

DEC 22 2011

DISTRICT OF COLUMBIA  
 OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
 Student Hearing Office  
 810 First Street, N.E.  
 Washington, D.C. 20002

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Parent <sup>1</sup> , on behalf of	)
Student,	)
	)
Petitioner,	)
	)Hearing Officer: James McKeever
v.	)
	)
	)Hearing Date: December 9, 2011
	)
SCHOOL	)
	)
Respondent.	)

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HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was conducted in accordance with the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; the federal regulations at 34 C.F.R. §§ 300.1 *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

II. BACKGROUND

Petitioner is the parent of the Student, a year-old girl with a disability who resides in the District of Columbia and currently attends Respondent high school (A Charter School that is its own Local Educational Agency (LEA) in the District of Columbia. The Student is eligible for special education and related services as a student with a disability under the IDEA.

On November 18, 2011, Petitioner filed a Due Process Complaint ("DPC") against the Respondent alleging violations of the Individuals with Disabilities Education Act ("IDEA"). Petitioner alleged that Respondent

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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.

denied the Student a free and appropriate public education by failing to make an appropriate manifestation determination on November 16, 2011, regarding the student's behavior that led to her suspension on November 9, 2011. Specifically, Petitioner asserts that the Respondent should have determined that the Student's behavior was a manifestation of her disability. Based on the allegations contained in the DPC, this matter was heard on an expedited basis.

Respondent has not challenged the sufficiency of the DPC. On November 30, 2011, the parties waived the resolution meeting. Respondent filed its response to the DPC on November 28, 2011. Respondent asserted a general denial of the allegations contained in the DPC and asserted that the Student's IEP is appropriate and that it was implemented during the subject school year.

A Prehearing Conference (PHC) was held on November 28, 2011. Counsel for the Petitioner and counsel for Respondent participated. During the PHC the parties discussed the issues raised in the DPC and the requested relief. It was agreed that the Due Process Hearing (DPH) would be held on December 9, 2011 and that the 3-day disclosures would be filed by December 6, 2011.

The Three-day disclosures were filed as directed on December 6, 2011 and the DPH was held on December 9, 2011. Petitioner elected for the hearing to be closed.

On December 5, 2011, Petitioner filed a motion to compel Respondent to disclose statements made by the Student's classmates on November 9, 2011. A conference call was held December 6, 2011 to address the motion. During the conference call Respondent's counsel was directed to provide Petitioner's counsel with redacted copies of the statements by 5 pm on December 6, 2011.<sup>2</sup> Respondent's counsel complied with the Order and the documents were provided to Petitioner's counsel on December 6, 2011 and offered into evidence as Exhibit P-25.

Petitioner's Exhibits 1-25<sup>3</sup> were admitted into evidence. Respondent's Exhibits 1-9 were also admitted into evidence.

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<sup>2</sup> A written Order was subsequently issued on December 8, 2011.

<sup>3</sup> A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

The following witnesses testified on behalf of the Petitioner: Parent, Student, and Parent's Advocate, who was qualified as an expert in special education.

The following witnesses testified on behalf of the Respondent: Psychologist, Special Education Coordinator (SEC), Counselor, Director, Dean and Principal.

### III. ISSUES PRESENTED

The following issue was certified for adjudication at the due process hearing:

a. Whether Respondent denied the Student a free and appropriate public education by failing to make an appropriate manifestation determination on November 16, 2011, regarding the student's behavior that led to her suspension on November 9, 2011. Specifically, Petitioner asserts that the Respondent should have determined that the Student's behavior that led to her suspension was a manifestation of her disability.

Petitioner requests that the Hearing Officer (HO) either find that the Student's conduct on November 9, 2011 was a manifestation of her disability or direct Respondent to reconvene a new manifestation meeting within seven days of this decision and make the same finding. Petitioner also requests funding for an independent Comprehensive Psychological Evaluation and funding for an independent Functional Behavior Assessment (FBA). Additionally, Petitioner requests compensatory education to be determined by the IEP team or an Order by the HO directing an independent evaluation to determine the propriety of compensatory education services (Exhibit P-2 DPC).

### IV. FINDINGS OF FACT

The Student is a     -year-old girl who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child classified with an Emotional Disturbance (Exhibit R-1. Individualized Education Plan (IEP) dated 4/27/11). The Student entered Respondent high school in the 9<sup>th</sup> grade. The Student presently attends     grade at Respondent high school in the District of Columbia.

The Student's cognitive ability is in the Low Average range as measured by the WISC-IV. However, "due to discrepancies between her index scores, her full scale [is] not informative" (P-10-Comprehensive Psychological Evaluation, February 27, 2011). The Student's verbal

comprehension and her ability to concentrate and maintain attention is in the Low Average range. Nevertheless, her ability to analyze, synthesize and reason using visual information is within the Average range. Additionally, the Student's mental and motor speed, which is used to solve nonverbal problems, revealed a relative strength and placed her solidly in the High Average range (Exhibit P-10, page 10). Academically, the Student scored in the Low Average range, except for written expression, where her scores placed her in the Average range of functioning. With respect to her social/emotional functioning, the Student tends to view the world using a "global perspective" and as a result neglects the details. The Student also struggles to develop and maintain friendships (Exhibit P-10 page 10).

On April 27, 2011, the multidisciplinary team convened an IEP meeting and generated an IEP, which provided for 4 hours per day of specialized instruction within the general education setting and 1 hour per week of behavior support services outside of the general education setting (R-1, IEP).

On May 9, 2011, the Student was suspended for threatening another student and for threatening a staff member. The Student was suspended from May 9 to May 16, 2011 (Exhibit P-11).

On May 19, 2011, the Student was suspended for 3 days for violating the Student Code of Conduct for her disrespectful behavior toward staff members (Exhibit P-12).

On September 22, 2011, the Student was suspended for 3 days for disrespectful behavior and use of profanity toward staff members (Exhibit P-13).

On September 27, 2011, a meeting was held to review the Student's progress. Present at the meeting were the parent, Student, parent's advocate, the SEC, the Student's counselor, the Student's special education teacher and Respondent's attorney. During the meeting, the Parent received the Student's behavior logs and the Behavior Intervention Plan (BIP), dated June 18, 2011. The parent and parent's Advocate were concerned that the BIP was not developed with the Student's input and noted that the Student objected to an issue raised in the BIP about missing homework assignments and a reward system developed by Respondent for the Student's positive performance at school (Testimony of parent and parent's Advocate).

At the hearing, the Student initially claimed that her special education teacher was not always with her during the school day, but then testified that the special education teacher is always there to help her (Student testimony).

The parent also reported that the Student's special education teacher was "great" (Exhibit P-6).

On October 7, 2011, the Student's BIP was revised by the Student's counselor with input from the parent and the parent's advocate. The BIP identified targeted behaviors such as: (1) impulsivity, inattention and disruptive behavior; (2) disorganization; (3) communication and social skills; and (4) aggression (verbal and physical). Positive interventions were developed and a monitoring system for the Student's behavior and classroom attendance was put in place (Exhibit R-2). At the request of the parent, parent Advocate and the Student, the BIP was modified and the parent and the parent Advocate agreed at the impartial hearing that the BIP as modified was appropriate (Testimony of parent and parent's Advocate).

Additionally, at the impartial hearing, the parent and the parents' Advocate agreed that the Student's IEP, dated April 27, 2011 was appropriate (Exhibit P-6 and testimony of parent and parent's Advocate).

During the first quarter of the 2011-2012 school year, the Student performed "exceptionally well" in her academic courses (Testimony of Student, parent Advocate and Counselor).

The Student testified that "sometimes her Counselor did not provide her counseling services." The evidence showed that the counseling services were provided during the subject school year and that if they were missed because of a school function and/or a holiday, the services were made up the following week (Testimony of Student, testimony of Counselor).

The IEP provides that the school should send the Student's behavior logs to the parent on a weekly basis. The parent testified that she did not receive behavior logs during the school year. The record revealed that the parent received the behavior logs during a meeting with the school on 9/27/11 (Exhibit P-6) and that the parent was informed by the school of the Student's behavior and of the possible consequences of her behaviors on an ongoing basis throughout the school year (Testimony of Dean of Students).

On November 3, 2011, the Dean of Students sent an email to the parent advising her that the school was very concerned about the Student's harassing and threatening behavior toward other classmates and that the school was also concerned about the Student's safety if this behavior continued (Exhibit R-4, page 2).

On November 5, 2011, the parent responded via email to the Dean advising, in sum and substance, that she, too, was concerned about the

reported incidents between her daughter and her classmates (Exhibit R-4, page 1).

On or about November 9, 2011, the Student was suspended until November 22, 2011 for skipping class and because the school received reports of "bullying" and "threatening behavior" about the Student from her classmates (Exhibit P-14 and R-5-Suspension Notice).

On or about November 16, 2011, a Manifestation Determination meeting was held (MDR). The following persons participated in the meeting: SEC, Parent, the Student's special education teacher, the student's Counselor, the Director of the school, parent's Advocate, parent's attorney, Respondent's attorney and a general education teacher. During the meeting the Dean of students described the behaviors for which the Student was being suspended and explained to everyone present, including the parent and the parent's Advocate, that the Student was suspended for having other students followed by the Student's friends and for threatening her classmates through her friends in the community, who were sent to the school by the Student (Exhibit R-6, page 1). It was explained that the harassing and threatening behaviors were directed to the Student's former boyfriend and his new girlfriend, who are the Student's current classmates. Since the beginning of the school year, the Student's former boyfriend and his current girlfriend were accosted as they left the school building by young adults who were sent to the school by the Student. The father of the Student's former boyfriend complained to the school that the Student was having her son followed home from school by young adult males, who did not attend the school, but who waited for his son to be released from school and then threatened his son with physical harm. The father of the Student's former boyfriend also reported that the Student came to his home with a group of young adult males and threatened to harm his son (Testimony of Dean, testimony of Principal). The Student did not deny that she knew the young adults who came to the school and who engaged in the threatening behavior toward her classmates. However, the Student denied that she instructed them to engage in this behavior. Additionally, the Student admitted that she went to her former boyfriend's home accompanied by two young adults males, but stated that she did not ask them to come with her (Student's testimony).

The Director of the school testified that the Student admitted during a subsequent expulsion hearing that she should not have had her friends come to the school (Testimony of Director).

During the MDR meeting, the Dean of Students discussed the two prior mediation meetings which were held with the parent of the Student and the parent of the Student's classmates in an effort to resolve the dispute and

end the harassing and threatening behavior (Exhibit R-6, page 1) (Testimony of Dean and Principal). The school acknowledged that the threatening and bullying behavior did not occur in the classroom, but asserted that the Student's behavior after school and in the community with respect to her classmates was "spilling over" into the school day (Testimony of Dean, Principal and Director). The parent acknowledged that the issues in the community were coming into the school (Exhibit R-6, page 1).

At the end of the MDR meeting, all of the participants from the school agreed that the Student's behavior was not a manifestation of the Student's disability. The parent and the parent's advocate believed that the Student's behavior was a result of her disability due to the Student's impulsive behavior. The parent's Advocate was concerned that she did not have enough information about the alleged incidents because the school would not provide copies of the statements taken from the Student's classmates on November 9, 2011 and because she believed that the Student might not have received all of her counseling services as per her IEP (Testimony of Dean, Director, Principal, Counselor, Parent and Parent's Advocate).

## VI. CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony with the exception of the Student, whose testimony concerning whether she directed her friends in the community to come to the school to threaten her former boyfriend and his current girlfriend was not credible. The Student did not testify in a forthright manner and, in light of the testimony of the Director of the school, who testified that the Student subsequently admitted that she directed her friends in the community to come to the school, and which was not rebutted by the Student who was present at the hearing, I find that the Student's testimony on this issue was not credible.

## VII. CONCLUSIONS OF LAW

The IDEA guarantees children with disabilities the right to a free and appropriate public education ("FAPE") 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction" *Rowley*, 458 U.S. at 188-89 (citation omitted). The individualized educational program ("IEP") is the centerpiece of special education delivery system *Honig v. Doe*, 484 U.S. 305, 311 (1988). In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited

to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner's IEP is reasonably calculated to enable Petitioner to receive educational benefit Rowley, 458 U.S. at 206-207.

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits (34 C.F.R. § 300.513 (a)(2)). In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006).

The burden of proof is properly placed upon the party seeking relief. Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence Shaffer v. Weast, 546 U.S. 49, 51 (2005).

## VIII. DISCUSSION

Petitioner has not meet her burden of demonstrating that Respondent denied the Student a FAPE by failing to determine that the Student's behavior that led to her suspension on November 9, 2011 was a manifestation of her disability.

School personnel may remove a child with a disability who violates a code of student conduct from her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement (34 C.F.R. § 300.530 (b)(1)).

For disciplinary changes in placement that would exceed ten consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability (as described below), school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities (*Id.* at § 300.530 (c)). However, the local educational agency ("LEA") must provide services to the student so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP (34 C.F.R. §§ 300.530 (a)(2), 300.530 (d)(1)(i)). As appropriate, the LEA also must conduct a functional behavioral assessment of the student and provide the student behavior intervention services and modifications that are designed to

address the behavior violation so that it does not recur *Id.* at § 300.530 (d)(iii).

If a LEA decides to make a removal that constitutes a change of placement for a student with a disability because of a violation of a code of student conduct, the LEA must immediately notify the parents of that decision and provide the parents with a procedural safeguards notice (34 C.F.R. § 300.530 (h)). Within 10 school days of any decision by the LEA to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA must also convene a meeting of the manifestation determination review ("MDR") team, which must include the parent and relevant members of the child's IEP team *Id.* at § 300.530 (e). The MDR team must review all relevant information in the student's file, including the student's IEP, to determine whether the conduct in question was a manifestation of the student's disability *Id.* at § 300.530 (g).

The MDR team must determine whether the conduct in question was: (1) caused by, or had a direct and substantial relationship to the student's disability or (2) was the direct result of the LEA's failure to implement the IEP (*Id.* at § 300.530 (e) (1)). If the MDR team answers either of these questions in the affirmative, the team must find that the conduct in question was a manifestation of the student's disability *Id.* at § 300.530 (e) (2)).

If the MDR team finds that the conduct was a manifestation of the student's disability, the IEP team must either conduct a functional behavioral assessment ("FBA") of the student, unless the LEA had previously conducted an FBA, and implement a behavioral intervention plan ("BIP") *Id.* at § 300.530 (f)(1)(i). If the student already has a BIP in place, the IEP team must review the BIP and modify it as necessary to address the behavior. The IEP team must also return the student to the placement from which the student was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. *Id.* at §§ 300.530 (f)(1)(ii), 300.530 (f)(2).

Here, Petitioner requests a finding that the Student's behavior that led to her suspension on November 9, 2011 was a manifestation of her disability. As stated above, I find that Petitioner has not met her burden proof to support such a finding.

First, the record revealed the MDR team determined that the conduct in question was not caused by, nor did it have a direct and substantial relation to, the Student's disability. The record shows that the Student is classified as a student with an emotional disturbance who requires special education and behavior support services. Petitioner and Petitioner's Advocate contend that the Student's behavior, with respect to the allegations

of bullying and threatening her classmates, was a result of the Student's "impulsivity" (Testimony of Advocate and Petitioner). I find nothing in the record to support this contention. Significantly, Petitioner failed to demonstrate how the Student's alleged poor impulse control resulted in the conduct that led to the Student's suspension. Here, the record shows that the bullying and threatening behavior was not the result of a sudden provocation, but the result on an ongoing dispute between the Student and her fellow classmates that began in the last school year. Additionally, the record shows that the conduct in question was planned and directed by the Student by way of third parties. This conduct can hardly be describe as impulsive behavior. Moreover, although the Student's BIP referenced impulsivity as a targeted behavior, the Student's counselor testified that the Student is able to differentiate between behaviors and that the Student understands the consequences of her behavior. Finally, the evidence shows that the Student generally behaves in school and that the Student has the ability to reason (Testimony of Director and Counselor and Exhibit R-3). The evidence also shows that the Student did not initiate any altercation with the two classmates in question during the school day, but waited for the students to be released from school and then used her friends in the community to threaten and intimidate them. Based on these facts, I find that the Student's conduct was not the result of any impulsivity, and that Petitioner has failed to meet her burden of proving that the Student's conduct was caused by, or had a direct and substantial relation to, the Student's disability.

With respect to Petitioners assertion that they did not have enough information about the facts the leading to the suspension because Respondent did not turn over the statements made by the Student's classmates on November 9, 2011, the evidence shows that Petitioner and Petitioner's Advocate were well aware of the Student's behavior throughout the school year, as well as the specific concerns that the school had regarding this Student's behavior. The parent also participated in two prior mediation meetings to address the conduct at issue. As such, I do not find that Respondent's failure to disclose the statements made by the Student's classmates at the MDR meeting deprived Petitioner of an opportunity to participate in the MDR meeting.

Further, I find that Petitioner has failed to demonstrate that the Student's conduct was the direct result of the Respondent's failure to implement the Student's IEP. Here, the evidence shows that Petitioner and Petitioner's Advocate agreed that the Student's IEP was appropriate (Testimony of Petitioner and Petitioner's Advocate). Petitioner and Petitioner's Advocate also agreed that the Student's BIP was appropriate, as modified on October 7, 2011 (Testimony of Petitioner and Petitioner's Advocate). Significantly, nothing in evidence supports a finding that Respondent failed to implement the Student's IEP. Additionally, although

the Student initially testified that her special education teacher was not always present, the Student subsequently testified that her Special Education teacher was always there and that, in sum and substance, he was very helpful to her, which is evidenced by the Student's exceptionally good grades during the first marking period of the subject school year. Moreover, the record shows that Petitioner believed that the Student's Special Education teacher was "great" (Exhibit P-6).

Lastly, although Petitioner asserted that Respondent failed to provide all of the Student's counseling services during the fall of 2011, the Student's Counselor testified, in a forthright and credible manner, that all of the Student's counseling services were provided and that if a session was missed, it was promptly made up the following week (Testimony Counselor).

Based on the foregoing, I find that Petitioner has failed to demonstrate by a preponderance of the evidence that the Student's conduct was the direct result of the Respondent's failure to implement the Student's IEP.

As I have not found a denial of FAPE, Petitioner is not entitled to an independent Comprehensive Psychological Evaluation or an independent Functional Behavior Assessment. I note that a comprehensive psychological evaluation was performed on February 27, 2011 (Exhibit P-10) and nothing in the record suggest that it is inadequate. Additionally, there is no need for a new FBA because Petitioner and Respondent agree that the current BIP, which is based on the FBA in evidence, is appropriate.

Finally, Petition's request for compensatory educational services is denied because there was no a denial of FAPE *Reid v. District of Columbia*, 401 F.3d 516, 521.

#### **ORDERED**

Petitioner's Due Process Complaint, Dated November 22, 2011 is dismissed with prejudice.

Dated: December 21, 2011

By: /s/ James McKeever  
Hearing Officer

#### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90

days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).