

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: December 14, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0770 (Expedited)

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on November 13, 2012. The Petitioner is represented by Alana Hecht, Esq., and the Respondent is represented by Maya Washington, Esq. The complaint was bifurcated into separate hearings based on an issue arising under 34 C.F.R. § 300.532 which must be heard in an expedited hearing and the remaining issues that fall under 34 C.F.R. § 300.507. This Hearing Officer Determination (HOD) is the result of the expedited hearing. The remaining issues will be heard in another hearing to be held on January 8 and 9, 2013, and will incorporate the evidence and findings of the expedited hearing.

A prehearing was convened in this case on November 21, 2012 and a prehearing order was issued on that date. A response to the complaint was filed on November 23, 2012. A resolution meeting was convened on November 26, 2012, and resulted in no agreements.

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

The parties were required to provide trial briefs in advance of the hearing outlining each party's legal arguments and describing the evidence they intended to present and how that evidence would support their cases including what documents would show or prove and what witnesses would testify about. Only the Petitioner's Counsel followed this order.

The Respondent moved for dismissal of the matter on November 28, 2012. The Petitioner filed a response to the motion on December 2, 2012. The Respondent argued that the matter was moot because the Student was no longer one of its students, having been placed in the custody of DYRS, and that because the Student was only removed for five days prior to being put under the custody of DYRS (and so was no longer under a 45 day suspension imposed by the Respondent) there was no claim for which relief could be granted. The arguments were unpersuasive because even a student who is no longer an LEA student is entitled to a hearing on a claim against a former school district as long as the claim is not more than two years old, and in this case the claim is an appeal of a manifestation determination. The motion is denied as to the manifestation determination appeal.

The expedited due process hearing was required to be held within 20 school days of the complaint, and was convened and timely held on December 7, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is January 7, 2013 (10 school days following the hearing). This HOD is issued on December 14, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-B2510 & 5-E30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is: Whether the Respondent incorrectly determined that the Student's behavior of challenging and swearing at the Principal was not a manifestation of his disability? The Petitioner is seeking to have the manifestation determination of November 5, 2012, reversed.² The Respondent failed to demonstrate that the Student's behavior on October 26, 2012, resulting in a disciplinary removal in November 2012 was a manifestation of his disability.

IV. EVIDENCE

Six witnesses testified at the hearing, three for the Petitioner and three for the Respondent.

The Petitioner's witnesses were:

- 1) [REDACTED] Educational Advocate and special education expert (providing an expert opinion on how the Student's disability impacted his behavior for which he was disciplined), ([REDACTED])
- 2) [REDACTED], Educational Advocate, ([REDACTED])
- 3) Petitioner, Student's Mother, (P)

The Respondent's witnesses were:

² The Student is currently incarcerated and in the custody of the Division of Youth and Rehabilitation Services on an unrelated matter and is not currently attending the Respondent's schools.

- 1) [REDACTED] Dean of Students, Dunbar Senior High School, ([REDACTED])
- 2) [REDACTED] Special Education Teacher/Case Manager, ([REDACTED])
- 3) [REDACTED], Clinical Social Worker Dunbar Senior High School ([REDACTED])

All of the witnesses testified credibly and with candor, were not evasive, and statements were often supported by witnesses from both parties and the documents.

All 16 disclosures from the Petitioner were entered into evidence. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	11/8/12	Email from [REDACTED] to [REDACTED], et, al
	11/5/12	[Meeting notes]
	11/5/12	MDR for [Student]
	11/8/12	Letter from [REDACTED] to [REDACTED]
	11/8/12	Email from [REDACTED] to [REDACTED], et. al
P 2	11/5/12	Manifestation Determination
	[Undated]	Meeting Participants
	11/5/12	Manifestation for [Student]
P 3	11/26/12	Student Discipline Findings of Fact and Conclusions of Law (See R 1)
P 4	10/31/12	Notice of Proposed Disciplinary Action (See R 3)
	10/26/12	Letter from [REDACTED] to Whom It May Concern (See R 4)
	10/26/12	Administrator Statement
	11/5/12	Notice of Immediate Involuntary Transfer
P 5	1/11/12	Student Incident Report
	9/26/12	Notice of Final Disciplinary Action
	3/2/12	Notice of Final Disciplinary Action
	11/13/12	Parent/Guardian and Student Rights
P 6	Undated	Teacher Input Report
	1/6/12	[Geometry class work]
P 7	9/25/12	Email from Hecht to [REDACTED], et. al
	10/5/12	Email from Hecht to [REDACTED], et. al
	9/28/12	Email from Hecht to [REDACTED]
	11/2/12	Email from [REDACTED] to [REDACTED]
	11/2/12	Email from [REDACTED] to [REDACTED]
	11/30/12	Email from [REDACTED] to [REDACTED]
P 8	12/6/11	Report to Parents of Student Progress
	1/4/12	Student Timetable (BV)
	1/4/12	Transcript
	1/4/12	Letter of Understanding
	2/24/12	Report to Parents on Student Progress

<u>Ex. No.</u>	<u>Date</u>	<u>Document (cont.)</u>
	1/20/12	Report to Parents on Student Progress
	9/27/12	Report to Parents on Student Progress
	11/5/12	Transcript
	11/5/12	Letter of Understanding
P 9	1/24/12	[Behavior Intervention Plan] (See R 6)
P 10	1/29/12	Comprehensive Psychoeducational Re-evaluation
	Undated	[Report of assessment on 1/30/12]
P 11	11/2/12	IEP
P 12	6/19/12	Assessment
P 13	2/2/12	Multidisciplinary Team (MDT) Meeting Notes
	2/2/12	Analysis of Existing Data
	1/13/12	Letter of Invitation to a Meeting
P 14	11/28/11	IEP
P 15	4/29/11	IEP
P 16	Undated	Resume [REDACTED], Ph.D.

All seven of the Respondent's disclosed documents were admitted into evidence. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	11/26/12	Student Discipline Findings of Fact and Conclusions of Law (See P 3)
R 2	11/5/12	[Student] MDR Meeting, 11/05/12 Paralegal Notes
R 3	10/31/12	Notice of Proposed Disciplinary Action (See P 4)
	11/13/12	Parent/Guardian and Student Rights
R 4	10/26/12	Letter from [REDACTED] to Whom It May Concern (See P 4)
R 5	10/1/12	Parent/Guardian Letter of Invitation
R 6	1/24/12	[Behavior Intervention Plan] (See P 9)
R 7	11/26/12	Student Incident History

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a [REDACTED] learner with a disability who was attending Dunbar Senior High School in the fall of 2012.³ He is currently in the custody of the Department of Youth Rehabilitation Services (DYRS) for a matter unrelated to this case.⁴ The Student is eligible for special education and related services as a result of having a condition meeting the definition of emotional disturbance.⁵
2. The Student was reevaluated in January 2012, while attending Dunbar Senior High School, and the Respondent determined the Student has "poor self-regulation and poor social skills" and that as a result "his relationships with most teachers and his age-peers are constantly strained." The Respondent also concluded:⁶

[Student] does not possess the ability to shift and adjust his mind set and behavior to the demands and the realities of the environment.

Oftentimes, during class proceedings, in the cafeteria and at flextime, [Student] is disruptive, disrespectful and poorly self-regulated.

[Student] disregards classroom rules and regulations. He curses. He refuses to complete deskwork. And, when re-directed to the task at hand, he walks out of classes.

When the Student is challenged by an authority figure, he becomes enraged.⁷ Once the Student is escalated, he cannot control himself until he is calmed down, and he will often apologize to adults afterward.⁸

3. The Student's IEP was last revised in November 2011.⁹ The IEP requires 26.6 hours of specialized instruction per week in the general education setting, and four hours of behavioral

³ P 14, T of P, T of M.P., T of B.S.

⁴ Undisputed Fact.

⁵ P 10, P 14.

⁶ P 10.

⁷ P 1, T of M.P., T of B.S.

⁸ T of I.H., T of M.P., T of B.S.

support services per month outside of the general education setting.¹⁰ Despite all of the Student's specialized instruction to be provided in the general education setting, the Student was receiving "pull-out" specialized instruction from B.S., the self-contained emotional disturbance special education teacher for between six and seven hours per week.¹¹ The Student was also receiving specialized instruction from another self-contained special education teacher for two periods during the day, [REDACTED].¹² The school social worker, [REDACTED], was to provide the behavioral support services to the Student during the 2012-2013 school year, and these services were never provided.¹³

4. A behavior intervention plan (BIP) was added to the Student's IEP in January 2012.¹⁴ The behaviors the plan seeks from the Student include:¹⁵

1. The student will attend class daily and arrive on time, (every class period).
2. The student will use appropriate language when speaking to adults and peers.
3. The student will follow directives given to him by teachers and staff.
4. The student will remain on task in the classroom setting and display appropriate decorum.
5. Daily Attendance Contract to be given to teachers to sign[.]

The interventions to be used are:

Teacher will review classroom expectations daily (remain in seat, work quietly, work on task and finish task, etc)
Immediately remove the student from others when cursing. Talk to the student in the manner that you want him to talk to you.
Teacher will employ proximity control to redirect inappropriate behavior (standing close to the student, making eye contact)
Teacher must be consistent in expectations and consequences.
Intervene early when the student begins to make inappropriate comments to other students, to help prevent the student from losing control.

The consequences for inappropriate behavior are:

⁹ P 14. (The Respondent convened the IEP team in October 2012 to review and revise the IEP, and the Petitioner failed to participate. However, the Respondent never provided written notice of the proposed changes to the IEP to the Petitioner, pursuant to 34 C.F.R. § 300.503, and so the October 2012 revision is not in effect.) T of B.S.

¹⁰ P 14.

¹¹ T of B.S.

¹² T of B.S.

¹³ T of M.M. (The Student refused to participate and the Respondent was not capable of addressing this behavior at Dunbar.) See also, T of M.P. and B.S.

¹⁴ R 6/P 9.

¹⁵ R 6/P 9.

1. After school detention
 2. Supervised Study
 3. Will remain at the group home on the weekends
 4. Will have an earlier curfew at home
 5. Written referrals or incident reports
 6. Revocation of privileges (playing sports, attending activities, watching television, etc)
5. The Student was suspended by the Principal for three days on September 26, 2012, following an incident where the Student engaged in verbal, written, or a physical threat to a person or property, including intimidating postures, despite the BIP developed by the IEP team.¹⁶
6. During the latter part of the 2011-2012 school year the Student was placed at Abraxis by DYRS and was released in the summer of 2012.¹⁷ On June 15, 2012, DYRS set up a “Youth Family Team Meeting” which included the Petitioner and representatives DYRS and the Respondent.¹⁸ The group determined the Student would be enrolled in a school called Village Academy and that the Petitioner would “complete the application for Village Academy and submit it to the school, with the support of [REDACTED].”¹⁹ Petitioner never completed the application for Village Academy and instead reenrolled the Student at Dunbar because he “begged to go back to Dunbar.”²⁰ An IEP team never changed the Student’s placement.²¹
7. While he came to school regularly, the Student rarely attended class after the start of the 2012-2013 school year.²² The Respondent attempted and did not complete a functional behavioral assessment (FBA) of the Student during the fall of 2012.²³ The Student was

¹⁶ P 5.

¹⁷ T of P.

¹⁸ P 12, T of P.

¹⁹ P 12. (Ms. Bridges is a DYRS supervisor.) T of P.

²⁰ T of P.

²¹ The Petitioner argued that the Student’s placement was to be changed, but the evidence shows no IEP team meeting and placement change prior to the 2012-2013 school year, and the Petitioner did not participate in the October 2012 team meeting. T of P.

²² T of M.P., T of M.M.

²³ T of M.M. (M.M. testified that the Student’s behavior of not attending class prevented him from completing the assessment of the Student’s behavior.)

prevented from attending school at all for a week due to questions raised by the Respondent about his residency.²⁴

8. On the morning of October 26, 2012, the Student entered the school through the security checkpoint wearing a ski suit instead of uniform pants.²⁵ [REDACTED] and the Principal asked the Student to remove the ski suit to put it through the scanner and to put on uniform pants.²⁶ The Student was given a pair of uniform pants by [REDACTED] and the Principal and proceeded to the restroom to change.²⁷ The Student became upset and began swearing at the Principal and challenging his authority.²⁸ The Student, who is larger than the Principal, threatened the Principal verbally and with his finger and fist.²⁹ The Principal advised the Student he would be suspended, further escalating the Student's behavior.³⁰ [REDACTED], who regularly and successfully interacted with the Student, was able to remove the Student from the school.³¹
9. A team meeting was convened on November 5, 2012, to determine whether the Student's conduct on October 26, 2012, was a manifestation of his disability.³² The IEP team discussed the October incident and prior behaviors.³³ There was talk about the BIP from the prior year, that it had not been updated during the current year, but there was no discussion about whether the BIP was implemented in relationship to the behavior on October 26, 2012.³⁴
[REDACTED] advised the team that the behavior support services in the IEP had not been provided to

²⁴ T of M.P.

²⁵ R 1/P 3.

²⁶ R 1/P 3.

²⁷ R 1/P 3, R 4/P 4.

²⁸ R 1/P 3, R 4/P 4, T of M.P.

²⁹ R 1/P 3, R 4/P 4, T of M.P.

³⁰ R 4/P 4, T of M.P.

³¹ R 1/P 3, R 4/P 4, T of M.P.

³² P 1, R 2, T of I.H., T of C.K., T of M.P., T of B.S., T of M.M.

³³ T of I.H.

³⁴ T of I.H., T of M.P., T of B.S., T of M.M., P 1, R 2.

the Student.³⁵ The Petitioner was advised that the IEP had been revised in October, even though she was never provided prior written notice of the proposed changes.³⁶ I.H. advised the team that the Respondent had “promised” the Student a different school and this was not done, and the Petitioner advised the team that the Student had begged the Principal and [REDACTED] to permit him to return to Dunbar.³⁷ The team agreed that Dunbar was not the appropriate placement for the Student, yet the Respondent’s staff advised the team at the meeting that the Student’s behavior toward the Principal was “crossing a line,” that the behavior was a choice, and that therefore, it was not a manifestation of the Student’s disability.³⁸ The team did not agree on the manifestation determination, and the Respondent’s participants at the meeting only analyzed, without examining the evaluation data and disregarding the lack of IEP implementation: 1) whether the behavior on October 26, 2012, was caused by or had a direct and substantial relationship to the Student’s disability; and 2) whether the behavior was the direct result of the Respondent’s failure to implement the IEP.³⁹

10. A 45 day suspension for the behavior of October 26, 2012, was proposed by the Respondent and recommended by an Administrative Law Judge (ALJ) following a disciplinary hearing, in which the Student did not participate.⁴⁰ The ALJ specifically noted that she did not have the authority to set aside a manifestation determination, but the “team should not have found

³⁵ P 1, R 2, T of I.H., T of M.M. (M.M. had stated at the meeting that the Student was seen for one session, and he clarified at hearing that he only saw the Student to get him to complete some paperwork for use in counseling sessions.)

³⁶ R 4/P 4, T of I.H., T of B.S.

³⁷ P 1, R 2, T of I.H.

³⁸ P 1, R 1/P 3, R 2, T of I.H., T of C.K., T of M.P., T of B.S.

³⁹ R 1/P 3, R 2, P 1, P 2, T of I.H., T of C.K., T of M.P., T of B.S., T of M.M.

⁴⁰ R 1/P 3.

that the Student's conduct was not a manifestation, since the team failed to consider the requirements of Title 5 DCMR B2510.12(b)(1)."⁴¹

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. "In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability." D.C. Mun. Regs. 5-B2510.16.
2. Federal Regulations at 34 C.F.R. § 300.530(e) prescribes how a manifestation determination is made:

(1) 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent 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 —

(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 LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

See also, D.C. Mun. Regs. 5-B2510.3 and 5-B2510.9. The District of Columbia requires a more specific analysis of the manifestation determination. D.C. Mun. Regs. 5-B2510.12.

provides:

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;

⁴¹ R 1/P 3. (Emphasis in original.) (At the expedited the Respondent's staff reiterated that the Student required a more controlled and therapeutic environment.) T of M.P., T of B.S., T of M.M.

- (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.

3. The Respondent has failed to show the Student's behavior on October 26, 2012, was not a manifestation of his disability. In fact, the evidence overwhelmingly shows the Student behaved precisely as predicted from evaluation data and consistent with prior behavioral incidents in that when challenged by the Principal, the Student was disrespectful and oppositional, and became increasingly escalated the more the Principal attempted to exert his authority. Furthermore, when making the manifestation determination, the Respondent failed to consider the most recent evaluation data and disregarded the fact that the IEP was in no way substantially implemented, as the behavioral support services were not provided, the failure to fully implement the BIP during the incident on October 26, 2012, was not discussed, and the Student's specialized instruction was not implemented as written. Pertinent to the manifestation determination should have been the behavioral supports and the BIP, specifically. Finally, as the disciplinary Administrative Law Judge noted in her recommendation, everyone agreed the Student was not in the appropriate placement, yet this had not been considered in the manifestation determination. The Petitioner's argument that another school had been promised is unavailing because that was not an IEP team determination, and the Petitioner chose not to meet with the IEP team in October when such a determination could have been made. Never the less, there appears to be no reason why the Student was at Dunbar on October 26, 2012, but for the fact that he convinced his mother to

reenroll him there and the staff did nothing, even at the IEP team meeting in October, to propose what a little over a week later said was necessary, a new placement in a more controlled and therapeutic setting.

VII. DECISION

The Respondent has not shown that that the manifestation determination made on November 5, 2012, was correct.

VIII. ORDER

1. The Student's education records will be revised, no later than January 15, 2013, to reflect that the Student's behavior on October 26, 2012, was a manifestation of his disability because the Student's IEP and placement were not appropriate and behavior intervention strategies were not provided consistent with the IEP, and his disability impaired his ability to control the behavior subject to disciplinary action.
2. The Respondent will work with DYRS and convene the IEP team, prior to the Student's release from DYRS, to review and revise the IEP and determine an appropriate placement, including the identification of a school, for the Student upon his release.
3. The Petitioner is advised to participate with the IEP team process to have input into the decision making process about the provision of free appropriate public education to the Student and the educational placement of the Student, and is further advised to inform her advocates about when IEP meetings are scheduled if she wishes to have their assistance.

IT IS SO ORDERED.

Date: December 14, 2012

A handwritten signature in black ink, consisting of a stylized, cursive 'S' followed by a long horizontal line.

Independent 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 USC §1415(i).