

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3rd Floor  
Washington, DC 20002

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: December 13, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2018-0283

v.

Hearing Date: November 29, 2018

PUBLIC CHARTER SCHOOL,

Office of Dispute Resolution, Room 111  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner alleges that PUBLIC CHARTER SCHOOL (PCS) disciplined STUDENT for code of conduct violations in September 2018, without affording Student the safeguards of the IDEA's provisions for disciplining students with disabilities.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 31, 2018, named PCS as respondent. The

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<sup>1</sup> Personal identification information is provided in Appendix A.

undersigned hearing officer was appointed on November 1, 2018. The parties met for a resolution session meeting in November 2018 and no agreement was reached. On November 7, 2018, I convened a prehearing telephone conference with counsel to confirm the expedited hearing date and to discuss the issues to be determined and other matters. The final decision in this case is due within 10 school days of the hearing date, by December 13, 2018.

Petitioner (AUNT) is Student's aunt. On October 22, 2018, MOTHER executed a power of attorney, which appointed Aunt as Mother's attorney-in-fact "to handle the control and management of education on my behalf, for my child, [Student]." On November 11, 2018, PCS filed a motion to dismiss Petitioner's claims on the grounds that Aunt is not Student's parent and therefore did not have standing to file the due process complaint. By a written order issued November 27, 2018, I denied PCS' motion.

The expedited due process hearing was held before the undersigned impartial hearing officer on November 29, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. Aunt appeared in person and was represented by PETITIONER'S COUNSEL. Respondent PCS was represented by DIRECTOR OF STUDENT SUPPORT and by PCS' COUNSEL.

Counsel for the respective parties made opening statements. Aunt testified and called PSYCHOLOGIST, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2 as additional witnesses. PCS called HEAD OF SCHOOL, Director of Student Support, and CLINICAL COORDINATOR as witnesses. Petitioner's Exhibits P-1 through P-24 and P-26 through P-35 were admitted into evidence, including Exhibits P-10, P-11, P-14, P-15, P-19, P-22, P-29 and P-30 admitted over PCS' objections. Exhibit P-

25 was withdrawn. PCS' Exhibits R-1 through R-15 were admitted into evidence without objection.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

### **ISSUES AND RELIEF SOUGHT**

The issues to be resolved in this case, and relief requested, as set forth in my November 7, 2018 Prehearing Order, are:

- a. Did PCS deny Student a FAPE by failing to hold an appropriate Manifestation Determination Review (MDR) meeting, provide an appropriate alternate placement and/or conduct an updated functional behavioral assessment and/or develop or update Student's behavior plan following PCS's decision to impose a long term suspension/expulsion of Student for incidents that occurred on or about September 17 and 28, 2018?
- b. Has PCS failed to provide the parent with access to all of Student's education records including past evaluations and/or discipline records and behavior logs and/or failed to make adequate requests to Student's previous LEA to obtain these records?

For relief, Petitioner requests a determination by the hearing officer that Student's September 2018 code of conduct violations were a manifestation of Student's disability, or, in the alternative, that the hearing officer order PCS to hold an immediate and emergency MDR and placement meeting; order PCS to determine the appropriate alternative interim placement and location of services for Student, with the participation of appropriate IEP team members, including but not limited to the Petitioner, Student and Petitioner's advocate and attorneys; order PCS to fund an independent functional behavioral assessment (FBA) of Student and hold a meeting to develop an appropriate Behavior Intervention Plan (BIP); order PCS to provide all of Student's education and behavior records to the Petitioner or Petitioner's representative; and order

PCS to fund reasonable compensatory education services to compensate Student for the denials of FAPE alleged in the complaint.

### **FINDINGS OF FACT**

After considering all of the evidence received at November 29, 2018 due process hearing in this case, as well as the argument of counsel, this hearing officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where Student resides with Mother. Testimony of Aunt.

2. Student enrolled in PCS at the beginning of the 2018-2019 school year. Previously Student attended DCPS SCHOOL. Student is currently enrolled in PCS, but is assigned to an interim alternative setting, following a September 2018 code of conduct violation at PCS. Testimony of Aunt.

3. Student is eligible for special education and related services under the IDEA disability classification Specific Learning Disability (SLD). Exhibit P-16. According to a May 2016 District of Columbia Public Schools (DCPS) psychological evaluation triennial review form, in math, Student's i-Ready score placed Student four grades below grade level. Student also struggled with basic reading skills and written language. Student's behaviors were described as a result of a performance/skill deficit. Exhibit P-7.

4. In May 2016, DCPS School developed a BIP for Student. Student was reported to have had a history of inappropriate behaviors that presented as verbal aggression, noncompliance, impulsivity, elopement and academic disengagement. These behaviors had been intense and highly unsafe in nature. During the 2015-2016 school year, Student's behaviors were described as more related to noncompliance and

academic disengagement. Student's behaviors were reported to have resulted in disruption in school, poor interpersonal relationships and an inability to consistently and successfully access the general education curriculum based on Student's cognitive abilities. Exhibit P-8.

5. Student's most recent Individualized Education Program (IEP) was developed at DCPS School on February 7, 2018. Stipulation of Counsel. The IEP identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as areas of concern. The IEP reported that Student continued to display disruption and profanity towards self and students in class and to engage in off-task behaviors, and that Student often displayed aggressive behaviors toward peers. The February 7, 2018 IEP reported that, based on Student's responses to a Strengths and Difficulties Questionnaire, diagnostic predictions were low risk for any disorder, including any behavioral or emotional disorder. In the Emotional, Social and Behavioral Development section of the IEP, the DCPS School IEP team reported that Student's behaviors such as inattentiveness, impulsivity, class disruption, verbal and physical aggression and walking out of the classroom were Student's response to frustration in the classroom when challenged academically. The February 7, 2018 IEP provided for Student to receive 10 hours per week of Specialized Instruction, including 5 hours outside general education, and 90 minutes per month of Behavioral Support Services. Exhibit P-16.

6. At the beginning of the 2018-2019 school year, Student came to PCS with the February 7, 2018 DCPS School IEP. I found credible the testimony of PCS' witnesses that PCS fully implemented the Specialized Instruction and Related Services specified for Student in the February 7, 2018 IEP. Testimony of Director of Student Support,

### Testimony of Clinical Coordinator.

7. Effective October 8, 2018, Student was expelled from PCS, as discipline for a code of conduct violation which occurred on September 28, 2018. There was some difference between the testimony of Aunt and the testimony of the PCS witnesses as to the events leading to the expulsion. I found the testimony of Head of School, who was present for most of the events, more credible than the account of Aunt who was not present. Based upon the preponderance of the evidence, I find that from around the first week of the 2018-2019 school year at PCS, there was a string of incidents antecedent to a fight at school on September 28, 2018, in which Student participated. There were two groups of PCS students involved. The first group included Student, Student's sibling and some friends of Student. The second group included another female student (STUDENT X<sup>2</sup>) and some of Student X's friends. Initially, parents of students in both groups reported to PCS incidents of bullying via social media, cell phones and text messages. Student X's parents also reported to PCS that Student and Student's group had gone to Student's X's home after school and had made Student X feel threatened. PCS staff spoke to all of the students who were allegedly involved and their parents, and obtained commitments that the issues were "squashed," that nothing needed to be discussed and that the two sides would stay away from each other. Testimony of Head of School.

8. Around the week of September 19, 2018, Head of School began receiving reports from Student X and her family and friends that Student and Student's group had not stopped their antagonizing behaviors. Student, Student's sibling and their group also reported that Student X's group had not stopped their behaviors. PCS staff held a mediation with all of the students involved, which seemed very successful at the time. A

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<sup>2</sup> To safeguard student privacy, Student X is not identified in this decision.

few days later, on September 20, 2018, there was a physical altercation at the school entrance stairwell between members of the two groups. Student did not participate in this altercation, but Student's sibling participated. PCS convened another mediation with the students involved, their parents and the D.C. Metropolitan Police Department (MPD). Mother and Student's sibling attended. PCS staff made it clear at the mediation meeting that any further physical altercations or threats would warrant suspension from school. Testimony of Head of School.

9. Shortly after the mediation meeting, Mother, Student, Student's sibling and other members of Student's group were involved in a loud verbal exchange with Student X's group on a street corner outside the school. PCS suspended all of the students who were involved in that verbal altercation, except for Student. Student was not suspended because Student had not participated in the mediation session which preceded that incident. Testimony of Head of School.

10. On the morning of September 28, 2018, there was an altercation in the PCS hallway. During a transition between classes, Student and Student's group exchanged words with members of Student X's group. Someone from Student's group swung at a student in the other group. This led to "huge" fight. During the altercation, Student swung at another student transitioning between classes, who was not involved with either group. The other student fell down and Student repeatedly stomped her in the face and kicked her. The injured student fled down a stairway, where another student from Student's group swung at her. PCS staff and MPD resource officers broke up the brawl. Testimony of Head of School.

11. Following this incident, on September 28, 2018, PCS initially suspended Student for 5 days. Student's conduct was also reported to MPD and Mother. Exhibit R-

11.

12. Student was subsequently recommended for expulsion from PCS for making a physical assault on school grounds. On October 5, 2018, a disciplinary review hearing was held by the PCS Hearing Board. The recommendation of expulsion was upheld. PCS notified Mother that, effective October 8, 2018, Student was to be expelled from PCS. Exhibits R-7, R-11.

13. On October 15, 2018, PCS convened a Manifestation Determination Review (MDR) meeting. Aunt participated by telephone. Educational Advocate 2 attended in person. Testimony of Aunt. At the meeting, the MDR team determined that Student's code of conduct violation on September 28, 2018 was not the result of PCS' failure to implement Student's IEP and that Student's conduct was not caused by and did not have a direct and substantial relationship to Student's IDEA disability. Aunt and Educational Advocate 2 did not agree that the conduct was not a manifestation of Student's disability. Testimony of Director of Student Support, Exhibit R-7.

14. After the MDR meeting, PCS placed Student at an interim alternative educational setting about 7 minutes from Student's home (INTERIM SETTING). Interim Setting serves about 7 students taught by 3 educators and a behavior specialist. The Interim Setting school hours are 9:00 a.m. to 2:30 p.m. daily. The courses offered to Student at Interim Setting are identical to Student's courses at PCS, except that Math Strategies and Reading Strategies have been substituted for Visual Media Arts. Student is provided all Specialized Instruction and Related Services per Student's February 7, 2018 IEP. Student has had very poor attendance at Interim Setting. Testimony of Director of Student Support.

15. At the time of the October 15, 2018 MDR meeting, Educational Advocate 2



presented a written consent form from Mother to release Student's education records. PCS has provided to the parent's representatives copies of all of the education records for Student that it has. Testimony of Director of Student Support.

16. At the October 15, 2018 MDR meeting, PCS agreed to conduct an IDEA reevaluation of Student, to include a functional behavioral assessment (FBA). The reevaluation and FBA have been delayed because Student has not been present at Interim Setting, when PCS' evaluators visited the school to conduct the assessments. Testimony of Director of Student Support.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, the Conclusions of Law of this hearing officer are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency (LEA), the LEA shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. In this case, Petitioner must shoulder the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

## Analysis

### A.

Did PCS deny Student a FAPE by failing to hold an appropriate Manifestation Determination Review (MDR) meeting, provide an appropriate alternate placement and/or conduct an updated functional behavioral assessment and/or develop or update Student's behavior plan following PCS's decision to impose a long term suspension/expulsion of Student for incidents that occurred on or about September 17 and 28, 2018?

The IDEA prohibits the disciplining of a student with a disability for misbehavior that is a manifestation of the disability. Prior to suspending a student with a disability for more than 10 school days, the school must conduct a "manifestation determination" during which the student's parents and educators consider the relevant information in the student's file, as well as information provided by teacher observations and the parents, to determine whether the conduct at issue "was caused by, or had a direct and substantial relationship to, the child's disability" or "was the direct result of the local educational agency's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E).<sup>3</sup> If the student's behavior is determined to be a manifestation of his or her disability, the student

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<sup>3</sup> Section 1415(k)(1)(E) provides in full:

Except as provided in subparagraph (B), 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 local educational agency's failure to implement the IEP.

*Id.*

must be restored to the regular education program. *See* 20 U.S.C. § 1415(k)(1)(F). If not, then the school may discipline the student as it would any other non-disabled student, provided that the student continues to receive FAPE. 20 U.S.C. §§ 1415(k)(1)(C), 1415(k)(5)(D)(i). *See Jackson v. Northwest Local Sch. Dist.*, 2010 WL 3452333, at 9 (S.D. Ohio Aug. 3, 2010), *report and recommendation adopted*, 2010 WL 3474970 (S.D. Ohio Sept. 1, 2010).

For children with disabilities in the District of Columbia, the IDEA discipline regulations are supplemented by regulations issued under District of Columbia law. Title 5-B, Chapter 5B-25 of the DCMR provides, in relevant part:

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;

(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.

*Id.*, § 2510.12.

Petitioner has not shown that PCS failed to comply with the MDR procedures required by the IDEA and the D.C. Regs. Student is a student with a disability. Aunt enrolled Student in PCS at the beginning of the 2018-2019 school year. Student "brought over" the previous February 7, 2018 IEP from DCPS School, which PCS fully implemented. Following the hallway brawl on September 28, 2018, when Student allegedly physically assaulted another Student, PCS determined that Student should be expelled. Prior to implementing the decision to expel Student, PCS convened the required MDR meeting, in which Aunt, as Mother's attorney-in-fact, and Educational Advocate 2 participated.

At the MDR meeting, the IEP team discussed Student's IDEA disability, reviewed Student's most recent February 7, 2018 IEP, and discussed Student's current performance at PCS, including teacher observations, discipline reports and attendance history. Director of Student Support described the September 28, 2018 code of conduct violation and the antecedent events, and the MDR team considered the relationship between that incident and Student's IDEA disability.

The MDT team agreed that the September 28, 2018 incident did not result from a failure to implement Student's IEP. Aunt and Educational Advocate 2 argued that Student's physical assault on the other student was consistent with Student's behavior history, including maladaptive and aggressive behaviors described in Student's earlier DCPS IEPs. However, the PCS members of the MDR team all agreed, that Student's

conduct was not a manifestation of Student's disability. The team, with Aunt and Educational Advocate 2 dissenting, concluded that Student's September 28, 2018 assault on the other student was neither caused by, nor had a direct and substantial relationship to Student's disability, and that the conduct was not the direct result of PCS' failure to implement Student's IEP.

At the due process hearing, Educational Advocate 1 and Educational Advocate 2 testified that Student's records from DCPS School documented a history of aggressive and reckless behaviors. The February 7, 2018 IEP reported that Student displayed disruption, profanity towards self and students in class, engaged in off task behaviors and often displayed aggressive behaviors toward peers. However, based on Student's responses to the Strengths and Difficulties Questionnaire, diagnostic predictions were low risk for any disorder, including any behavioral or emotional disorder. In the Emotional, Social and Behavioral Development section of the February 7, 2018 IEP, the DCPS School IEP team reported that Student's behaviors such as inattentiveness, impulsivity, class disruption, verbal and physical aggression and walking out of the classroom were Student's response to frustration in the classroom when challenged academically. Educational Advocate 2 opined that Student's conduct on September 28, 2018 was a manifestation of Student's disability. Petitioner also called Psychologist as an expert witness. However Psychologist did not offer an opinion as to whether Student's code of conduct violation had a relationship to Student's disability.

As Director of Student Support explained, the PCS MDR team decided that Student's participation in the brawl on September 28, 2018, when Student assaulted another Student, was a result of what Head of School called a "Neighborhood Beef" that overflowed into the school setting – not a manifestation of Student's disability. I found

Director of Student Support's opinion persuasive. The hallway brawl on September 28, 2018 was the culmination of several weeks of conflict between two groups of students, on and off the school premises. Petitioner has not shown that Student's participation in the brawl on September 28, 2018, along with Student's sibling, Student X and their respective friends, was caused by, or had a direct and substantial relationship to Student's SLD disability or Student's documented impulsivity and aggression when challenged academically in the classroom.

Nor has PCS failed to provide Student an interim alternative educational setting. An LEA must continue to provide services to a student with a disability who violates a code of student conduct, so as to enable the student to continue to participate in the general curriculum, although in an interim alternative education setting, and to progress toward meeting the goals set out in the student's IEP. *See* 34 CFR § 300.530(d). However, an LEA is not required to provide students expelled for disciplinary reasons exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. *See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46716 (August 14, 2006).

In this case, since the October 15, 2018 MDR meeting, PCS has provided interim services to Student at Alternative Setting, where Student receives all prescribed IEP services and the courses offered are identical to Student's courses at PCS, except that Math Strategies and Reading Strategies have been substituted for Visual Media Arts. Petitioner offered no credible evidence that the alternative interim setting is not appropriate for Student, such that Student is not able to continue to participate in the general curriculum and to progress toward meeting the February 7, 2018 IEP goals. I conclude that Petitioner has not met her burden of persuasion that the MDR team's

October 15, 2018 determination was incorrect or that PCS has not provided Student an appropriate interim alternative educational setting.

Petitioner also alleges that PCS failed to conduct an updated functional behavioral assessment (FBA) or develop Student's behavior plan following the October 15, 2018 MDR determination. The IDEA only requires the LEA to conduct an FBA if the code of conduct violation is determined to be a manifestation of the Student's disability – not when a “not a manifestation” determination is made, as occurred here. *See* 34 CFR 300.530(f)(1). Notwithstanding, as reported in Educational Advocate 2's meeting notes, PCS agreed at the October 15, 2018 MDR meeting to reevaluate Student and to conduct an FBA. Due to Student's frequent absences from Interim Setting, to date, the PCS evaluators have not been able to conduct the reevaluation.

B.

Has PCS failed to provide the parent with access to all of Student's education records including past evaluations and/or discipline records and behavior logs and/or failed to make adequate requests to Student's previous LEA to obtain these records?

In the District of Columbia, special education records for students with IDEA disabilities are compiled in the central Special Education Data System (SEDS) maintained by the D.C. Office of the State Superintendent of Education (OSSE), pursuant to D.C. Code § 38-2609. *See DL v. District of Columbia*, 194 F. Supp. 3d 30, 43 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). The special education records for a specific student are accessible to the LEA in which the Student is currently enrolled.

PCS is obliged to permit the parent to inspect and review any education records relating to her children that are collected, maintained, or used by the school, to include special education records accessible in SEDS. *See* 34 CFR § 300.613(a). On October 24,

2018, Petitioner's Counsel requested PCS to provide copies of all of Student's education records. On October 31, 2018, PCS' Counsel responded that in order to release the records, PCS needed a release authorization signed by Mother. At the time of the MDR meeting on October 15, 2018, Educational Advocate 2 provided Mother's signed consent to release the records. By email of November 19, 2018, PCS's Counsel sent an email to Petitioner's Counsel attaching Student's education records. PCS' Counsel invited Petitioner's Counsel to "let me know if you are missing anything." Up to the due process hearing date, Petitioner's Counsel did not notify PCS that any records were missing. At the due process hearing, Director of Student Support confirmed that PCS had provided the parent's representatives all of the education records it had for Student. I find, therefore, that Petitioner provided no probative evidence that there were special education records maintained by Student's prior LEA, DCPS, that were not uploaded to SEDS and provided to Petitioner's Counsel or that PCS had withheld any of Student's education records from the parent. Petitioner has not met her burden of persuasion on this claim.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

All relief requested by the Petitioner herein is denied.

Date: December 13, 2018

s/ Peter B. Vaden  
Peter B. Vaden, 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 U.S.C. §1415(i).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE Division of Specialized Education