out” diagnosis for a number of other clinical disorders. (Witness 1’s testimony, Petitioner’s Exhibit 14-5, 14-6, 14-7, 14-8)

4. The evaluator recommended that a clinician who has regular contact with the student rule-out the various diagnoses and make a more accurate diagnosis than the evaluator was capable of doing at the time. The evaluator stated that the student would benefit from an assessment with a treating psychiatrist within the community to assist with diagnosis and to determine if psychotropic medication may help reduce the student’s then current depressive symptoms and rapid changes in mood. (Petitioner’s Exhibit 14-5, 14-6, 14-7, 14-8)
5. The student participates in individual and family therapy outside of school. (Parent’s testimony, Petitioner’s Exhibit 14-10)
6. DCPS reviewed the Court ordered evaluation and scheduled an eligibility meeting for October 16, 2013. Prior to the eligibility meeting, on October 8, 2013, the student engaged in conduct at school that resulted in disciplinary action. As a result she received a long-term suspension. (Witness 1’s testimony, Respondent’s Exhibits 1, 14, 17-3)
7. The Discipline Reports states the following describing the incident and the student’s behavior on October 8, 2013: “[The student] was seen in the girl’s locker room. She was cutting class. She was found in that area when another staff member responded to a call that there was smoke coming from that area. When the staff investigated the scene the student denied any involvement with the fire and smoke in the locker area. One staff member confiscated a lighter. [The student] became agitated and denied any involvement in the items that were burning. Later she admitted her involvement. [The student] wrote a narrative stating her involvement.” (Respondent’s Exhibit 1, Petitioner’s Exhibit 13)
8. The student’s October 8, 2013, conduct was considered arson/attempted arson. (Respondent’s Exhibit 1)
9. On October 16, 2013, DCPS held both an eligibility meeting and a MDR. The student’s parent, GAL, educational attorney, among others representing the student, participated in the meeting. The DCPS personnel included two school psychologists, the school social worker, a special education teacher and an assistant principal. (Respondent’s Exhibit 16-1)
10. At the October 16, 2013 DCPS first found the student ineligible for special education services. The School A team members agreed that the student had behavioral issues that were impacting her learning but disagreed that she needed supports through special education to address the behaviors. (Parent’s testimony)
11. The DCPS school psychologist concluded that because he had no documentation that evidenced based interventions had been tried with the student and it was not clear that the

behaviors described in the Court order evaluation had not been displayed at school he could not use the social/emotional information from the evaluation to conclude the student yet met the ED classification. (Witness 4's testimony)

12. Ultimately the team determined the student was ineligible under both the SLD and ED classifications. DCPS concluded, however, the student was eligible for a 504 plan and developed a plan. DCPS also concluded the student would receive interventions through the SST process to determine if interventions would successfully address her poor academic performance and her class attendance and behavioral difficulties. The student's representatives at the meeting disagreed with the finding of ineligibility. (Parent's testimony, Petitioner's Exhibit 17, Respondent's Exhibit 15, 16, 17, 18, 19, 20-4,)
13. The DCPS team concluded the student's eligibility would be revisited and if the SST interventions were unsuccessful the team would determine if additional evaluation(s) were necessary. The team left open the issue of whether the student might be eligible. Thus, the student was due the protections under IDEA (including the right to a MDR) as a student with a suspected disability despite having been found ineligible.⁵ (Witness 3's testimony, and Witness 4's testimony, Witness 1's testimony, Respondent's Exhibit 16-4)
14. The School A social worker was to begin the process which would take six weeks of meetings and interventions that each of the student's teacher would implement. If there was no improvement in the student's performance and behavior that information was to be forwarded to the School A special education coordinator for a team to consider moving forward with evaluations. (Witness 3's testimony)
15. After the ineligibility determination the team then turned to the MDR. The MDR is a procedure for a student who has a current IEP or who is suspected of having a disability. Most often the eligibility meeting is held first. If the student is not eligible then the MDR is usually not necessary. (Witness 3's testimony)
16. The student's parent expressed concerns that a psychiatric examination should be conducted because of the alleged arson. The student's parent shared with the team that the student had had prior incidents of arson. (Witness 3's testimony)
17. The October 16, 2013, team concluded the student's behavior of October 8, 2013, of lighting a fire in the school along with two other students was not a manifestation of a suspected disability. (Petitioner's Exhibits 11-5, 11-6, 12)
18. The student's parent and her other representatives at the meeting expressed their opinion that the student's behavior stemmed from the student's inability to control her emotions and behaviors and that her impulsiveness as well as her exploding and being combative after being caught was manifestation or symptom of a disability. (Witness 1's testimony)

⁵ Although the student might have been entitled to MDR based on the 504 status, the evidence, including testimony of DCPS witnesses, did not indicate that the MDR was conducted based the student's 504 status.

19. Because of the student's mood disorder the student has difficulty modulating her behaviors and shows signs of impulsivity. She is quick to act without thinking. Consequently, she has less ability to make sound decisions exemplified by her decision to cut class and instead hang around the school and engage in destructive behaviors with classmates. (Witness 2's testimony)
20. The student's behavior of lighting fire to a bag of Cheetos at school along with her resulting denial and combativeness was a manifestation of her impulsivity resulting from her mood disorder. The behavior was a manifestation of a disability of emotional disturbance due to her mood disorder. (Witness 2's testimony)
21. The school team concluded the student's behavior was not a manifestation of a disability. A member of the DCPS team expressed that if the student could acknowledge that her behavior was wrong then it was not a manifestation of her disability. (Witness 1's testimony)
22. The School A psychologist who participated in the eligibility meeting and in the MDR determination was unaware that the student reacted combatively during and/or after the October 8, 2013, incident and he did not recall seeing the administrative statement describing the incident during the MDR discussion on October 16, 2013. (Witness 4's testimony)
23. The team agreed to conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP") to address the student's behaviors. (Witness 3's testimony)
24. The student's long-term suspension at School B was instituted and the student began attending School B on October 26, 2013. (Respondent's Exhibits 1, 2)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁶ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE: Whether DCPS denied the student a FAPE by failing to find on October 16, 2013, that the student's behavior (lighting a fire at school/arson/attempted arson) on October 8, 2013, was a manifestation of her suspected ED disability.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's conduct on October 8, 2013, that was the basis of the disciplinary action and the MDR held October 16, 2013, was a manifestation of her suspected ED disability and the October 16, 2013, MDR determination is hereby reversed.

Petitioner presented expert testimony from Witness 2 coupled with the Court ordered psycho-educational evaluation that the student's diagnosed mood disorder results in her impulsivity and that her initial behavior on October 8, 2013, of cutting class and then lighting a fire within the school along with her actions of denial and combativeness following her being accused of the behavior is a manifestation of her mood disorder and a manifestation of the her suspected disability of ED.⁷ In addition, the student's parent acknowledged at the October 16, 2013, meeting that the student had engaged in arson behavior previously and requested that a psychiatric evaluation be conducted.⁸

Although the DCPS witnesses who were members of the MDR team agreed with the determination that the team made, they offered no testimony that effectively countered Witness

⁶ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

⁷ Finding of Fact ("FOF") #s 19, 20

⁸ FOF #16

2's expert testimony that the student's behavior of cutting class and lighting a fire within the school was a symptom of her diagnosed mood disorder. In fact one DCPS witness was unable to recount the specifics of the incident that was the subject of the MDR.⁹ They did, however, agree that a FBA should be conducted and a BIP developed.¹⁰

The October 16, 2013, team determined that the student needed to receive interventions including counseling to determine if she should later be determined eligibility under the ED or SLD classification if the interventions were unsuccessful. Thus, the student continued to be due protections under IDEA.

Consequently, the Hearing Officer concludes that the October 16, 2013, MDR determination regarding the student's behavior was in error and is reversed. Because the student's behavior was a manifestation of her suspected ED classification, pursuant to 34 C.F.R § 300.530(f)(2)¹¹ the student should not have received a long-term suspension but instead should have remained at School A. Therefore, the Hearing Officer, directs in the Order below that the student be returned to School A and that a FBA be conducted and a BIP developed for the student.

ORDER:¹²

1. The October 16, 2013, MDR determination regarding the student's October 8, 2013, behavior is hereby reversed and DCPS/School A shall, within five (5) school days of issuance of this Order, if it has not already done so, return the student to School A.
2. DCPS/School A shall within fifteen (15) school days of the issuance of this Order provide and fund an independent FBA¹³ at the OSSE/DCPS approved rate and convene a team meeting to determine if the student missed any instruction or work from the courses she was enrolled in at School A prior to her removal that she was unable to continue and

⁹ FOF #22

¹⁰ FOF #23

¹¹ 34 C.F.R. § 300.530(f) provides:

If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

¹² Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

¹³ The parties may mutually agree that DCPS will conduct the FBA instead of conducting an independent FBA.

complete at school B and make provision for that material to be delivered to the student by tutoring or other means by and/or at School A prior to the end of SY 2013-2014.

3. DCPS shall within fifteen (15) school days of its receipt or completion of the FBA convene a team meeting for the student and develop a BIP as appropriate.

APPEAL PROCESS:

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

/s/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: December 19, 2013