DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONERS,
on behalf of STUDENT,[1]

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: January 16, 2015

Hearing Officer: Peter B. Vaden

Office of Dispute Resolution,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the Petitioners or PARENTS), 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 their Due Process Complaint, Petitioners appeal the determination of the Manifestation Determination Review (MDR) team at PUBLIC CHARTER SCHOOL 3 (PCS-3) that Student's October 20, 2014 code of conduct violation was not related to her disability or the result of PCS' failure to implement her Individualized Education Program (IEP). The Petitioners also allege other IDEA substantive and procedural

[1] Personal identification information is provided in Appendix A.

violations relating to the October 20, 2014 behavior incident and failures to implement and to revise Student's IEP.

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on November 26, 2014, named DCPS and PCS-3 as respondents. The undersigned Hearing Officer was appointed on November 28, 2014. In lieu of holding a resolution session, the parties agreed to meet for a mediation session on December 19, 2014. No settlement agreement was reached. On December 8, 2014, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. Upon request of the Petitioners, I dismissed PCS-3 as a separate respondent to the proceedings.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on January 12, 2015 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 Petitioners appeared in person and were represented by Petitioners' COUNSEL and CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL and by PCS-3 SPECIAL EDUCATION COORDINATOR (SEC).

Petitioner MOTHER testified and Petitioners called LICENSED PSYCHOLOGIST as their only other witness. DCPS called as witnesses SCHOOL PSYCHOLOGIST, PCS-2 STUDENT SUPPORT DIRECTOR, PCS-3 CLINICAL COUNSELOR, CITY HIGH SCHOOL 2 SEC, PCS-3 SPECIAL EDUCATION TEACHER, PCS-3 DEAN AND PCS-3 SEC. Petitioners' Exhibits P-1 through P-14, P-16 through P-18, P-20 (first page only) through P-23 and P-25 were admitted into evidence, including Exhibits P-2, P-3, P-6, P-7, P-13, P-14, P-17, P-20, and P-25, which were admitted over DCPS' objections, DCPS' objections to Exhibits P-19 and P-20 (second and third pages) were sustained. Exhibits

P-15 and P-24 were withdrawn. DCPS' Exhibits R-1, R-2, R-4 through R-11, R-13, R-14, R-15, and R-18, were admitted into evidence, including Exhibits R-4, R-5, R-7, R-9, which were admitted over the Petitioners' objections. Petitioners' objections to Exhibits R-3 and R-16 were sustained. Exhibits R-12 was not offered. Exhibit R-17 was withdrawn. Counsel for the Petitioners made an opening statement. At the request of Petitioners' Counsel the parties were granted leave until January 14, 2015 to file post-hearing written argument. Counsel for both parties filed closing briefs.

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, are:

– Whether DCPS failed to ensure that PCS-3 implemented, and whether PCS-3 failed to implement, the provision for behavioral support services in Student's September 14, 2014 IEP;

– Whether DCPS has failed to ensure that Student's IEP was appropriately revised to increase behavioral support services;

– Whether DCPS and PCS-3 failed to permit the Parents to participate fully in the October 29, 2014 MDR meeting;

– Whether DCPS and PCS-3's MDR team erred in determining that the October 20, 2014 behavior incident was not a manifestation of Student's disability;

– Whether DCPS and PCS-3's MDR team erred in determining that the October 20, 2014 behavior incident was not due to DCPS' failure to implement Student's IEP;

– Whether DCPS and PCS-3 violated the IDEA and denied Student a free appropriate public education (FAPE) by failing to conduct a functional behavioral assessment and provide behavior interventions after the October 20, 2014 incident;

– Whether DCPS failed to provide Student an appropriate alternative interim

educational setting following the October 20, 2014 behavior incident; and

– Whether DCPS has denied Student a FAPE by failing to offer her a suitable placement to implement her IEP.

For relief, Petitioners request that DCPS be ordered (1) to ensure that the October 29, 2014 MDR determination is overturned, (2) to place Student in a suitable therapeutic day school to implement her IEP, and (3) to allow Student additional time to make up work for the period when she was not provided an alternative interim placement. In addition, Petitioners seek a compensatory education award for the denials of FAPE alleged in the complaint

FINDINGS OF FACT

After considering all of the evidence, as well as the argument and legal memoranda 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 Parents. Testimony of Mother.

2. Student is eligible for special education and related services under the disability classification Multiple Disabilities, based upon the concomitant underlying disabilities Specific Learning Disability (SLD) and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). Her last special education eligibility meeting date was June 26, 2014, when she attended PCS-1. Exhibit P-5.

3. For the 2012-2013 and 2013-2014 school years, Student was enrolled in PCS-1. Testimony of School Psychologist. After "graduating" from PCS-1, Student was enrolled in PCS-2 from the beginning of the 2014-2015 school year until September 26, 2014. Due to her dissatisfaction with PCS-2, Mother disenrolled Student on September 26, 2014 and enrolled her in PCS-3. Student began attending PCS-3 on September 30,

2014, where she was in the GRADE. Testimony of Mother.

4. PCS-3 has elected to be treated as a District of Columbia public school for purposes of the IDEA. *See* 5E DCMR § 923.3. Therefore, DCPS is the Local Education Agency (LEA) for PCS-3. Hearing Officer Notice.

5. Student's most recent IEP was developed by her PCS-2 IEP team on September 10, 2014. The September 10, 2014 IEP identified as Areas of Concern, Mathematics; Reading; Written Expression and Emotional, Social and Behavioral Development (ESBD). The ESBD Area of Concern focused on Student's OHI-ADHD disability, including difficulty establishing strong relationships with her peers and with teachers, negative communication patterns, impulsive and hyperactive behaviors and negative attention seeking behaviors. The IEP provided for Student to receive 18.75 hours per week of Specialized Instruction, including 3.75 hours per week outside general education and 60 minutes per week of Behavioral Support Services. Exhibit P-5.

6. PCS-1 School Psychologist conducted a psychoeducational evaluation of Student on May 20, 2014. A PCS-1 teacher informed School Psychologist that she was concerned about Student's classroom behaviors/self-control, relationships with peers and adults, attention and study skills. She reported that Student consistently interrupted and distracted class, had trouble sitting still, was easily frustrated, lacked strategies to maintain self-control, demonstrated mood changes throughout the day, had difficulty following the rules, was unable to ignore the comments of peers and had poor attendance. In addition, the teacher reported that Student had difficulty staying on task, was easily distracted, instigated conflicts, had difficulty making and keeping friends, and resisted or challenged authority. Exhibit P-4.

7. In her June 26, 2014 Psychoeducational Report, School Psychologist

reported, *inter alia*, that Student's general cognitive ability, as estimated by the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV), was in the Low Average range. Her overall educational achievement was in the Average range as measured by the Wechsler Individual Achievement Tests, 3rd Edition (WIAT-III). She obtained her lowest score on the Mathematics and Math Fluency composites indicating that these continued to be areas of relative weakness for her. Based on the Behavior Assessment System for Children, 2nd Edition (BASC-2) rating scales, there was evidence to suggest anxiety disorder that warranted further investigation due to her teacher's and Mother's agreement that Student complained about relatively minor physical problems or discomforts, and due to the teacher's report of disruptive, hyperactive, impulsive and noncompliant behaviors and Student's self-report of dislike of her teachers. Based on the Conners 3rd Edition Short Form (Conners 3) rating scales completed by Mother, Student continued to present behaviors that endorsed the presence of ADHD, Combination Presentation. Exhibit P-4.

8. School Psychologist testified that at PCS-1, Student was verbally aggressive, but not usually physically aggressive. She explained that an adult with whom Student had a relationship, especially Mother, would be able to deescalate her when she got out of control. However, if a police officer were involved, Student might "escalate." In one incident in the 2013-2014 school year, Student fought with another Student at school and had a hard time de-escalating. When she saw school resource officers (who are police officers), she started to escalate again. School Psychologist opined that a police officer should not be the one to try to deescalate Student. School Psychologist provided counseling services to Student over two school years and conducted the May 20, 2014 psychological evaluation. Testimony of School Psychologist. I found School Psychologist

to be a credible witness.

9. Since April 2014, Student has received services from the Department of Psychiatry at LOCAL HOSPITAL. In a September 12, 2014 email, the treating psychiatrist wrote that she had treated Student for diagnosed Adjustment Disorder with Anxiety. Exhibit P-8.

10. On October 9, 2014, Student engaged with another PCS-3 student (hereinafter "Student A") in a verbal altercation in class. Student was sent to the Dean's office. He counseled Student about speaking negatively of the other student. The following day, there was another verbal altercation between Student and Student A in the hallway. The two students were separated by school staff. Immediately afterwards, a mediation session was convened with the two students, Dean and a former PCS-3 dean. Student and Student A got into another verbal altercation in the last class period on October 20, 2014. Dean intervened and the students were released back to class. Testimony of Dean, Exhibit P-7.

11. After school dismissal on October 20, 2014, Student and Student A got into a physical altercation near the school gate. The students punched at each other. A school resource officer (SRO) intervened and separated the two students. Student A moved away. Student attempted to get past the SRO to go after Student A. Testimony of Dean. That afternoon, Mother was at school to pick up Student. She saw the fight between Student and Student A and the SRO's attempt to break up the fight. The SRO physically restrained Student. Other police officers were summoned and Student was arrested. Mother asked for medical attention for Student. Student was taken to HOSPITAL 2 and was released that night. Student has not returned to PCS-3 since the October 20, 2014 incident. Testimony of Mother.

12. Student was suspended from PCS-3 on October 24, 2014. Exhibit R-6.

13. Following an investigation of the October 20, 2014 incident, Dean determined that Student had committed two Category III school code of conduct violations, fighting and violent behavior and threatening behavior; and Category II violations, disrespect to staff and insubordination. Exhibit P-7.

14. PCS-3 convened an MDR meeting on October 29, 2014. The purpose of the meeting was to determine whether Student's October 20, 2014 code of conduct violation was due to her disability or based on implementation of her IEP. Both Parents and Petitioners' Counsel attended the MDR meeting. Testimony of SEC, Exhibit R-1. Mother was offered the opportunity to speak at the MDR meeting, but, toward the end of the meeting, elected to have Petitioners' Counsel speak for her. Testimony of Mother, Exhibit P-10. About an hour before the meeting, Petitioners' Counsel sent by email to PCS-3 documentation concerning Student, including, *inter alia*, prior emails from Mother, a September 12, 2014 email from Student's psychiatrist outlining the care she had provided Student, IEPs from prior school years, a spring 2014 FBA from PCS-1, a June 14, 2010 BIP from PCS-2, and the June 26, 2014 Psychoeducational Report from PCS-1. Exhibit P-8. The MDR team reviewed this information at the meeting. Testimony of SEC.

15. The October 29, 2014 MDR team determined that Student's behavior on October 20, 2014 was not caused by and did not have a direct relationship to her disability, and that the conduct was not a direct result of DCPS' failure to implement Student's IEP. Exhibit R-2. The MDR team felt that what happened on October 20, 2014 was not symptomatic of Student's regular practices or her disability. Testimony of Dean. The Parents disagreed with the MDR determination. Testimony of Mother.

16. On November 4, 2014, the PCS-3 Executive Director wrote Mother that a disciplinary panel of three school faculty/staff who reviewed the facts of the case had unanimously voted to expel Student from PCS-3, effective immediately. Mother was informed by telephone of the panel's decision on November 5, 2014. The expulsion decision was appealed to the PCS-3 Board of Trustees, which held a hearing on December 1, 2014. A panel of three members of the Board of Trustees upheld the November 4, 2014 expulsion of Student. Exhibit P-12.

17. After the expulsion from PCS-3, Mother was given information to enroll Student at City High School 1, based upon the home address on Student's September 4, 2014 IEP. When Mother went to City High School 1, she was informed that this was not her neighborhood school. Mother was next informed that Student should be enrolled in City High School 2. Mother decided not to enroll Student in City High School 2 because she did not have any information about the school and because she had been threatened by the truancy office at City High School 2 that she could go to jail if she did not enroll Student. The Parents decided to home school Student. Since November 2014, Mother has been aware that she can enroll Student at City High School 2. Testimony of Mother.

18. City High School 2 is capable of implementing the requirements of Student's September 10, 2014 IEP. Testimony of SEC.

19. After Student began attending PCS-3 on September 30, 2014, she was assigned to Clinical Counselor for Behavioral Support Services. Due to schedule conflicts, Clinical Counselor was not able to meet with Student until October 14, 2014. Clinical Counselor met with Student on October 14, 2014. That session ended after 30 minutes because Student requested permission to go meet with Dean. Student had no

more counseling sessions with Clinical Counselor because she stopped attending PCS-3 following the October 20, 2014 behavior incident. Testimony of Clinical Counselor.

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 Petitioners 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.
Failure to Implement Behavioral Support Services

– Did DCPS failed to ensure that PCS-3 implemented and did PCS-3 fail to implement, the provision for Behavioral Support Services in Student's September 10, 2014 IEP?

The Petitioners' first claim is that DCPS failed to ensure that PCS-3 implemented the requirement in Student's September 10, 2014 IEP for 60 minutes per week of Behavioral Support Services. DCPS maintains that PCS-3 began providing Behavioral Support Services to Student in a timely manner following her transfer from PCS-2 to PCS-3 after the school year started.

The standard for failure-to-implement claims used by the courts in this jurisdiction was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that in order to prevail on a failure-to-implement claim, a petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Johnson v. District of Columbia,* 962 F.Supp.2d 263, 268 (D.D.C.2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import, as articulated in the IEP, of the specific service that was withheld. *Johnson, supra* (internal quotation and citation omitted.)

Here, Student transferred from PCS-2 to PCS-3 after the 2014-2015 school year started and her first day at PCS-3 was September 30, 2014. Clinical Counselor met with Student on October 14, 2014. That session ended after 30 minutes because Student requested permission to go meet with Dean. Student had no more counseling sessions with Clinical Counselor because she stopped attending PCS-3 following the October 20, 2014 behavior incident. After Student was expelled from PCS-3, the Parents elected not to enroll Student at City High School 2, where DCPS proposed to implement her IEP. I find that, under these circumstances, PCS-3's not providing all of the Behavioral Support Services specified in Student's September 10, 2014 IEP was not a failure to implement "substantial or significant provisions" of the IEP.

B.
<u>October 29, 2014 MDR Meeting</u>

– Did DCPS and PCS-3 fail to permit the Parents to participate fully in the October 29, 2014 MDR meeting?

– Did the October 29, 2014 MDR team err in determining that the October 20, 2014 behavior incident was not a manifestation of Student's disability?

– Did the October 29, 2014 MDR team err in determining that the October 20, 2014 behavior incident was not due to DCPS' failure to implement Student's IEP?

The IDEA prohibits the punishment of a child with a disability for misbehavior that is a manifestation of the disability. Prior to expelling a child with a disability, 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).[2] If the child's behavior is determined to be a manifestation of his or her disability, the child must be restored to his or 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). *See, also,*

[2] 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.

District of Columbia v. Doe, 573 F.Supp.2d 57, 59 (D.D.C.2008), *rev'd on other grounds* 611 F.3d 888 (D.C.Cir.2010).

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:

> 2510.10 The conduct must be determined to be a manifestation of the child's disability if DCPS, the parent, and relevant members of the child's IEP Team determine that a condition in either 34 CFR 300.530(e)(1)(i) or (1)(ii) was met.
>
> 2510.11 If the DCPS, the parent, and relevant members of the child's IEP Team determine the condition described in 34 CFR 300.530(e)(1)(ii) was met, the DCPS must take immediate steps to remedy those deficiencies.
>
> 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) 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., §§ 2510-10 through 2510.12

Above in this decision, I have concluded that Petitioners did not establish that PCS-3 failed to implement the September 10, 2014 IEP. It follows that the MDR team did not err in determining that Student's conduct on October 20, 2014 was not the direct result of PCS-3's failure to implement her IEP. I uphold that determination.

With regard to whether Student's conduct had a "direct and substantial relationship" to her disability, the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), explained the intent of the law in its 2006 guidance to the IDEA regulations:

> The revised manifestation provisions in section 615 of the Act provide a simplified, common sense manifestation determination process that could be used by school personnel. The basis for this change is provided in note 237-245 of the Conf. Rpt., pp. 224-225, which states, "the Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented."
>
> . . .
>
> The Conferees further intended that "if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability."
>
> . . .
>
> The intent of Congress in developing section 615(k)(1)(E) was that, in determining that a child's conduct was a manifestation of his or her disability, it must be determined that "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability."

Department of Education, *Assistance to States for the Education of Children with Disabilities,* 71 Fed. Reg. 46720 (August 14, 2006).

In an October 23, 2014 narrative report on the October 20, 2014 incident, the PCS-3 investigator reported that Student and Student A had a verbal altercation near the end of the school day, which ended without incident. After school was dismissed and the Students were outside the building, Student A provoked an altercation with Student. The two students began to fight and punched each other repeatedly. The SRO intervened and Student A backed away from the fight. However the SRO was unable to calm Student down. Instead of de-escalating, Student allegedly proceeded to physically assault the SRO. Student was restrained by the SRO and eventually secured by additional police officers called to the scene. Afterwards, after reviewing the October 20, 2014 incident, Dean determined that Student had committed two Category III "expellable" offenses, fighting and violent behavior and threatening behavior.

When PCS-3 convened the MDR meeting for Student on October 29, 2014, the school staff had a relatively brief experience with Student, who had enrolled three weeks before the October 20th incident. As PCS-3 SEC testified, the school did not have "a whole lot of information" on Student. During the three weeks that Dean had known Student, Student had demonstrated the ability to be redirected and was able to be calm and rational. According to Dean, the MDR team felt that Student's alleged physical altercations on October 20, 2014 with Student A and the SRO were not in keeping with Student's regular practices or her disability. The team determined that Student's conduct was not a manifestation of her disability. I agree with the Parents that this determination was erroneous under the MDR criteria set out in the IDEA and the DCMR.

First, I find that the evidence establishes that, analyzing Student's assessments

and behavior "across settings and across time," Student's conduct on October 20, 2014 did have a direct and substantial relationship to her OHI-ADHD disability. Petitioners' expert, Licensed Psychologist, testified that Student's fighting with Student A and her alleged assaults on the police officer implicated her compromised ability to self-regulate, lack of self control and difficulty in thinking through consequences, which are cardinal characteristics of ADHD, one of Student's underlying disabilities. The MDR team was also made aware that Student was receiving regular psychiatric care for a diagnosed Adjustment Disorder with Anxiety, based upon her self-reports of incidents with other students, that left her feeling anxious and concerned for her personal safety.

Licensed Psychologist's knowledge of Student's disability was limited. Student was not her patient and they had only met for a two-hour interview at Student's home. However, this expert's opinion was buttressed by the testimony of PCS-1 School Psychologist, who provided counseling services to Student over the 2012-2013 and 2013-2014 school years and conducted a psychoeducational evaluation in spring 2014. In her June 26, 2014 Psychoeducational Report, School Psychologist related that a PCS-1 teacher reported, *inter alia*, that she was concerned about Student's classroom behaviors/self-control and relationships with peers and adults, that Student consistently interrupted and distracted class, was easily frustrated, lacked strategies to maintain self-control, demonstrated mood changes throughout the day, had difficulty following the rules, was unable to ignore the comments of peers, instigated conflicts, had difficulty making and keeping friends, and resisted or challenged authority. School Psychologist reported that there was evidence to suggest an anxiety disorder that warranted further investigation due, in part, to the teacher's report.

In her testimony at the due process hearing, School Psychologist observed that

while an adult with whom Student had a relationship, especially Mother, would be able to deescalate her when she got out of control, if a police officer were involved, Student might "escalate." She described a spring 2014 physical altercation between Student and another child at PCS-1. School Psychologist related how just seeing a School Resource Officer caused Student to escalate again, after School Psychologist has successfully deescalated her. School Psychologist opined that a police officer should not be the one to try to deescalate Student.

The PCS-3 report on the October 20, 2014 fight between Student and Student A and the aftermath with the SRO fits the pattern of compromised ability to self-regulate, lack of self control, difficulty in thinking through consequences, and difficulty de-escalating described by Licensed Psychologist and School Psychologist. After school was dismissed on October 20, 2014 and the students were outside the building, Student A provoked an altercation with Student. The two students began to fight and punched each other repeatedly. When the SRO intervened, Student A backed away from the fight. However, Student did not deescalate. Instead, she allegedly proceeded to physically assault the SRO. Student eventually was secured by additional police officers called to the scene. I conclude that the testimony of School Psychologist and Licensed Psychologist, as supported by Student's psychoeducational assessment and her treating psychiatrist's report, establish that it is more probable than not that Student's conduct in the October 20, 2014 after-school incident had a direct and substantial relationship to her OHI-ADHD disability.

Further, under the DCMR, in order to determine that Student's conduct was not a manifestation of her disability, the MDR team was required to determine (i) that Student's disability did not impair her ability to understand the impact and

consequences of her behavior and (ii) Student's disability did not impair her ability to control the behavior. *See* 5B DCMR § 2510.12(b), *supra*. Licensed Psychologist opined that due to her OHI-ADHD disability, Student's ability to self-regulate was compromised and she was unable to deescalate when the SRO restrained her. Her opinion was supported by the testimony of School Psychologist that adults with whom Student does not have a relationship are not able to calm her and a police officer should not be the one to attempt to deescalate her.

In summary, I find that the hearing evidence established that Student's conduct in the October 20, 2014 incident had a direct and substantial relationship to her OHI-ADHD disability and that Student's disability impaired her ability to control the behavior for which she was disciplined. Therefore, I reverse the MDR team's determination that Student's behavior was not a manifestation of her IDEA disability.

I find no merit to the Petitioners' claim that they were not permitted to participate fully in the October 29, 2014 MDR meeting. Both Parents and Petitioners' Counsel attended the meeting. As Mother admitted, she was given an opportunity to speak at the meeting, but she preferred to have her attorney speak for her. From the attorney's notes (Exhibit P-10), it is evident that he made the Parents' views known. "Parents have a right to participate and be heard in the MDR hearing, but these proceedings may become adversarial, as parents may well disagree with the school's decision to discipline their child. . . . [T]he IDEA does not require the LEA and the parents to reach a consensus regarding the education or discipline of a disabled child. Instead, if a consensus cannot be reached, the LEA must make a determination, and the parents' only recourse is to appeal that determination." *Fitzgerald v. Fairfax County School Bd.* 556 F.Supp.2d 543, 557-558 (E.D.Va.2008).

C.
Alternative Educational Setting

Did DCPS deny Student a FAPE by failing to provide her an appropriate alternative interim educational setting following the October 20, 2014 behavior incident?

Petitioners contend that after PCS-3 expelled Student, DCPS violated the IDEA by failing to provide her an appropriate alternative educational setting. DCPS maintains that it complied with the Act by instructing Mother to enroll Student in her neighborhood high school and, also, that PCS-3 provided a work packet for Student to work on at home.

The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The Act requires that when a student with a disability is expelled from school and the MDR team determines that the behavior that gave rise to the violation of the school code was not a manifestation of the student's disability, the student must continue to receive educational services, although in another setting. *See* 34 CFR § 300.530(c), (d). While the IDEA does not specify the alternative setting in which educational services must be provided, the Act is clear that the determination of an appropriate alternative educational setting must be selected "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." *See* 20 U.S.C. § 1415(k)(1). Further, Section 1415(k)(2) of the IDEA provides that the alternative educational setting must be determined by the IEP Team. What constitutes an appropriate alternative educational setting will depend on the

circumstances of each individual case. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46722.

I agree with the Petitioners that DCPS violated the IDEA by unilaterally deciding Student's alternative education setting, when the Act required that the determination be made by Student's IEP team. This was a procedural violation of the Act. *See, e.g., Metropolitan Bd. of Public Educ. of the Metropolitan Government of Nashville and Davidson County v. Bellamy* 116 Fed.Appx. 570, 578, 2004 WL 2452567, 7 (6th Cir. 2004) (Affirming failure to timely convene IEP meeting constituted a procedural violation.) Procedural violations of the IDEA are only actionable if they compromise the student's educational opportunities or seriously infringe parents' participation in their child's education. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006); *see* 20 U.S.C. § 1415(f)(3)(E)(ii).

DCPS' evidence at the due process hearing was unrebutted that its proposed assignment of Student to City High School 2 would not change the educational setting or services provided in Student's IEP. Moreover, City High School 2 SEC testified that after Student had been at the school for 30 days, an IEP team meeting would be convened to review her IEP and to revise it as appropriate. The Parents would then have the opportunity to provide input as IEP team members. I find that in this case, DCPS' determining that Student's neighborhood school would implement her IEP did not seriously infringe upon the Parents' participation rights. *Cf. Cooper v. District of Columbia*, 2014 WL 7411862, 4 (D.D.C. Dec. 30, 2014) (predetermination of school location not fatal because it did not preclude parent's meaningful participation in student's education.)

Further, there was no credible evidence that Student lost educational opportunity

as a result of DCPS' unilaterally selecting City High School 2 as her alternative educational placement. DCPS' evidence established that City High School 2 is capable of implementing Student's IEP. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (where IEP is adequate, school capable of implementing the IEP is an appropriate placement.) The Parents elected, however, to home school Student. I conclude, therefore, that DCPS' failure to involve Student's IEP team in the identification of City High School 2 as Student's alternative education setting did not result in denial of FAPE to Student. *See Cooper, supra*, 2014 WL 7411862, 3 (because the alleged defects did not violate the parent's or student's substantive rights, they must be disregarded as harmless.)

Because I am overturning the PCS-3 MDR team's determination that Student's October 20, 2014 conduct was not a manifestation of her disability, the IDEA's requirement to provide an alternative educational setting no longer applies. Notwithstanding, in my disposition of this case, I will order DCPS to convene Student's IEP team to determine her ongoing placement should Petitioners elect not to have Student return to PCS-3.

D.

– Did DCPS and PCS-3 violate the IDEA and deny Student a FAPE by failing to conduct a functional behavioral assessment and provide behavior interventions after the October 20, 2014 incident?

– Did DCPS fail to ensure that Student's IEP was appropriately revised to increase behavioral support services after the October 20, 2014 incident?

The Petitioners maintain that DCPS was required to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP) for Student following the October 20, 2014 discipline incident. The IDEA requires that if a student's

conduct is determined to be a manifestation of her disability, the IEP team must 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;

34 CFR § 300.530(f). The FBA/BIP requirement was not applicable in this case because the October 29, 2014 MDT team determined that Student's October 20, 2014 conduct was not a manifestation of her disability. Moreover, an FBA was conducted on February 20, 2014 at PCS-1. However, because I am reversing the determination that Student's conduct was not a manifestation of her disability, I will also order DCPS to ensure that Student's current BIP is reviewed and modified as appropriate to address her behaviors in the current school year.

The Petitioners' contention, that DCPS violated the IDEA by not ensuring that Student's IEP was revised after the October 20, 2014 incident, is unfounded. The IDEA requires that an LEA must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address, *inter alia*, information about the child provided to, or by, the parents, the child's anticipated needs; or other matters. *See* 34 CFR § 300.324(b). Student's IEP was revised at PCS-2 on September 10, 2014. When Student transferred to PCS-3 on September 30, 2014, PCS-3 continued to implement the PCS-2 IEP. There was no evidence that the Parents requested that Student's IEP be revised after the October 20, 2014 incident or that the IEP did not continue to be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v.*

Rowley, 458 U.S. 176, 243, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Therefore, the IDEA did not require that Student's IEP be revised.

E.

– Has DCPS denied Student a FAPE by failing to offer her a suitable placement to implement her IEP?

Following Student's November 4, 2014 expulsion from PCS-3, DCPS offered Student a placement at City High School 2, apparently her neighborhood school. The Parents contend that this school location is not suitable. Under the IDEA, DCPS is obligated to match a student with a school capable of fulfilling her IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). If no suitable public school is available to fulfill the student's needs, DCPS must pay the costs of sending the student to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Id.* (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). Under the IDEA, an appropriate location of services is one which can implement a student's IEP and meet her specialized educational and behavioral needs. *James v. District of Columbia*, 949 F.Supp.2d 134, 139(D.D.C. 2013). I have found in this decision that DCPS' evidence established that City High School 2 is capable of implementing Student's IEP.

Notwithstanding, DCPS' proposed placement of Student at City High School 2 was understood to be an alternative educational placement under 34 CFR § 300.530(d), which was a decision delegated in the IDEA to Student's IEP team. In my order in this

hearing officer determination, I will require PCS-3 to annul Student's expulsion and to allow her to return to classes at the charter school. However, Petitioners' Counsel represents in the Petitioners' post hearing brief that Student cannot return to PCS-3 "due to the extreme circumstances of her expulsion, and her fear of injury upon her return." Therefore, in the event that the Parents elect not to have Student return to PCS-3, and DCPS proposes City High School 2 as Student's new educational placement, my findings herein shall be without prejudice to the Parents' rights hereafter to challenge the appropriateness of City High School 2 as Student's ongoing educational placement.

Remedy

In this case, I have found that the PCS-3 MDR team erred in its October 29, 2014 determination that Student's conduct on October 20, 2014 was not a manifestation of her disability. My remedial authority under 34 CFR § 300.532(b) is to return Student to the placement from she was removed and I will so order. As additional relief, the Petitioners request that I order (1) that DCPS fund Student's enrollment in a suitable therapeutic day school and (2) that DCPS allow Student additional time to make up work for the period when she was not provided an alternative interim placement. With regard to the special school request, the Petitioners have not shown that an appropriate public school is not available to fulfill Student's need. Nor have they identified a nonpublic school which is appropriate for Student under the controlling case law in this jurisdiction. *See Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 12 (D.C.Cir.2005). Therefore I decline to order DCPS to fund Student's enrollment at a nonpublic school. *See Jenkins v. Squillacote, supra.*

With regard to extra time to make up work, assuming that a special education hearing officer has authority to order this remedy, it is not warranted on the theory that

Student was not provided an alternative interim educational placement. Mother admitted in her testimony that she was aware that Student could have enrolled in City High School 2 after her expulsion from PCS-3.

The Petitioners also seek a compensatory education award based upon a proposal recommended by Licensed Psychologist. The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir. 2005). A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) *(*quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 952 F.Supp.2d 31 (D.D.C.2013).

Licensed Psychologist's compensatory education plan is premised upon the allegation that DCPS has failed to provide Student with any access to special education or related services since October 20, 2014. I have found to the contrary that DCPS offered Student IEP services at City High School 2 beginning November 2014. The hearing evidence does not establish how long Student was denied services after October 24, 2014 when she was initially suspended from PCS-3, until DCPS offered her services at the public high school. However, DCPS admits in its response to the due process complaint that it instructed the Parent to enroll Student at City High School 3 on November 20, 2014. I conclude, therefore, that Student was not provided her IEP services for approximately four weeks from October 24 through November 20, 2014. During this

period, Student should have received some 75 hours of specialized instruction, including 15 hours of mathematics instruction outside the general education setting. Moreover, because Student was not allowed to attend school during this period, the educational harm was presumably greater than just not providing special education services.

The D.C. Circuit, has rejected a one-for-one compensation standard in favor of a flexible approach depending on the child's needs, *see Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005). However, I find in this case that requiring DCPS to make up the missed Specialized Instruction services is the appropriate equitable remedy. That is because Student has not returned to school since the October 24, 2014 suspension and it is too speculative to attempt to assess what services would be needed to elevate her to where she would have been had she not been expelled from PCS-3. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (The IDEA does not require a student "to have a perfect case to be entitled to compensatory education.")

Lastly, Petitioners' Counsel requested in Petitioners' closing brief that DCPS be ordered to fund an independent psychological evaluation and FBA of Student. This relief was not requested in the Parents' due process complaint and I decline to order it in this decision.

ORDER

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

1. The PCS-3 October 29, 2014 MDR determination is set aside as erroneous. Student's suspension and expulsion from PCS-3 are annulled. DCPS shall ensure that Student is allowed, forthwith, to return to her classes and IEP program at PCS-3 and that all references to Student's suspension and expulsion from PCS-3, because of the October 20, 2014 code of conduct violation, are expunged from Student's education records;

2. DCPS shall ensure that Student's Behavior Intervention Plan is promptly reviewed and modified as appropriate to address her behaviors in the current school year;

3. In the event that Students' parents elect for her not to return to PCS-3, DCPS shall promptly offer Student another suitable placement that is capable of implementing her current IEP. Within 10 school days of receipt of written notice by the Parents that Student will not return to PCS-3, DCPS shall convene an IEP team, including the Parents, to make an ongoing educational placement decision for Student, pursuant to 34 CFR § 300.116. In the event that the placement or location of services decided upon is City High School 2, this hearing officer determination shall be without prejudice to the Parents' rights under the IDEA to contest the appropriateness of that school;

4. As compensatory education for the failure to provide Student IEP services after her suspension and expulsion from PCS-3, DCPS shall provide Student 75 hours of one-on-one academic tutoring in such academic subjects and on a schedule as may be reasonably agreed upon between the Parents and DCPS. DCPS may provide the tutoring services through a qualified DCPS employee or a private provider. The tutoring services must be used before the start of the 2015-2016 regular school year or shall be forfeited.

5. All other relief requested by the Petitioners herein is denied.

Date: January 16, 2015

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).