DC Office of the State Superintendent of Education
Office of Compliance & Review
State Enforcement & Investigation Division
STUDENT HEARING OFFICE
Van Ness Elementary School
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2009 JAN 21 PM 12: 17

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:	*	
	*	**CASE NO.**
Parent on behalf of Student*	*	
	*	
Petitioner,	*	**Complaint Date: 12/01/08**
	*	**Hearing Date: 01/05/09 & 01/09/09**
vs.	*	
	*	**Hearing Site:**
	*	**Van Ness Elementary School**
The District of Columbia Public Schools	*	**1150 5th Street, S.E., 1st Floor**
	*	**Washington, D.C. 20003**
Respondent.	*	
	*	

HEARING OFFICER DETERMINATION

Petitioner's Counsel:

Chike Ijeabuonwu, Esq.
6495 New Hampshire Ave
Suite 211
Hyattsville, MD 20783

Respondent's Counsel:

Nia Fripp, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this document and must be removed prior to public distribution.

JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.")

INTRODUCTION

On 12/01/08, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent"), aka ("Petitioner"), on behalf of year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a Free and Appropriate Public Education ("FAPE"), in violation of IDEIA, when DCPS failed to conduct a manifestation determination meeting, failed to conduct an Individualized Education Program ("IEP") meeting, failed to review and revise Student's IEP, failed to provide special education and related services, failed to provide an appropriate school placement for Student, failed to evaluate Student in all areas of suspected disability, and failed to invite parent and child to meeting.

PRE-HEARING CONFERENCE

A pre-hearing teleconference occurred on 12/22/08. Attorney Chike Ijeabuonwu represented Petitioner. Attorney Nia Fripp represented DCPS.

DUE PROCESS HEARING

The due process hearing convened on 01/05/09 from 11:00 a.m. – 1:00 pm. at the Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The allotted time was insufficient to conclude the hearing, and the case was continued until 01/09/09, at which time the due process hearing concluded.

Petitioner was represented by Chike Ijeabuonwu, Esq. ("Petitioner's Attorney"). DCPS was represented by Nia Fripp, Esq. ("DCPS' Attorney"). The parties did not engage in mediation or the resolution process prior to the due process hearing. Petitioner participated in the due process hearing by telephone only to the extent that Petitioner provided testimony for Petitioner's case in chief.

Disclosures

Petitioner's Disclosure letter dated 12/23/08, containing Exhibits #1-4, was entered into the record without objection.

DCPS' Disclosure Statement, dated 12/23/08, containing Exhibits #1-8, was entered into the record without objection following corrections made to the dates listed

for documents #4-6 on page 2 of DCPS' Disclosure Statement. The dates listed for disclosure documents #4-6 were changed from 06/08/08 to 06/03/08.

Preliminary Matters

Petitioner withdrew from litigation Issue #2 of Petitioner's Complaint, i.e., DCPS failed to conduct an IEP meeting, thereby denying Student a FAPE.

Issues Presented for Litigation

(1) Whether DCPS failed to conduct a manifestation determination review ("MDR") meeting pursuant to 34 C.F.R. 300.530(e), thereby denying Student a FAPE?

(2) Whether DCPS failed to review and revise Student's IEP, thereby denying Student a FAPE?

(3) Whether DCPS failed to provide special education and related services; thereby denying Student a FAPE?

(4) Whether DCPS failed to provide an appropriate placement for Student, thereby denying Student a FAPE?

(5) Whether DCPS failed to evaluate Student in all areas of suspected disability, pursuant to 34 C.F.R. 300.304(c)(4), thereby denying Student a FAPE?

(6) Whether DCPS failed to invite parent and child to meeting, thereby denying Student a FAPE?

Relief Requested

(1) A finding of a denial of a FAPE on each of the issues presented;

(2) DCPS to fund a comprehensive psychological evaluation that includes a social history;

(3) DCPS to convene a Multidisciplinary Team ("MDT")/IEP/Placement meeting within 15 calendar days of the issuance of the HOD, with all relevant and necessary team members to review the current evaluations, review/revise Student's IEP as necessary, and discuss/determine appropriate placement, with Petitioner reserving all issues pertaining to compensatory services;

(4) DCPS to convene an MDT/IEP meeting within 15 calendar days of the receipt of the independent evaluation, with all relevant and necessary team members to review the current evaluation, review/revise the Student's IEP as necessary, and discuss/determine appropriate placement; and

(5) Immediate placement of Student at

Stipulations

is its own Local Education Agency ("LEA").

Witnesses Presented

For Petitioner:
(1) Petitioner (via telephone)
(2) Ogom Ijeabuonwu, educational advocate (via telephone)
(3) admissions specialist (via telephone)

For DCPS:
(1) Special Education Coordinator ("SEC") at

(2) Principal at (via telephone)

FINDINGS OF FACT

#1. Student's 06/07/07 IEP prescribed 10 hours/week of specialized instruction and one hour/week of psychological services, with 34% of services Not in a general education setting. Student's disability classification was Other Health Impaired ("OHI") and Learning Disabled ("LD"). *(Petitioner's Exhibit #3, Student's IEP dated 06/07/07).*

#2. Student's current IEP, dated 06/03/08, prescribes a combined total of 27.5 hours/week of special education services, with 100% of services NOT in a regular education setting. Student's disability classification is OHI and LD. Student requires specialized instruction in the areas of reading, mathematics and written expression. *(DCPS' Exhibit #4, Student's IEP dated 06/03/08).*

#3. On 06/03/08, a Functional Behavioral Assessment ("FBA") was completed for Student while Student attended The targeted behaviors of the 06/03/08 FBA were running the halls and not staying in class. *(DCPS' Exhibit #6, Functional Behavioral Assessment dated 06/03/08).* Neither Petitioner or teacher requested a FBA, a BIP or a comprehensive psychological evaluation while Student attended during the 2008-2009 school year. *(Testimony of SEC at*

#4. During the 2008-2009 school year, Student was suspended from for less than five days for being disrespectful to staff; suspended again one month later for less than 5 days for pulling a fire alarm; and then expelled one month later for 45 days, due to fighting. *(Testimony of Petitioner).*

#5. Student's grades at for the 1st advisory of the 2008-2009 school year consisted of 4 "F's" and 1 "D." During this 1st advisory, Student had 3.5 unexcused

absences and was tardy 4 times. *(Petitioner's Exhibit #2, Student Progress Report dated 10/24/08).*

#6. Student attended from the beginning of the 2008-2009 school year until Student was suspended for fighting and then expelled on 10/20/08. *(Testimony of SEC at Testimony of Petitioner).* The SEC at obtained Student's 06/03/08 IEP from the school registrar at the beginning of the 2008-2009 school year and used it as the basis for implementation of special education services. *(Testimony of SEC at*

#7. A FBA of Student was completed on 06/03/08. *(DCPS' Exhibit #6, Functional Behavioral Assessment dated 06/03/08).* A comprehensive psychological reevaluation of Student was completed on 05/02/06. *(DCPS' Exhibit #8, Comprehensive Psychological Reevaluation dated 05/02/06).* An independent psychiatric evaluation of Student was completed on 07/27/06. *(DCPS' Exhibit #7, Psychiatric Evaluation dated 07/27/06).*

#8. Approximately three days prior to 10/20/08, Student was suspended for fighting outside of The Principal ("Principal") and Vice-principal witnessed the event and attempted to break up the fight. *(Testimony of SEC at* The fight was a retaliation fight initiated by Student and Student's family members in response to Student being jumped by some kids. *(Testimony of Petitioner).*

#9. Petitioner telephoned the Principal many times to find out when the meeting would be held to discuss Student's fighting behavior that led to suspension, but Petitioner was continually told that Petitioner would be contacted regarding the meeting. Petitioner learned that the meeting took place without Petitioner when Petitioner received documentation in the mail indicating that Student had been expelled from for 45 days, and that Student was to enroll in as an interim placement for the duration of the expulsion period. *(Testimony of Petitioner).* The SEC at did not attempt to contact Petitioner by phone or in writing regarding the date and time of the MDR meeting, either prior to the MDR meeting or during the MDR meeting. *(Testimony of SEC at*

#10. On 10/20/08, a MDR meeting occurred. Parent and Student did not attend. Student's school file, containing all of Student's records, was reviewed by the IEP Team. The IEP Team, after review of Student's IEP, BIP and psychiatric evaluation, determined that Student's behavior, i.e., fighting in front of the school, was not a manifestation of Student's disability. The basis for decision used by the IEP Team was whether Student knew the consequences of Student's behavior. The IEP Team concluded that Student's behavior was pre-meditated due to the circumstances of the fight. The SEC at who attended the MDR meeting, prepared the MDR form. *(DCPS' Exhibit #3, DCPS Manifestation Determination form dated 10/20/08; Testimony of SEC at*

#11. Student's 06/03/08 IEP is being implemented at for the 2008-2009 school year. Student is in a self contained classroom with all specialized instruction provided by a special education teacher. Student is pulled out for art, music or physical education. Student receives one hour/week of counseling. *(Testimony of SEC at*

#12. Petitioner enrolled Student at following Student's expulsion from *(Testimony of Petitioner).* is a school for suspended students with special education needs. The school provides an educational program for grades 6-12. has a social worker that provides counseling to students on Mondays and Tuesdays. has an LD teacher for the middle school and the high school. does not have self contained classrooms and cannot provide services for a student with a disability classification of OHI who requires 27.5 hours/week of special education services. The maximum number of hours per week of specialized services that can provide to any student is 20 hours/week. *(Testimony of Principal at*

#13. The admissions specialist reviewed the records of Student, i.e., the Multidisciplinary Team ("MDT") Meeting Notes dated 06/07/07, the psychiatric evaluation dated July 2006, the speech and language evaluation dated October 2002, the psycho-educational evaluation dated October 2002, the FBA dated April 2006, the comprehensive psychological evaluation dated April 2006, and the IEP dated June 2008. Based on review of these records, determined that Student was an appropriate candidate for the school and issued a letter of admission. The admission decision was based on review of Student's records, the ability of to implement Student's 06/03/08 IEP, and the ability of to provide the service recommendations contained in the various evaluations reviewed. *(Testimony of admissions specialist).*

#14. has a full time special education program from kindergarten through 12th grade, and has a 1 to 6, teacher to student ratio. If enrolled at Student would be placed in a class with 4 other students who have disability classifications of LD, ED, and OHI. related services staff includes an occupational therapist, a physical therapist, a licensed social worker, an adaptive physical education teacher, and a speech and language therapist. *(Testimony of admissions specialist).*

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005).* The burden of proof falls upon the party seeking relief, whether it is regarding a challenge to the content of the IEP or the implementation of an IEP. *(Van Duyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007)).*

Local law provides that "The burden of proof shall be the responsibility of the party seeking relief. Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." *30 D.C.M.R. 3030.3.*

Issue #1 - Whether DCPS failed to conduct a manifestation determination review ("MDR") meeting, pursuant to 34 C.F.R. 300.530(e), thereby denying Student a FAPE?

Petitioner's basic challenge to the MDR meeting held on 10/20/08 at was that Petitioner did not have the opportunity to participate in the meeting because Petitioner was not invited to the meeting, and despite many telephone conversations with the Principal, the Principal never advised Petitioner of the date and time of the MDR meeting. Petitioner argues that because Petitioner was denied the opportunity to participate in the meeting that resulted in Student being expelled from Petitioner's procedural rights under IDEIA were violated.

DCPS responds by saying that Petitioner was properly notified of the date and time of the MDR meeting and simply failed to attend. DCPS properly reviewed Student's academic file at the MDR meeting, received eye witness accounts of the incident, and DCPS properly applied the correct principles in determining whether Student's behavior was a manifestation of Student's disability. DCPS asserts that there were no procedural violations of IDEIA and Student was not denied a FAPE.

34 C.F.R. 300.530(e) requires DCPS to conduct a meeting within 10 days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. At the meeting, the Local Education Agency ("LEA"), the parents, and relevant members of the child's IEP Team (as determined by the parents and the LEA) must 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 if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP.

A few days prior to 10/20/08, Student participated in a fight outside of Browne EC, and as a result of the fight, Student was suspended. *(Finding of Fact #8)*. On 10/20/08, a MDR meeting took place. Parent and Student did not attend the meeting. At the meeting, the IEP Team reviewed all of the records in Student's file and decided that Student's conduct was not a manifestation of Student's disability because the fight was pre-meditated. *(Finding of Fact #10)*. The conclusion of pre-meditation drawn by the IEP Team is corroborated by the testimony of Petitioner that Student brought Student's family to school to engage in a retaliatory fight. *(Finding of Fact #8, #10)*. As a result of the IEP Team's decision that Student's conduct was not a manifestation of Student's

disability, Student was expelled from and sent to for 45 days. *(Finding of Fact #6, #9).*

Based on the evidence, the Hearing Officer concludes that the IEP Team followed the proper procedures under 34 C.F.R. 300.530(e) when it reviewed the Student's school file, talked with eye witnesses to the event, and applied the proper principles of law in reaching the conclusion that Student's behavior was not a manifestation of Student's disability.

The remaining question, a question of credibility, is whether Petitioner had notice of the MDR meeting. If Petitioner did not have adequate or proper notice, then Petitioner was denied the opportunity to participate in an educational proceeding, contrary to the provisions of 34 C.F.R. 530(e) and 34 C.F.R. 300.322.

DCPS' responsibility in ensuring parent participation at meetings is codified at 34 C.F.R. 300.322. DCPS must take steps to ensure that the parent is present at each IEP team meeting or is afforded the opportunity to participate, including notifying the parent of the meeting early enough to ensure that the parent will have the opportunity to attend, and scheduling the meeting at a mutually agreed upon time and place. Moreover, DCPS must take steps to ensure participation by telephone or other alternative means.

Petitioner testified credibly that Petitioner called the Principal many times regarding the fighting incident and was told that Petitioner would be notified of the meeting. According to Petitioner, Petitioner received notice of Student's expulsion in the mail with instructions to enroll Student at *(Finding of Fact #9).* According to Petitioner' testimony, Petitioner was well aware of the necessity of a meeting because Student had been suspended on two prior occasions and Petitioner had attended meetings with the same Principal to get Student back into school.

The only evidence in the record that Petitioner was notified of the MDR meeting was the testimony of the SEC at who stated that he was told by the Principal that Petitioner was advised of the meeting. The SEC was not present when the call was made. The SEC testified that he himself made no effort, by telephone, or in writing, to advise Petitioner of the meeting, either prior to the MDR meeting or during the MDR meeting. *(Finding of Fact #9).* The Hearing Officer concludes that DCPS' failure to include Petitioner in the meeting by attempting to contact Petitioner by telephone immediately prior to and during the MDR hearing, constitutes a procedural violation of IDEIA under 34 C.F.R. 322 (a)(2) because the meeting was not mutually agreed upon, and under 34 C.F.R. 322 (c) which requires DCPS to attempt to include Petitioner in the meeting through individual or conference telephone calls.

Therefore, the preponderance of evidence falls on the side of Petitioner, i.e., that Petitioner did not receive notice of the MDR meeting and was denied the opportunity to participate. Thus, there was a procedural violation of IDEIA under 34 C.F.R. 300.530(e) and 34 C.F.R. 300.322. Does this procedural violation arise to a denial of a FAPE?

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. *34 C.F.R. 300.513(a).*

In this case, Student was denied a FAPE because Petitioner was deprived of the opportunity to participate in the MDR meeting and present any relevant information to the IEP Team to determine whether Student's conduct was a manifestation of Student's disability. As a result of this meeting, Student was expelled from school and sent to an alternative educational placement, which, as it turns out, was unable to fully implement Student's current IEP. *See Issue #3 below.* Petitioner was deprived of the important, fundamental, and substantive right to participate in educational decisions regarding the provision of a FAPE to Petitioner's child.

Petitioner met its burden of proof on Issue #1.

Issue #2 - Whether DCPS failed to review and revise Student's IEP, thereby denying Student a FAPE?

DCPS must review Student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and revise the IEP, as appropriate, to address among other things, information about the child provided to, or by, the parent; the child's anticipated needs; or other matters. *34 C.F.R. 300.324(b).*

Petitioner's argument on this issue is that DCPS failed to review Student's IEP in light of Student's behaviors leading to expulsion, and to revise Student's IEP as appropriate.

DCPS argues that there was no need to revise Student's IEP because it was determined at the MDR meeting that Student's conduct was not a manifestation of Student's disability.

At the MDR meeting on 10/20/08, Student's entire file was reviewed. Student's 06/03/08 IEP was included in the file, and it was therefore reviewed by the IEP Team. *(Finding of Fact #10).* The IEP team determined that the behavior that led to Student's expulsion, i.e., pre-meditated fighting, was not a manifestation of Student's disability. The Hearing Officer concludes that the IEP Team was not required to revise Student's IEP in light of that determination. There is no statutory provision contained in 34 C.F.R. 300.530(e) that can lead this Hearing Officer to a different conclusion.

Petitioner did not meet its burden of proof on Issue #2.

Issue #3 - Whether DCPS failed to provide special education and related services to Student; thereby denying Student a FAPE?

Petitioner alleges that DCPS failed to provide the specialized instruction and related services prescribed in Student's IEP while Student was expelled from

When Student was expelled from in October 2008, Student went to to attend school for the duration of the expulsion period. *(Finding of Fact #12).* Gary Washington, the principal of C.H.O.I.C.E. Academy, testified that C.H.O.I.C.E. Academy could not provide a self contained classroom for a student with 27.5 hours of special education with a disability classification of OHI. *(Finding of Fact #12).* Student's 06/03/08 IEP called for 27.5 hours of special education services, and required that Student spend 100% of the time NOT in a regular education setting. *(Finding of Fact #2).*

34 C.F.R. 300.323(c)(2) states that DCPS must ensure that as soon as possible following the development of the IEP, special education and related services are made available in accordance with Student's IEP. And, 34 C.F.R. 300.530(d) states that "a child with a disability who is removed from the child's current placement if the behavior that gave rise to the violation of the school code is determined not be a manifestation of the child's disability, must continue to receive the educational services of a FAPE, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."

The Hearing Officer concludes that Student's 06/03/08 IEP, that required 27.5 hours/week of special education services, could not be fully implemented while Student attended C.H.O.I.C.E. Academy, and as a result, Student was denied the full spectrum of special education services required by Student's IEP.

Did this procedural violation of IDEIA result in harm to the Student resulting in a denial of a FAPE? A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. *34 C.F.R. Section 300.513(a).*

Student *was* deprived of specialized services during the 45 days that Student was enrolled at but only if Student attended school. "Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure occurs when the services provided fall significantly short of the services in the IEP. The child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall." *(Van Duyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007).*

There was no evidence in the record regarding Student's attendance at during the 45 days Student was enrolled. Therefore, it is impossible to determine exactly how many hours of special education services Student missed due to inability to fully implement Student's IEP. Moreover, Petitioner did not offer any direct or indirect evidence of harm to Student caused by this missed instruction, and none can be inferred based on the evidence in the record.

Petitioner failed to meet its burden of proof on Issue #3.

Issue #4 - Whether DCPS failed to provide an appropriate placement for Student, thereby denying Student a FAPE?

Petitioner asserts in its Complaint that Student's 07/27/06 psychiatric evaluation recommended a small educational setting with a low teacher to student ratio. Petitioner also asserts that for the past two years, Student has been struggling in academics and performing below grade level. And, based on these factors, Student's current placement at is inappropriate.

DCPS asserts that Student's 06/07/07 IEP and Student's 06/03/08 IEP are reasonably calculated to provide educational benefit, and are appropriate.

In determining the educational placement of a child with a disability, each public agency must ensure that the child's placement is determined at least annually and is based on the child's IEP. *34 C.F.R. 300.116(b)(1), 300.116(b)(2).*

Rowley sets the standard for determining whether a FAPE has been provided by asking a two part question: "(1) Have the procedures set forth in the IDEA been adequately complied with, and (2) Is the IEP reasonably calculated to enable the child to receive educational benefits?" *Board of Education of the Hendrick Hudson Central School District, et. al. v. Rowley, et al. (102 S.Ct. 3034, IDELR 553:656 (1982)).*

Under *Kerkam v. McKenzie, 441 IDELR 311, 862 F.2d 884 (United States Court of Appeals, District of Columbia) (1988)),* FAPE is not defined as a potential maximizing education. A school has met its obligation to provide a FAPE if the IEP provides services that allows the student to receive some meaningful educational benefit.

At that 06/03/08 IEP meeting, the number of hours of special education services for Student was increased from 11 hours/week as prescribed in Student's 06/07/07 IEP to 27.5 hours/week. Student's most current IEP, dated 06/03/08, requires specialized instruction and related services 100% of the time, NOT in a regular educational setting. *(Finding of Fact #1, #2).* Therefore, Student is at the maximum ceiling for receiving special education services.

Student's 06/03/08 IEP was in effect at at the beginning of the 2008-2009 school year, and is currently implementing Student's IEP. *(Finding of*

Fact #6, #11). However, Student's grade point average for 5 subjects in the 1st advisory of the 2008-2009 school year ending on 10/24/08, consisted of an "F." And, Student's absences during the 1st advisory were not excessive. *(Finding of Fact #5).* Since Student does not have attendance problems, the source of Student's academic failure lies elsewhere. It is evident from Student's grades that although Student's IEP is being fully implemented at *(Finding of Fact #11)*, Student is not receiving any educational benefit from the academic environment. There was no evidence in the record regarding Student's class size at The Hearing Officer concludes that is not an appropriate placement for Student.

Student has been accepted for enrollment at an educational placement that can implement Student's current IEP, has a low teacher to student ratio, and can provide services recommended in Student's evaluations. Therefore, qualifies as an appropriate educational placement for Student. *(Finding of Fact #13, #14). See 34 C.F.R. 300.116(b)(2)*, "An educational placement must be able to implement Student's IEP."

Petitioner met its burden of proof on Issue #4.

Issue #5 - Whether DCPS failed to evaluate Student in all areas of suspected disability, pursuant to 34 C.F.R. 300.304(c)(4), thereby denying Student a FAPE?

Petitioner alleges that despite Student's increasingly negative behaviors and expulsions, DCPS failed to reevaluate Student to determine the level of need for services. Specifically, Petitioner alleges that DCPS failed to perform a clinical psychological evaluation to assess Student's social emotional status, and DCPS failed to perform a FBA and develop/implement a BIP to address problem behaviors.

DCPS responds by saying that DCPS conducted a FBA on 06/03/08; a comprehensive psychological reevaluation on 05/02/06; and an independent psychiatric evaluation, dated, 07/27/06, is part of Student's school record. *(Finding of Fact #7).* And, pursuant to 34 C.F.R. 300.303(b)(2), all of these evaluations are current because they are less than 3 years old. Furthermore, DCPS argues, since neither Parent or school personnel requested reevaluations, there has not been a violation of IDEIA, and no denial of a FAPE.

Petitioner cites 34 C.F.R. 300.530(d)(1)(ii) as the provision supporting Petitioner's claim that DCPS should have performed an updated comprehensive psychological evaluation, a FBA and a BIP to address Student's behavior problems. That provision states that when a child with a disability is removed from the child's current placement for more than 10 consecutive days due to a behavior that did not arise from a manifestation of the child's disability, the child must receive, *as appropriate*, a FBA, and behavior intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

The record indicates that during the 2008-2009 school year, Student was suspended from for less than five days for being disrespectful to staff, suspended again one month later for less than 5 days for pulling a fire alarm, and then expelled one month later for 45 days, due to fighting. *(Finding of Fact #4).* At the time the Complaint was filed, this was the extent of Student's maladaptive school behaviors that had occurred at

The statute gives DCPS the option of developing a FBA and/or a BIP, as appropriate, if the student is removed from the student's school placement for more than 10 consecutive days. The only maladaptive behavior pertinent to this statute is the fighting that resulted in Student being expelled from school. There is nothing in the record to suggest that this fight, that was not school related, but happened to take place directly outside of the school, warrants a FBA or a BIP. This incident, although serious enough to trigger expulsion, appeared to be an isolated incident, as there was no evidence in the record that Student had a history of fighting. Moreover, the behavior of fighting, on this record, was not a chronic behavior that interfered with learning. It was a retaliatory fight initiated by Student for something that had occurred in the past; something entirely unrelated to school or learning. Student's 06/03/08 FBA was appropriately developed due to behaviors that impeded learning, i.e., running the halls and not staying in class. *(Finding of Fact #3).*

Additionally, neither Petitioner or a teacher requested a FBA, a BIP or a comprehensive psychological reevaluation while Student attended Browne EC during the 2008-2009 school year. *(Finding of Fact #3).*

Therefore, the Hearing Officer concludes that Student was not denied a FAPE as a result of DCPS' failure to complete a FBA or BIP based on Student's expulsion from for the behavior of fighting. The nature of the circumstances leading to the expulsion did not necessarily warrant a FBA, a BIP or a comprehensive psychological reevaluation, and DCPS did not abuse its discretion by not completing these assessments.

Petitioner did not meet its burden of proof on Issue #5.

Issue #6 - Whether DCPS failed to invite parent and child to meeting, thereby denying Student a FAPE?

Petitioner alleges that DCPS convened a manifest determination meeting following Student's suspension from for fighting in front of the school, and didn't advise or invite Petitioner to the meeting. Petitioner kept calling the Principal and was finally advised by the Principal that Student was expelled and sent to for 45 days. *(Finding of Fact #9).*

This allegation was addressed in Issue #1 where it was concluded by the Hearing Officer that DCPS failed to invite Petitioner to the 10/20/08 MDR meeting as required by statute, and there was a denial of a FAPE.

Since Petitioner met its burden of proof on Issue #1, Petitioner has met its burden of proof on Issue #6; the allegations being virtually the same.

CONCLUSION

Petitioner met its burden of proof on Issue #1, #4, and #6; with a finding of a denial of a FAPE on each issue.

ORDER

WHEREFORE, based on the denials of a FAPE,

IT IS ORDERED, that

(1) DCPS shall issue a letter of funding for an independent comprehensive psychological evaluation that includes a social history, no later than seven (7) business days from the issue date of the HOD;

(2) DCPS shall provide funding and issue a Notice of Placement to within 30 calendar days of the issue date of the HOD, and fund transportation if needed by Student;

(3) DCPS shall convene an appropriate MDT/IEP team meeting within thirty (30) calendar days following Student's enrollment at to review existing evaluations, and review and revise the IEP as necessary; with Petitioner reserving all issues pertaining to compensatory services;

(4) DCPS shall convene an appropriate MDT/IEP team meeting within fifteen (15) business days after receipt of the independent comprehensive psychological evaluation, to review the evaluation, and review and revise the IEP as necessary; and

(5) All meetings with DCPS shall be scheduled through Petitioner's Attorney, Chike Ijeabuonwu, Esq., in writing, via facsimile, at (301) 270-9173.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

01/19/09
Date

Virginia A. Dietrich /s/
Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

Issued: January 19, 2009