District of Columbia

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Confidential

Parent on Behalf Student[1], Petitioner, v. District of Columbia Public Schools ("LEA") Respondent. Case # 2016-0151 Date Issued: August 29, 2016	HEARING OFFICER'S DETERMINATION ON EXPEDITED ISSUE ONLY Hearing Dates: July 25, 2016 August 23, 2016 August 24, 2016 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on July 25, 2016, [2] August 23, 2016, and concluded on August 24, 2016, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[3] He has been determined eligible for special education and related services pursuant to IDEA with a disability classification of intellectual disability ("ID").

The student began attending a self-contained special education program housed in a District of Columbia Public Schools ("DCPS") [redacted] school ("School A") at the start of school year ("SY") 2014-2015, and was in the same program during SY 2015-2016.

On June 16, 2016, the student's parent ("Petitioner") filed a due process complaint alleging, inter alia, that DCPS, the local education agency ("LEA") denied the student a free appropriate public education ("FAPE") by constructively suspending the student for a period of not less than twenty-two (22) days without complying with the disciplinary procedures including conducting a manifestation determination review ("MDR"), conducting a functional behavior assessment ("FBA"), and developing a behavior intervention plan ("BIP"). This allegation entitled the parent to an expedited hearing and decision pursuant to the provisions of 34 C.F.R. 300.532. [4]

Petitioner alleged other issues in the complaint that were not subject to the expedited hearing and decision. Evidence on all issues was presented in the three-day hearing. This Hearing Officer Determination ("HOD") only addresses the issue raised in the complaint that entitles Petitioner to an expedited hearing and decision. The other issues are addressed in a separate HOD.

Petitioner seeks as relief that the Hearing Officer find that the DCPS denied the student a FAPE, and requests with regard to the alleged violation that is the subject of this HOD, an award of compensatory education.

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[2] This date was the twentieth (20^{th}) school day after the complaint was filed.

[3] The student's current age and grade are in indicated in Appendix B.

[4] The Hearing Officer calculated, and the parties agreed, that school days following the hearing included four (4) days of DCPS summer school (July 26 through July 29) and six (6) days of SY 2016-2017 (August 22 through August 29). Therefore, the decision is due on the expedited issue is due August 29, 2016.

On June 27, 2016, the LEA filed a timely response to Petitioner's complaint in which it denies that it failed to provide the student with a FAPE. The LEA asserts in its response, inter alia, that the student was suspended for six (6) days due to an incident that occurred on March 11, 2016, and that DCPS attempted mediation between the parents and students involved in the incident; however, DCPS was unsuccessful in doing so. DCPS contends it proposed a transfer for the student to a different school location in order to resolve the conflict, but Petitioner disagreed with the transfer. DCPS asserts it did not change the student's placement and there was no requirement for a MDR because the student was not suspended for the requisite number of days that would have required a MDR, or mandated FBA and BIP.

The parties participated in a resolution meeting on July 1, 2016. The parties did not resolve the complaint and did not mutually agree to proceed directly to hearing. The 45-day period began on July 16, 2016, and ends (and the Hearing Officer's Determination ("HOD"), on issues other than the expedite matter, is due) on August 30, 2016. The decision on the expedited matter is due by August 29, 2016, which is ten (10) school days from the first day of hearing.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on July 13, 2016, and issued a pre-hearing order ("PHO") on July 18, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUE: [5]

The issue adjudicated is:

Whether the LEA denied the student a FAPE by constructively suspending the student for a period of not less than twenty-two (22) days during SY 2015-2016 without complying with the disciplinary procedures, including conducting a MDR and conducting a FBA and developing a BIP.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 101 and Respondent's Exhibits 1 through 23) that were admitted into the record and are listed in Appendix A.[6] Witnesses' identifying information is listed in Appendix B.[7]

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[5] The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this is the issue to be adjudicated.

[6] Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

[7] Petitioner presented six witnesses: Petitioner, the student's classroom teacher, two educational advocates employed by Petitioner's law firm, an educational consultant regarding compensatory education and the parent of another student who attended the student's school program. Respondent presented four witnesses: The student's classroom teacher, the principal of the student's school, a DCPS program manager, and a DCPS compliance case manager.

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence that LEA denied the student a FAPE by suspending the student for more than ten (10) days during SY 2015-2016 without complying with the disciplinary procedures, including conducting a MDR, conducting a FBA and developing a BIP. As relief for the denial of FAPE determined, the Hearing Officer grants Petitioner compensatory education in the form of independent tutoring and counseling/mentoring.

FINDINGS OF FACT: [8]

1. The student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of ID. (Petitioner's Exhibit 2-1)

2. The student began attending a self-contained special education program housed in School A, a DCPS [redacted] school, at the start of SY 2014-2015 and was in the same program at School A during SY 2015-2016. (Parent's testimony)

3. The student's May 11, 2015, individualized educational program ("IEP") prescribed that the student be provided 24.5 hours per week of specialized instruction outside general education and 120 minutes per month of behavioral support services outside general education. (Petitioner's Exhibits 4-1, 4-11)

4. The student had one behavioral incident during SY 2014-2015. However, during SY 2015-2016, the student began to display significant behavior difficulties. On September 14, 2015, the student made threatening statements to his teacher. (Parent's testimony)

5. The School A nurse issued a form notice to the student's parent regarding this incident. This form had the box checked next to a statement informing the student's parent that the student could not return to school without first seeing a doctor. (Parent's testimony, Petitioner's Exhibit 35)

6. The School A nurse is employed by the D.C. Department of Health and is assigned to School A. The nurse uses this form when a student is experiencing mental crises to prevent the student from hurting himself or herself on anyone else. This directive to see a doctor before returning to school is not considered by School A to be discipline and the student was not formally suspended as result of this September 14, 2015, incident. When this incident occurred the School A principal telephoned the parent to inform her that the student was in crisis and needed to see a mental health care provider before retuning to

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[8] The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

school but she did not say that the student was suspended.[9] (Witness 6's testimony, Petitioner's Exhibit 35)

7. On September 15, 2015, the student was seen for mental health treatment and was enrolled at a mental health program for ongoing services. The student brought documentation from the mental health care provider to School A when he returned to school. (Petitioner's Exhibit 37-1)

8. As a result of the directive from School A the student missed two (2) days of school. He was absent on September 15, 2016, and September 16, 2016. His absences were noted as excused for a medical appointment. (Parent's testimony Petitioner's Exhibit 33-1, Respondent's Exhibit 4-12, 4-13)

9. The School A nurse and/or attendance counsel kept the document(s) the student brought in from his health care provider(s) in the his student record to verify and excuse his absence. (Witness 6's testimony, Petitioner's Exhibit 37-2, 37-3, 37-5, 37-6, 37-7)

10. On October 5, 2015, another incident occurred, resulting in a directive to the parent that the student see a doctor. The student missed one (1) day of school as a result: October 6, 2015. (Parent's testimony, Petitioner's Exhibits 33-1, Respondent's Exhibit 4-12)

11. The student was provided discharge summary from Children's National Medical Center ("CNMC") stating the student could return to school on October 7, 2015. (Parent's testimony, Petitioner's Exhibits 37-2)

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[9] Although School A did not consider the student's removal from school in this instance to be a disciplinary action, the student made verbal threats to a teacher which the Hearing Officer notes can be the basis of a Tier III disciplinary infraction for which a student could be suspended in accordance with DCMR Title 5 Chapter 25 §2502.3(a)(8), which provides:

2502.3 Tier III behaviors are those behaviors not specifically enumerated in any other tier in this chapter that cause significant disruption to the academic environment or cause harm to self or others. In addition to lesser consequences, Tier III behaviors may result in either on-site or off-site Suspension.

(a) The following behaviors shall be considered Tier III behaviors:

(8) Verbal, written, or physical Threat to person or property (including intimidating postures);

(b) Disciplinary responses for Tier III behaviors shall include:

(9) On-site Short-Term Suspension with provision of appropriate intervention services;
(10) Off-site Short-Term Suspension, except in response to unexcused tardiness or absence; and
(11) Off-site Medium-Term Suspension, except in response to unexcused tardiness or absence.

12. On November 9, 2016, the student was disciplined for disrespectful behavior toward a staff member. However, the student did not miss any days from school as a result of this referral. (Petitioner's Exhibit 54)

13. On November 10, 2016, the student received a discipline referral for using profanity. However, the student did not miss any days from school as a result of this referral. (Petitioner's Exhibit 55)

14. On November 13, 2015, the student threatened to harm himself. The School A nurse issued a notice that the student should be evaluated by his doctor for these statements. However, this form did not have the box checked that the student could not return to school without seeing a doctor. The student missed the next school day, November 16, 2016. His absence was excused due to illness. (Parent's testimony, Petitioner's Exhibits 36, 56, Respondent's Exhibit 4-10, 4-11)

15. The student received a discharge summary from CNMC stating the student could return to school on November 17, 2015. (Parent's testimony, Petitioner's Exhibits 37-3

16. The student was absent from school on November 24, 2015, and November 25, 2015, because the student's parent received a telephone call from the principal directing the parent to take the student to the doctor. Unlike the incidents in September 2015 and November 2015 there was no written notice issued to the parent stating the student had to see a doctor or that he had to see a doctor before returning to school. (Parent's testimony, Petitioner's Exhibit 38)

17. On November 30, 2015, the student received a disciplinary referral for disrespectful and disruptive behaviors. However, the student did not miss any days from school as a result of this referral. (Petitioner's Exhibit 57)

18. On December 1, 2015, the student was out of school due to behavioral concerns and then was hospitalized from December 2, 2015, to December 9, 2015. In December 2015 the student was seen at Psychiatric Institute of Washington ("PIW") for aggressive and threatening behaviors. This hospitalization and the student's resulting absence from school during the hospitalization was not the result of any directive from School A that the student could not return to school without seeing a doctor. (Petitioner's Exhibits 37-6, 46, 47, Respondent's Exhibit 4-10)

19. On December 15, 2015, School A convened a meeting that the student's parent requested to address the student's repeated behavioral concerns. The student's parent participated in the meeting by telephone and the student attended the later part of the meeting. The student's classroom teacher, the School A psychologist and nurse, and a representative from the DCPS central office participated. Although the team discussed the student's behavior and mental health, no changes were made to student's IEP and the team did not initiate a FBA or BIP. (Parent's testimony, Petitioner's Exhibit 6-2)

20. DCPS developed a crisis plan for the student developed with the help of the student's parent. A DCPS central office representative worked with the student's teacher and aide and implemented some of the strategies that were in the crisis plan. (Respondent's Exhibit 11)

21. The student's classroom teacher kept weekly behavior tracking charts to document the student's behaviors. (Petitioner's Exhibit 66)

22. On January 4, 2016, the student made a threatening statement to another student and received a disciplinary referral. The student was absent from school on January 5, 2016. (Petitioner's Exhibits, 31-1, 58, Respondent's Exhibit 4-9)

23. On January 5, 2016, the student's parent took the student for a regular mental health appointment and the provider gave the parent documentation that included a crisis plan that the parent provided to School A. (Parent's testimony, Petitioner's Exhibits 39-1, 40)

24. On January 6, 2016, the School A nurse issued a notice that the student should be evaluated by his doctor because he was making harmful threats to his teachers and their children and the box on the form was checked indicating that the student's should not return to school until he had seen a doctor. The student missed several school days because the parent could not get an appointment for the student's to be seen by a doctor any sooner than January 18, 2016. The parent took the student to the emergency room of CNMC on January 18, 2016. (Petitioner's Exhibit 33-1, 34-1, 37-5, Petitioner's Exhibit 34, Parent's testimony)

25. The student was provided discharge summary from CNMC stating the student could return to school on January 20, 2015. (Parent's testimony, Petitioner's Exhibits 37-5)

26. The student was absent from school on the following days after the January 6, 2016, School A notice: January 7, 8, 11, 12, 13, 14, 19, 2016. These absences were excused and noted as illness and/or a medical appointment in DCPS attendance records. (Respondent's Exhibit 4-7, 4-8, Respondent's Exhibit 33-1)

27. In February 2016 the student was voluntarily hospitalized at PIW from February 4, 2016, to February 12, 2016. PIW conducted a psychological evaluation of the student. The student's parent provided DCPS the student's discharge plan from PIW. This absence from school was not the result of School A directing that the student should not return to school without seeing a doctor. (Petitioner's Exhibits 13, 48)

28. On March 11, 2016, the student engaged in sending threatening text messages with another child at School A. The other student's parent reported the incident to police. Although it was an alleged threat that was made off campus, until it was resolved, the principal suspended the student for six (6) days from March 11, 2016, through March 18, 2016. This was the first and only official suspension for the student while he was attending School A. (Witness 6's testimony, Respondent Exhibit 23)

29. The School A principal scheduled a reentry meeting for the student for March 19, 2016, that was also planned as mediation with the student and his parent, and the other student involved in incident and her parent. However, prior to the scheduled mediation, the other parent declined to mediate. (Witness 6's testimony)

30. Instead of the mediation, the student's parent and the principal sat and talked. Because the other parent had talked to the police, the student's parent said she would take the student home until she talked to the police detectives. This gave School A time to facilitate how the two students would be separated when the student returned to school. (Witness 6's Testimony)

31. Following the March 11, 2016 incident, and while the student was still out school, School A initiated an involuntary transfer of the student from School A to another DCPS school. On April 2, 2016, the School A principal communicated to the parent's attorney that the student could return school on April 6, 2016. (Respondent's Exhibit 17-3)

32. On April 6, 2016 School A convened a meeting with the parent regarding the proposed involuntary transfer. The student's parent asserted her right to appeal the involuntary transfer, and the involuntary transfer was ultimately halted by DCPS. The student remained at School A for the rest of SY 2015-2016. (Parent's testimony, Respondent's Exhibit 17-1, 17-2)

33. The student returned to school on April 6, 2016, following the March 11, 2016, suspension. He missed thirteen days of school as a result: March 11, 14, 15, 16, 17 18, 21, 22, 23, 24, 25, April 4, 5. (Respondent's Exhibit 4-7, 4-8, Petitioner's Exhibit 33-1)

34. The student met the tenth day of removal from school during SY 2015-2016 as of the incident that occurred on March 11, 2016. As of March 14, 2016, School A should have conducted a MDR. However, School A did not initiate a MDR for the student, nor did it initiate a FBA or develop BIP as result of this behavioral incident. (Respondent's Exhibit 4-7, 4-8, Petitioner's Exhibit 33-1)

35. On May 3, 2016, School A convened an IEP meeting and developed a BIP for student. Prior to that date the student did not have a BIP at School A. The parent did not attend the March 3, 2016, meeting but School A convened a meeting on May 10, 2016, to review with the student's parent the issues that had been discussed at the May 3, 2016, meeting. (Parent's testimony)

36. Although the student made steady academic progress at School A during SY 2014-2015 and the first part of SY 2015-2016, his academic progress became stagnant by December 2015. Due to his behavior concerns and absences he did not make academic improvement. The student would benefit from academic tutoring and mentoring for the time the he missed instruction due to his removal from school and resulting loss of instruction. (Witness 5's testimony, Witness 2's testimony)

37. Petitioner engaged the services of an educational consultant who was designated as an expert witness to offer an opinion regarding compensatory education for the student. The consultant presumed, in developing the compensatory education proposal, that the harm to the student for which the plan addressed included among other things that the student missed over 22 days of schools as result of DCPS not complying with disciplinary procedures resulting in 110 hours of missed instruction. Petitioner alleged the student was segregated from his classmates for at least a week upon his return following the March 11, 2016, suspension. To compensate for these alleged missed services the consultant proposed the following services: 100 hours of specialized tutoring, 80 hours of mentoring. However, the consultant never spoke with any of the student's teachers and based her opinion on review of records and speaking with the parent and student. (Witness 2's testimony, Petitioner's Exhibit 95)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a 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. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:
A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether the LEA denied the student a FAPE by constructively suspending the student for a period of not less than twenty-two (22) days during SY 2015-2016 without complying with the disciplinary procedures, including conducting a MDR and conducting a FBA and developing a BIP.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS suspended the student for more than 10 days without complying with the disciplinary procedures, including conducting a MDR and conducting a FBA and developing a BIP.

Pursuant to the requirements 34 C.F.R. § 300.530 et seq. once a student is removed from school for a violation of a code of conduct for more than ten (10) school days in a school year a MDR must be convened with the parent, and relevant members of the student's IEP team to 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 student's conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. A student should not be removed from school if his or her behavior is determined to be a manifestation of his or her disability.

In addition, pursuant to 34 C.F.R. 300 530 (f) when a MDR is conducted and it is determined that the student conduct is a manifestation of his disability the IEP Team must— (1) either— (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior;

Petitioner alleged that all the instances in which the student was required to get, or the student's parent sought, mental health intervention because of the student's in-school behavior should be counted as removal from school toward the threshold of ten cumulative school days to determine when a MDR should have been conducted. Petitioner thus alleges that the student missed a total of twenty-two school days beyond the ten school days of the MDR threshold.

By contrast, Respondent asserts that all the student's absences prior to the suspension on March 11, 2016, were not disciplinary removals from school and should not be counted toward the threshold of ten school days that would trigger a MDR. Respondent asserts the student was only suspended for total of six school days during SY 2015-2016 and the absences prior to that suspension were for student's health and safety. Respondent also asserts that the absences after the official suspension was to end on March 18, 2016, should not be counted as disciplinary removals because the student's parent voluntarily kept the student home from school although the official suspension had ended. The Hearing Officer is convinced by neither of Respondent's arguments.

With respect to Petitioner's assertion that the student was "constructively suspended", Petitioner and Respondent are at a divide. Resolving this issue involves looking at each individual instance where the student was excluded from school, in order to determine how to categorize the resulting exclusion.

On September 14, 2015, the student made threats to his teacher that resulted in School A advising the parent that the student should not return to school until he was evaluated by his doctor. The student did not attend school on September 15, 2015 and September 16, 2015, a two (2) day absence.

On January 6, 2016, the School A nurse issued a notice that the student should be evaluated by his doctor because he was making threats and should not return to school until he did. The student missed seven (7) days because his parent could not secure an earlier medical appointment.

Although School A did not consider the incident a disciplinary event, but rather a temporary measure for the student's safety, the student was nonetheless excluded from school and this exclusion amounted to a "constructive suspension". [10]

With the exception of the six-day suspension in March 2016, School A believed that it was allowing the student the opportunity to receive necessary medical assistance. However, the directive to the parent to certify that the student was seen by a doctor before he could return to school, clearly works as a constructive suspension. The characterization as a constructive suspension is supported by the fact that the student's exclusion from school was precipitated by conduct that could have qualified as a Tier III disciplinary infraction.

The evidence demonstrates that when the student made threats in September 2015 the student's parent was provided a note from the School A nurse that clearly stated the student could not return to school until he had seen a doctor. Although School A did not consider this a disciplinary action, it was nonetheless a removal from school due to the student's in-school conduct. Despite it being principally a safety measure, it was nonetheless a removal from school.

Although the School A nurse provided another such note for an incident in November 2015, that note did not specifically state the student could not return to school without seeing a doctor, as did the note provided to the parent is September 2015.

Likewise, although there were other instances in the first semester of 2015-2016 in which the student was taken to a mental health professional prior to returning to school, the Hearing Officer was not convinced by the parent's testimony, that in fact in these instances, the student could not return to school without first being seen by a doctor.

In January 2016, School A provided the parent a note that specifically stated that the student could not return to school until he had seen a doctor. The student missed another seven days of

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[10] See *Cumberland School District, Wisconsin State Educational Agency*, 114 LRP 25301, August 28, 2002 where a student was not permitted to return to school and was not provided services an additional day following the last day of formal suspension. "On February 21, 2002, the student had been removed from school without services for 9.5 cumulative school days in the school year. District administration, in consultation with the student's special education teacher, determined that he should not return to the high school setting following the period of removal in the belief that it could endanger the student's safety for him to return. This action resulted in a "de facto" or "constructive" suspension of the child from school. This day must be considered when determining whether a series of removals results in a change of educational placement or whether the child had been removed from school for more than 10 cumulative days in a school year."

school prior to being able to see a doctor and returning to school. The Hearing Officer concludes that these days should been counted along with the two days in September 2015 as school removals toward the threshold for a MDR to be convened. Thus, as of January 2016 the student had in effect been removed for a total of nine days during SY 2015-2016 as result of in-school conduct.

The evidence demonstrates that the student was removed from school for a total of eleven school days as of March 14, 2016, and DCPS was therefore, at that point, required to convene a MDR for the March 11, 2016, incident and was required to provide the student continued education services pursuant to 34 C.F.R. § 300.530 et seq.

Although Petitioner testified that she had been informed by School A on all the occasions the student saw a mental health provider that the student could not return to school until he had seen a doctor, the Hearing Officer did not find this portion of Petitioner's testimony credible as it was unsupported by any contemporaneous documentation or any other evidence that effectively refuted the documentary evidence that only in September 2015 and January 2016 was the parent directed that the student should not return to school until he had seen a doctor.

The Hearing Officer found the School A principal's testimony credible that she had not told the student's parent that the student was suspended and could not return to school for disciplinary reasons except for the March 11, 2016 meeting. The Hearing Officer credited this testimony based on the forthright and unhesitant statements of this witness and found her testimony more persuasive than Petitioner's testimony in this regard.

Although the School A principal testified that that the student was free to return to School A as of March 19, 2016, the documentary evidence indicates that School A attempted a safety transfer for the student and communicated in writing that the student could return to school on April 6, 2016. Therefore, the Hearing Officer concludes that the student actually missed a total of thirteen days of school as result of this suspension, not just six school days. Therefore, the Hearing Officer concludes that the student missed a total of twelve school days after his tenth day of removal during SY 2015-2016, without the benefit of a MDR, was denied a FAPE a result, and should be compensated for the resulting missed instruction. The Hearing Officer also concludes that because there was no MDR conducted and no determination that the student's conduct during the March 11, 2016, event was a manifestation of his disability, there was no determination as to whether a FBA should be conducted and a BIP developed following the March 11, 2016, incident. Therefore, the student was denied a FAPE.

The evidence demonstrates that DCPS has now developed a BIP, but it is unclear whether DCPS ever conducted a FBA prior to developing the BIP. As a result, in the order below the Hearing Officer directs that DCPS conduct a FBA and update the student's BIP as appropriate.

Petitioner also asserted that when the student finally returned to school after the March 11, 2016, suspension he was not immediately placed in his regular classroom. Petitioner did not specifically allege that the student was given in-school suspension or that any in-school suspensions should be counted as school removals for purposes of determining the number of days for which the student should be compensated. However, even if there had been an in-

school suspension for the student or his alleged separation from his class been considered an in-school suspension, there is no legal authority that in-school suspensions would be counted for the purpose of compensating the student for missed school days.

As the IDEA regulations comments point out: "It is the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement." Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations page: 46715

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was not provided special education services for a total of twelve school days that he was removed from school without the benefit of a MDR and there was no FBA conducted and BIP developed as a result of that removal. The Hearing Officer has concluded that the student shall be provided, as remedy for the denial of FAPE, compensatory education and that DCPS be ordered to conduct a FBA and update the student's BIP as appropriate.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner presented a witness who testified that the student would benefit from independent tutoring and mentoring for the time he was removed from school. The amount of days that Petitioner asserted the student missed, however, were greater than the amount the Hearing Officer determined the student missed. Nonetheless, there was sufficient evidence presented that the student would benefit from and be compensated for the missed services through tutoring and mentoring. The Hearing Officer thus, awards Petitioner in the order below an amount of tutoring and mentoring the Hearing Officer considers commensurate with the number of days of services the student missed and the amount of services that would assist the student in recouping the missed services.

ORDER:[11]

1. DCPS shall, within ten (10) school days of this issuance of this order, conduct a FBA and shall within ten (15) school days of the issuance of this order update the student's BIP as appropriate.

2. DCPS shall, within thirty (30) calendar days of the issuance of this order, provide Petitioner, as compensatory education for the twelve (12) school days the student was removed as determined in this HOD, authorization for fifty (50) hours of independent tutoring and ten (20) hours of independent counseling, both at the DCPS/OSSE prescribed rates.

APPEAL PROCESS:

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).

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: August 29, 2016

Copies to: Counsel for Petitioner: Roberta Gambale, Esq.
Counsel for DCPS – Maya Washington, Esq.
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
CHO

[11] Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.