

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
STUDENT HEARING OFFICE**

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STUDENT,<sup>1</sup> )  
By and through PARENT, )  
 )  
 *Petitioner,* )  
v. )  
 )  
DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS, )  
 )  
 *Respondent.* )

Case No. )  
 )  
Bruce Ryan, Hearing Officer )  
 )  
Issued: April 11, 2011 )

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STUDENT HEARING OFFICE

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**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION/ PROCEDURAL BACKGROUND**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed February 11, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia, currently attends a DCPS public charter school (the "Charter School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioner is the Student's mother. She claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (a) failing to convene a manifestation determination review ("MDR") meeting and to make a manifestation determination;<sup>2</sup> (b) failing to implement the Student's individualized education program ("IEP"); and (c) failing to provide an appropriate educational placement for the Student.

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

<sup>2</sup> While the Complaint includes a manifestation/discipline claim under 34 C.F.R. 300.530, Petitioner's counsel stated in a 2/17/2011 email correspondence that the Student had been allowed to return to school since the filing of the Complaint, and that Petitioner no longer sought or required an expedited hearing under the IDEA. Petitioner's counsel confirmed this at the 3/08/2011 prehearing conference, and the parties agreed that the case should proceed on an ordinary (non-expedited) calendar.

DCPS filed its Response on February 18, 2011, which denies that the Student was not provided with a FAPE. DCPS further asserted (*inter alia*) that Petitioner was barred from bringing these claims under the terms of a December 21, 2010 settlement agreement.

A resolution session was held on February 25, 2011, which failed to resolve the Complaint, and the parties agreed in writing to proceed to a due process hearing. Thus, the resolution period ended on February 25, 2011.

A Prehearing Conference (“PHC”) was then held on March 8, 2011, at which the parties discussed and clarified the issues and requested relief. It was agreed that the Due Process Hearing (“DPH”) would be held April 1, 2011; that five-day disclosures would be filed by March 25, 2011; and that any motions would be filed by March 17, 2011. *PE-22*, pp. 2-3. Petitioner elected for the hearing to be closed.

At the PHC, the parties also discussed the fact that DCPS had recently issued a proposed notice of placement (“PNOP”) for the Student’s neighborhood high school (the “High School”) at a February 25, 2011 IEP team meeting. The parties stipulated and agreed that the Student would remain in her current educational placement at the Charter School during the pendency of this due process complaint proceeding, notwithstanding any other action taken by DCPS or the Student’s IEP team. A Stay-Put Order was issued March 9, 2011, to confirm this stipulation and agreement, and to enforce the Student’s “stay-put” rights pursuant to the IDEA, *see* 20 U.S.C. § 1415 (j); 34 C.F.R. § 300.518, and District of Columbia law, *see* DCMR § 5-E3033.<sup>3</sup>

No motions were thereafter filed by either party, and the case proceeded to hearing. Five-day disclosures were filed as directed on March 25; and the DPH was held in two sessions, on April 1 and 4, 2011. During the DPH, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner’s Exhibits:** PE-1 through PE-37.

**Respondent’s Exhibits:** R-1 through R-13.

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<sup>3</sup> Also, while the parties agreed that the 02/25/2011 proposed action by DCPS is not the subject of the Complaint (which predates such action), it was discussed at the PHC that such proposed DCPS placement may still be relevant to the determination of appropriate relief at hearing in the event Petitioner prevailed on one or more of her present denial of FAPE claims.

In addition, the following Witnesses testified on behalf of each party at hearing:

**Petitioner's Witnesses:** (1) Parent; (2) Student's Aunt; (3) Psychologist; and (4) Private School Representative.

**Respondent's Witnesses:** Evan Murray, Program Manager.

## II. JURISDICTION

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is April 11, 2011.

## III. ISSUES AND REQUESTED RELIEF

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at hearing (*see PE-22, ¶ 6*):

- (1) **Failure to Convene an MDR Meeting and Make a Manifestation Determination** — Did DCPS deny the Student a FAPE by suspending the Student for 10 or more days without an MDR since December 2010?
- (2) **Failure to Implement July, 2010 IEP** — Did DCPS deny the Student a FAPE by failing to implement the Student's 07/09/2010 IEP in that she allegedly did not receive: (a) her related occupational therapy ("OT") services; (b) consistent pull-out counseling services; and (c) pull-out specialized instruction?
- (3) **Failure to Provide an Appropriate Educational Placement** — Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate educational placement during the 2010-11 School Year, as of December 2010?

Petitioner requests (*inter alia*) that DCPS be ordered to: (a) fund a "full-time special education placement in a therapeutic milieu" (*PE-1*, p. 5), at a non-public day school selected by Petitioner (the "Private School"); (b) update and implement the Student's functional behavior assessment ("FBA") and behavior intervention plan ("BIP"), based on her recent suspensions;

(c) fund “therapeutic wrap around services” (*PE-1*, p. 5) ; and (d) fund compensatory education as warranted pursuant to *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).<sup>4</sup>

#### IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. She has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. *See R-1* (07/09/2010 IEP); *PE-2* (same); *see also Parent Test*.
2. The Student currently attends the Charter School, where she is in the grade. Petitioner elected to enroll the Student there at the beginning of the 2010-11 school year after she aged out of a non-public day middle school in the District. *See Parent Test.; Aunt Test.; PE-15; PE-16*. A DCPS official actually selected Charter School, and Petitioner agreed. *Aunt Test*.
3. On or about July 9, 2010, DCPS convened a meeting of the Student’s MDT/IEP team, which developed an IEP. The 07/09/2010 IEP provides 24.5 hours per week of specialized instruction, 2.5 hours per week of behavioral support services, and 0.5 hours per week of OT services. All of the services are to be provided in a setting Outside General Education. *R-1*, p. 6. The IEP further stated under the Least Restrictive Environment (“LRE”) section that the Student required a “structured, therapeutic environment [to] access the general education curriculum. *Id.*, p. 7.
4. On or about December 7, 2010, an “Emergency Placement Meeting” of the IEP team was convened, but the LEA representative was not in attendance. The team reviewed the Student’s academic progress, recent behavioral incidents, and safety issues. *PE-11*. The Charter School Principal stated that there was a concern whether the Student’s needs could be met at the Charter School. *Id.*, pp. 1-2. *See also PE-9* (Sept.-Nov. 2010 disciplinary reports).
5. On or about December 12, 2010, Petitioner filed a prior due process complaint (Case No. 2010-1545), alleging that DCPS denied the Student a FAPE by (a) failing to provide an appropriate placement because the Charter School was unable to implement the 07/09/2010 IEP; (b) failing to conduct an updated FBA and social history; and (c) failing to convene an

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<sup>4</sup> Other items of relief originally requested in the Complaint, relating to the MDR and suspension were withdrawn at the PHC.

- MDR meeting and make a manifestation determination due to a mid-November suspension. *R-7* (12/12/2010 Due Process Complaint Notice), pp. 3-5 (*R7-5 – R7-7*).
6. The claims asserted in the December 12, 2010 complaint are substantially similar to the claims asserted in the instant Complaint. For example, the 12/12/2010 complaint alleged that the Charter School was not an appropriate placement in part because it was “not clear that [Student] has been receiving the full number of hours of special and related services at the current placement, inclusive of the OT and behavioral supports,”<sup>5</sup> because the Student had been “placed on a long-term suspension for exhibiting aggressive behaviors and threats,” and because the Charter School “was unable to provide the full-time therapeutic milieu that [Student] requires to benefit from her special education.” *R-7*, p.3 (*R7-5*). The complaint also requested virtually identical relief, including an updated FBA and social history. *R7-8*.
  7. On or about December 21, 2010, Petitioner and DCPS entered into a settlement agreement (“SA”) that resolved the 12/12/2010 complaint. DCPS agreed (a) to fund an independent FBA and independent social history assessment, and (b) convene an MDT/IEP team meeting to review the evaluations, develop a BIP, review and revise the IEP if necessary, and discuss placement. *R-6*, p. 2. The MDT/IEP team would also discuss compensatory education for the Student, if warranted. *Id.*
  8. Following the 12/21/2010 SA, the Student continued to attend the Charter School and continued to experience behavioral difficulties there. *See R12-3, R12-4* (noting 1/10/2011, 1/19/2011 and 1/24/2011 incidents); *Parent Test.*; *Aunt Test*; *Psychologist Test*.
  9. On January 20, 2011, an FBA was completed by Interdynamics, Inc., the independent evaluator selected by Petitioner, as contemplated by the December 2010 SA. *R-3*.
  10. On January 21, 2011, a social history report was also completed by Interdynamics, Inc., the independent evaluator selected by Petitioner, as contemplated by the December 2010 SA. *See R-2*.
  11. Approximately three weeks later, and before DCPS had an opportunity to convene an MDT/IEP team meeting to review the evaluations pursuant to the December 2010 SA, Petitioner filed the instant Complaint on February 11, 2011. *PE-1*.

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<sup>5</sup> In the present action, Petitioner’s witnesses generally were unable to establish what specific services had been provided, or not provided, at the Charter School. *See, e.g., Psychologist Test.* (testifying on cross examination that she did not know what services were being provided at school).

12. A few days after that, on February 16, 2011, Petitioner received a letter of acceptance from Private School, stating that it was prepared to accept the Student for the remainder of the 2010-11 school year, contingent on placement authorization from DCPS and a 30-day review. *P-33*.
13. On or about February 25, 2011, two weeks after the Complaint was filed, DCPS convened a meeting of the Student's MDT/IEP team to review the evaluations and discuss the other matters required by the December 2010 SA. *See R-4*. Attending the meeting were Petitioner, Student, Student's Aunt, Petitioner's attorney, Special Education Teacher, Program Manager, Social Worker, independent FBA examiner, Case Manager, and Special Education Coordinator. *Id.*
14. At the February 25, 2011 meeting, the IEP team reviewed both independent evaluations and agreed that a BIP was necessary. *R-4*, pp. 1-2. The Special Education Teacher then explained the BIP that will be implemented for the Student. *Id.*, p. 2. The team further agreed that it was not necessary to make any changes in the IEP, and agreed to continue to use the current IEP that was in place for the Student. *Id.*
15. At the February 25, 2011 meeting, DCPS also issued a PNOP for High School, and the Case Manager gave Petitioner and her attorney a copy of the PNOP. DCPS stated that High School is able to implement the full-time IEP for the Student. *See R4-2; R-5; Program Manager Test*. Petitioner and the Student's aunt expressed safety concerns in reference to the Student attending High School, but neither of them forwarded copies of any safety reports to DCPS as requested. *R4-2; Aunt Test*. If safety concerns are documented, DCPS says that it would offer another placement. *Program Manager Test*.
16. The 02/25/2011 IEP team also discussed compensatory education pursuant to the December 2010 SA. The team agreed that compensatory education is warranted due to missed services from August 31, 2010 to February 25, 2011. DCPS authorized the following compensatory education for the Student: eight (8) hours of independent OT services; 10 hours of independent counseling; and 20 hours of independent mentoring. DCPS then issued a Compensatory Education Authorization letter dated March 1, 2011, confirming the agreed compensatory education services. The letter stated that DCPS' authorization resolved all issues pertaining to compensatory education as indicated in the SA. *See R4-2; R-10; PE-28*.

## V. DISCUSSION AND CONCLUSIONS OF LAW

The Hearing Officer concludes that Petitioner's claims must be dismissed with prejudice since the record makes clear that these claims are substantively indistinguishable from the claims that Petitioner asserted and settled just two months earlier, in December 2010, and DCPS was still engaged in the MDT process implementing the parties' agreement at the time the Complaint was filed. Allowing Petitioner to circumvent the parties' written SA in this manner "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements," especially in the context of the IDEA. *D.R v. East Brunswick Board of Education*, 109 F.3d 896, at \*5 (3d Cir. 1997), citing *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

Like the current Complaint, the prior due process complaint filed 12/06/2010 alleged the inappropriateness of the Charter School as an educational placement/location of services, alleged that DCPS needed to complete an updated FBA and social history of the Student, and alleged a failure to make required manifestation determinations in light of recent disciplinary actions. R-7. Petitioner chose to settle these prior claims by accepting DCPS' authorization of an independent FBA and social history, along with DCPS' agreement to convene an MDT meeting to review the evaluations, review and revise the IEP as necessary, and discuss placement and compensatory education. See R-6. Moreover, the SA specifically provided that it was "in full satisfaction and settlement of all claims contained in the [then] pending complaint, including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed settlement agreement." R6-3, ¶10.

While this agreed process was underway, Petitioner then filed another complaint on essentially the same issues. The Complaint was filed prior to the MDT/IEP team meeting provided in the December SA, and while DCPS was still performing within the time period specified in the SA. The SA required DCPS to convene the MDT/IEP team meeting within **20 business days** of its receipt of the final independent evaluations. R6-2. Assuming that the evaluation reports were immediately transmitted to DCPS on January 21, 20 business days later would appear to be **February 18, 2011**. Petitioner thus jumped the gun by filing on February 11.

As a result of the December 2010 SA, DCPS has now (a) funded and reviewed Petitioner's independent FBA and social history, (b) determined a new placement/location of services, and (c) authorized compensatory education to remedy missed services through February

25, 2011. Petitioner has not argued or shown that these actions are in any way inconsistent with the SA. Absent that, Petitioner cannot demonstrate that DCPS denied the Student a FAPE by taking any of these actions. The actions were taken pursuant to the agreed process outlined in the SA, which Petitioner accepted “in full satisfaction and settlement” of her prior claims.<sup>6</sup> Moreover, even assuming *arguendo* that Petitioner could prove a denial of FAPE by any of these actions, equitable considerations would counsel against any award of relief where DCPS is abiding by the terms of the SA and making timely efforts to resolve the current placement issues.

The only claim presented in the instant Complaint that conceivably could warrant different treatment is the claim under Issue #1 (“Failure to Convene an MDR Meeting and Make a Manifestation Determination”). Assuming Petitioner had shown by a preponderance of the evidence that DCPS issued *new suspensions* totaling 10 or more school days between *December 21, 2010*, and *February 11, 2011* (the filing date of the Complaint), such facts might give rise to a separate manifestation claim under 34 C.F.R. 300.530. However, Petitioner has not carried her burden<sup>7</sup> of proving those facts in this hearing. *PE-9* contains only behavior incidents and notices of suspension occurring *prior* to the December SA; *R-12* includes a three-day suspension in January; and Petitioner’s witnesses testified about additional suspensions in March, which occurred subsequent to the Complaint. *See, e.g., Aunt Test.; Parent Test.;* Moreover, the record shows that separate MDR meetings were held for the March incidents, that the Student was returned to the Charter School based on manifestation determinations, and that an independent FBA had been completed by that time. *See Program Manager Test.; R-9; P-36. See also Parent Test.* (absence of testimony concerning missed related services at Charter School since 12/21/2010).

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<sup>6</sup> While the IDEA allows a parent to file “a separate due process complaint on an *issue separate from* a due process complaint already filed,” 34 C.F.R. 300.513 (c) (emphasis added), it does not allow the parent to re-file the *same* complaint on issues that have already been settled. *Cf. Theodore v. District of Columbia*, Civil Action No. 09-0667 (D.D.C. March 28, 2011) (applying claim preclusion to bar re-litigation of IDEA claims sharing the “same nucleus of facts”); *Serpas v. District of Columbia*, 108 LRP 9952 (D.D.C. 2005) (same). The claim preclusion doctrine of res judicata does not directly apply in this case because there was a settlement agreement, rather than a final judgment on the merits of the previous complaint.

<sup>7</sup> The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-E3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Finally, as noted above, the parties discussed and agreed at the PHC that DCPS' February 25, 2011 PNOP for High School has not been challenged as a denial of FAPE in the present Complaint, which predates such action. It was agreed that the PNOP would only be relevant to the determination of appropriate relief *if* Petitioner prevailed on one or more of her claims that DCPS had already denied a FAPE, as of February 11, 2011. *PE-22*, ¶ 9. However, Petitioner did not agree to accept whatever placement ultimately resulted from the SA process. Accordingly, if Petitioner chooses, she may still file another due process complaint claiming that the February 25 PNOP denies the Student a FAPE by offering an inappropriate educational placement, just as she is free to challenge any other new actions taken by DCPS at or after the February 25 meeting including further suspensions.

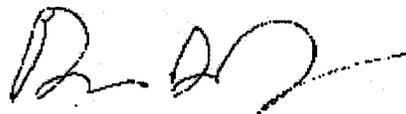
**VI. ORDER**

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

1. Petitioner's requests for relief in her Due Process Complaint filed February 11, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: April 11, 2011



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).