

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 March 4, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, DC 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a _____ at a DCPS public school (“School A”). The student began attending School A during school year (“SY”) 2013-2014. The student resides with his parent in the District of Columbia and is eligible for special education services as a child with a disability pursuant to IDEA with a disability classification of multiply disabled (“MD”) that includes other health impairment (“OHI”) and specific learning disabled (“SLD”).

On December 2, 2014, an incident occurred at School A in which the student was reportedly in possession of a controlled substance. Based on a suggestion the student’s parent withdrew the student from school to avoid disciplinary action. When the student’s parent had difficulty enrolling the student in other schools he returned to School A and re-enrolled the student on or about December 8, 2014. School A thereupon proposed a long-term suspension of student of 45 days.

DCPS held a manifestation determination review (“MDR”) meeting on December 16, 2014. The team determined that the student’s alleged possession of a controlled substance was not a result of his disability.

DCPS held an IEP meeting immediately following the MDR. The team agreed to increase the student’s hours of specialized instruction outside general education from 10 hours per week to 15 hours per week. The team also increased the student’s behavioral supports from 120 minutes per month to 160 minutes per month outside of general education. Although the student was given a long-term suspension from School A DCPS did not provide the student an alternative or interim school to attend.

The student’s parent (“Petitioner”) filed for an administrative hearing regarding the suspension with the District of Columbia Office of Administrative Hearings (“OAH”). And on January 12, 2015, Petitioner filed a due process complaint asserting, inter alia, that DCPS failed to provide the student an interim alternative placement and failed to provide the student any IEP services following the December 8, 2014, suspension.

On January 15, 2015, OAH conducted the student’s discipline hearing and issued a decision reducing the student’s long term suspension from 45 days to 25 days and the student returned to School A on January 27, 2015.

On February 4, 2015, Petitioner's withdrew his January 12, 2015, due process complaint without prejudice and filed the current complaint on February 5, 2015. In addition to asserting that the student was not provided an interim alternative placement, in the current complaint Petitioner asserted that DCPS denied the student a free appropriate public education ("FAPE") by failing to conclude the student's December 2, 2014, conduct was a manifestation of his disability.

Petitioner also asserted DCPS failed to implement the student's February 20, 2014, and December 16, 2014, IEPs and failed to comprehensively re-evaluate the student for his triennial review. Petitioner seeks as relief compensatory education.³

DCPS filed a timely response to the complaint on February 13, 2015. DCPS denied any alleged violation(s) or that it failed to provide the student with a FAPE. DCPS asserted, inter alia,⁴ that the School A team correctly determined the student's conduct was not a manifestation of his disability and while the student was out of school he was provided work packets in all of his specialized instruction classes as well a special education contact in case there were questions related to the assignments.

A resolution meeting was held on February 18, 2015. The case did not resolve and the parties did not mutually agree to proceed to hearing; the 45-day period for non-expedited issues alleged in the complaint began on March 7, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on April 22, 2015. The decision on the expedited issue(s) is due ten (10) school days following the March 4, 2015, hearing: March 18, 2015.

The Hearing Officer convened a pre-hearing conference on February 23, 2015, and issued a pre-hearing order ("PHO") on February 25, 2015, outlining, inter alia, the issues to be adjudicated. The Hearing Officer noted in the PHO that although there was a single hearing scheduled the decisions on the expedited and non-expedited issues might be issued separately.⁵

ISSUES: ⁶

The issues adjudicated are:

³ Petitioner originally also sought additional relief but by the time of the hearing he was only seeking compensatory education.

⁴ DCPS also asserted that the student's current IEP was acceptable to Petitioner at the time it was developed and that appropriate triennial evaluation(s) was conducted. The student's FBA was conducted on March 22, 2013, and all behaviors were thoroughly addressed in the student's February 21, 2014, BIP. School A has and is able to successfully provide out of general education instruction to the student.

⁵ All issues were decided in this single HOD.

⁶ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

1. Whether DCPS denied the student a FAPE by failing to implement the student's February 20, 2014, and December 16, 2014, IEPs (in SY 2013-2014 and in SY 2014-2015) by not providing all specialized instruction outside general education.
2. Whether DCPS denied the student a FAPE by failing to conclude at the December 16, 2014, MDR that the student's December 2, 2014, conduct was a manifestation of his disability.
3. Whether DCPS denied the student a FAPE by failing to implement the student's IEP (from December 3, 2014, to January 26, 2015) by failing to provide him with an interim alternative placement when he was placed on long-term suspension for the December 2, 2014, incident.
4. Whether DCPS denied the student a FAPE by failing to comprehensively re-evaluate the student for his triennial review because it did not conduct a comprehensive psychological and/or new FBA.

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 47 and Respondent's Exhibits 1 through 24) that were admitted into the record and are listed in Appendix A.⁷ Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁸

1. The student resides with his parent in the District of Columbia, attends School A, and is eligible for special education services with a disability classification of MD that includes OHI and SLD. The student began attending School A during SY 2013-2014. (Petitioner's Exhibits 16-1, 31-1)
2. In March 2011 when the student was in elementary school DCPS conducted a psychological evaluation of the student. The student's cognitive and academic functioning were low average and he displayed behavioral concerns. (Petitioner's Exhibit 33-9, 33-13, 33-14)
3. Immediately prior to attending School A the student attended a DCPS middle school ("School B"). In February 2013 School B conducted an analysis of existing data

⁷ Any item(s) disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

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

("AED"). The AED included a review of the student's 2012 academic assessments and concerns of his general education teacher regarding his social, emotional and behavioral development. The student had an IEP at School B that prescribed 15 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support services. (Petitioner's Exhibits 19-7, 30-1, 30-2, 30-3, 30-4)

4. In March 2013 DCPS conducted a functional behavioral assessment ("FBA"). The FBA notes the student's behavioral issues that included, inter alia, defiance, physical aggression, moodiness, and attention seeking. (Petitioner's Exhibit 32-1, 32-2, Respondent's Exhibit 1-1)
5. On January 15, 2014, the student received an educational evaluation in which his academic skills, fluency and applications were assessed. The student's results placed his academic skills and his fluency with academic tasks in the low average range and low range, respectively. The student's broad mathematics and calculation skills were also in the low average range. (Petitioner's Exhibit 4-1, 4-3)
6. On February 20, 2014, School C conducted an eligibility review and completed eligibility worksheets for the OHI, SLD and MD disability classifications for the student and issued a prior written notice ("PWN") to the student's parent indicating the student's continued eligibility for special education services and indicating that the FBA and WJ-III⁹ were used as the basis for the continued eligibility determination. Neither the parent, nor student, attended this meeting. (Respondent's Exhibit 6, 7, 8, 9)
7. On February 20, 2014, School A also prepared a final eligibility determination report and an evaluation summary report that indicated the following assessments and data were reviewed as a part of the student's reconsideration for eligibility: September 6, 2013, Brigance Calculation Assessment, the I-READY computer based diagnostic assessment, teacher observations in November 2013, the Paced Interim Assessment from October 2013 and the formal WJ-III assessment of January 2014. (Respondent's Exhibit 10)
8. On February 20, 2014, School A conducted an annual review of the student's IEP. During the IEP meeting the team revised the student's goals and determined that the student's "hyperactive and inattentive behaviors, and difficulty managing his emotions impact how he is able to attend to his academic assignments and participate fully in the general education setting." (Petitioner's Exhibit Petitioner's Exhibit 3-1, 3-6)
9. The IEP developed February 20, 2014, required the student to receive 10 hours of specialized instruction in a small group with limited distractions outside general education. It also required 120 minutes per month of behavioral support services outside general education. (Petitioner's Exhibit 3-7, 3-8)
10. The February 2014 IEP also contained a behavioral intervention plan ("BIP") which, among other things, states the student "will come to school on time and avoid becoming involved in illegal and destructive activities. (Petitioner's Exhibit 3-11)

⁹ Woodcock Johnson -III

11. On February 7, 2014, the student's IEP progress report for the second reporting period was issued for the period beginning November 4, 2013, and ending January 24, 2014. According to the report from his special education teacher the student had made no progress in mathematics because his behavior "greatly impeded his ability to acquire new information". (Petitioner's Exhibit 13-1)
12. Although the student had demonstrated progress in reading during the first reporting period he was not progressing in the second reporting period due to his classroom behavior. During the second reporting period according to the school social worker the student was either not progressing or regressing in his emotional, social and behavioral development. (Petitioner's Exhibit 13-2, 13-3, 13-4)
13. During SY 2013-2014 the student received math, instruction with five other students and an instructor and he received English and reading instruction with even fewer students but a different teacher. His instruction in math, reading and English was provided to him daily. The student saw the social worker three times per week for about 30 minutes each time. The remainder of his instruction during the day was provided in larger classes. The student acknowledged that during SY 2013-2014 he was not performing well, not listening to the teacher and walking out the classroom. (Student's testimony)
14. In the beginning of SY 2014-2015 to present the student has been receiving a total of fifteen (15) hours of specialized instruction per week: ten hours from his special education teacher and five additional hours spread throughout the week with a special education case manager and another special education student. All students in the small group are special education students. Overall the other students are below or equal to the student's academic performance. (Witness 3's testimony)
15. On December 2, 2014, an incident occurred at School A in which the student was in possession of a controlled substance.¹⁰ Based on a suggestion the student's parent withdrew the student from School A attempting to avoid disciplinary action. When the student's parent had difficulty enrolling the student in other schools he returned to School A and re-enrolled the student on December 8, 2014. School A thereupon proposed a long-term suspension of student. (Parent's testimony, Student's testimony, Petitioner's Exhibit 39-1, Respondent's Exhibit 12)
16. School A cited D.C Official Code §48-1101 et seq. (2001) as the authority for imposing an off-site, long-term suspension of 45 days. (Petitioner's Exhibit 6-1)
17. On December 8, 2014, a Notice of Disciplinary Action was sent to the parent regarding the December 2nd incident. This notice only contained the allegation of possession of drug paraphernalia or controlled substance. (Petitioner's Exhibits 6-1, 7-1)

¹⁰ The student was also said to be in possession of a weapon, namely a box cutter, a Tier 4 violation as well as possession or use of tobacco, a Tier 3 violation. (Petitioner's Exhibit 6-1)

18. The notice also advised the parent of the need to pick up an educational plan for the student and that the plan was to be completed by the student and would make up for class assignments, homework and exams without penalty. (Petitioner's Exhibit 7-1)
19. The notice provided information to the parent concerning the rights of the parent and included, among other things, information on the right to appeal. (Petitioner's Exhibit 7-2)
20. The parent also received information on DCPS Student Discipline Hearings with the Office of Administrative Hearings ("OAH"). (Petitioner's Exhibit 7-3)
21. The student's long-term suspension was to begin on December 2014 and end on February 2015. (Petitioner's Exhibit 8-1)
22. On December 16, 2014, School A conducted a MDR in order to determine whether the student's behavior was a manifestation of his disabilities. The student and parent attended this meeting along with the student's general education teacher, case manager, social worker, School A's LEA representative and psychologist as well as petitioner's attorney. (Respondent's Exhibit 13-1, 13-2, 13-3)
23. The school psychologist reviewed the criteria for student's disability classifications and provided clinical expertise in order to determine whether the student's behavior was the result of his disability. (Witness 1's testimony)
24. The school psychologist and other MDR team members determined that the student's possession of a controlled substance was not a manifestation of his ADHD. They reached this conclusion because the student's expression of ADHD relates to his ability to remain focused and organized. (Witness 1's testimony, Respondent's Exhibit 13-2)
25. The team also determined that the student's SLD classification also played no role in his possession of a controlled substance because SLD is related to the student's academic performance rather than his behaviors. When the team reviewed the allegations related to the student's possession of a knife they determined that it also was not related to his disability.¹¹ (Witness 1's testimony, Respondent's Exhibit 13-2)
26. The MDR team imposed a 45-day long term off site suspension. (Respondent's 13-2)
27. The student admitted that he purchased controlled substance from another student at school with the intention of smoking the

¹¹ Although, contrary to what the MDR notes state regarding the student's possession of the knife not being a manifestation of his disability Witness 1 testified that she believed that the student picking up the work knife was related to be impulsive behavior and related to his disability. However, the suspension notice and the basis for the suspension that was the subject of the OAH hearing was only the drug possession; therefore, the Hearing Officer does not consider the knife possession to have been the conduct for which the student was given a long-term suspension.

substance after school.

28. Although the student was given a long-term suspension from School A DCPS did not provide the student an alternative or interim school to attend following the December 2, 2014, incident. (Student's testimony)
29. When the student was suspended on December 8, 2014, his special education teacher provided him with a reading packet and a math packet. The student worked on the packets while suspended; however, the packets were not related to his classroom assignments. (Student's testimony)
30. DCPS held an IEP meeting immediately following the December 16, 2014, MDR. The student and his parent participated. The team agreed to increase the student's hours of specialized instruction outside general education from 10 hours per week to 15 hours per week. The team also increased the student's behavioral supports from 120 hours per month to 160 hour per month outside of general education. (Respondent's Exhibits 14-1, 14-9, 16-8)
31. The student's specialized instruction was to occur in a "small group setting with limited distractions in order to access the general education curriculum". (Respondent's 14-10)
32. During the IEP meeting, the parent requested a comprehensive psychological evaluation and a FBA and on January 26, 2015, Respondent issued a prior written notice to proceed with evaluation. (Witness 1's testimony, Respondent's Exhibit 18-1)
33. A comprehensive psychological is being conducted along with the FBA requested by the parent. The DCPS psychologist is close to concluding the evaluation to determine the student's cognitive and educational and social/emotional functioning. (Witness 1's testimony, Respondent's Exhibit 18-1)
34. After the student returned to school in January 2015 the student's father informed the student's special education teacher that the student is now taking ADHD medication. Since the student returned to school his special education teacher has observed that the student is now more available for instruction. He is now not so off task and is easier to redirect. He shows more effort in learning. (Witness 3's testimony)
35. At the start of SY 2014-2015 the student was displaying similar behaviors as he did in SY 2014-2015 but has, in the second half of the current school year since returning from suspension, conducted himself better and performed better academically. The student is staying in class and taking his ADHD medication consistently. The student can benefit from tutoring and more instructional time with a teacher. (Student's testimony)
36. The student's special education teacher developed and the implements the behavior tracking sheet for the student. The student was recently rated as having met expectations with no prompting. (Witness 3's testimony, Respondent's Exhibit 19)

37. During SY 2014-2015, prior to and since the student's suspension from School A, the student's specialized instruction in math occurred for 1 hour each day in a group containing four (4) other students. The student's specialized reading instruction occurred for one (1) hour each day in a classroom with three (3) other students. (Student's testimony)
38. The student receives his specialized math instruction in the rear of the classroom with the special education teacher, and his specialized reading instruction occurs in a separate classroom with a special education instructor and three (3) other students. (Witness 3's testimony)
39. On January 15, 2015, OAH conducted the student's discipline hearing and issued a decision reducing the student's long term suspension from 45 days to 25 days and the student returned to School A on January 27, 2015. (Respondent's Exhibit 21-2, Respondent's Exhibit 15-1)
40. On January 15, 2015, the parent had a hearing on whether the student's 45-day suspension was appropriate disciplinary action with the Office of Administrative Hearings. (Petitioner's Exhibit 2-1)
41. The Administrative Law Judge ("ALJ") ruled that DCPS failed to prove that the student was in "possession of...a controlled substance" pursuant to D.C Official Code §48-1101 et seq., because this statute only applies to drug paraphernalia. But the ALJ found the student to have been in possession of marijuana, an illegal act constituting a violation of a Tier V regulation, pursuant to 5 DCMR B2502.5(a)(23). This regulation also allows for off-site, long term suspension or expulsion, pursuant to 5 DCMR B2502.5(b). (Petitioner's Exhibit 2-4, 2-5)
42. The ALJ considered the age of the student; circumstances of the infraction; the involvement of a controlled substance; the safety of other students and staff; and, the educational needs of the student to be disciplined. The ALJ determined that the offence supported a 25-day long-term suspension. The ALJ gave the student credit for the time he had been on suspension. (Petitioner's Exhibit 2-5)
43. Petitioner's educational consultant developed a compensatory education proposal for the student designed to remediate for the time he was suspended, for an alleged inappropriate IEP, for DCPS' alleged failure to implement his IEP and its failure to evaluate him. The consultant also based her proposal on the student having allegedly missed out on additional specialized instruction outside general education and behavioral support services. The consultant proposed that the student be provided 240 hours of specialized tutoring: two hours three times per week for 40 weeks and 40 hours of counseling/behavior support services at 1 hour per week for 40 weeks. (Witness 2's testimony; Petitioner's Exhibit 44-4)¹²

¹² Petitioner attempted to offer this witness an expert but the designation was not granted. The witness offered testimony based on her review of documents and what she believed to be alleged violations. The witness had not

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. ¹³ *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. With regard to the challenge to DCPS’ MDR determination, pursuant to DCMR 5B § 2510.16 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.

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).

conferred with the student’s teachers, assessed or evaluated the student and had no personal knowledge of his educational functioning and services beyond her review of documents.

¹³ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to implement the student's February 20, 2014, and December 16, 2014, IEPs (in SY 2013-2014 and in SY 2014-2015) by not providing all specialized instruction outside general education.

Conclusion: Petitioner has failed to sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by the LEA failing to implement the student's February 20, 2014, and December 16, 2014, (in SY 2013-2014 and in SY 2014-2015) IEP by not providing specialized instruction outside of general education.

The student acknowledged that during SY 2013-2014 he was provided his math, reading and English instruction in a small group of students. There was no evidence presented to indicate that during that school year the student's instruction was not provided outside general education. During SY 2014-2015 the student's IEPs in February 2014 and December 2014 each described the student's specialized instruction as being provided in small group. Although the student's specialized math instruction was provided in the general education classroom, the special education students were sequestered in an area of the room and were being taught by a special education teacher, while the general education teacher taught the other students.¹⁴

Based upon this evidence the Hearing Officer concludes that the student was being provided all his specialized instruction outside general education and that Petitioner failed to demonstrate otherwise and therefore did not meet the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to conclude at the December 16, 2014, MDR that the student's December 2, 2014, conduct was a manifestation of his disability.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence that the LEA denied the student a FAPE by failing to conclude at the December 16, 2014, MDR that the student's December 2, 2014, conduct was a manifestation of his disability.

Pursuant to the requirements 34 C.F.R. § 300.530 et seq.¹⁵ once a student is removed from

¹⁴ FOF #s13, 14, 37, 38

¹⁵ 34 C.F.R. § 300.530: School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under Sec. 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must--

(i) Continue to receive educational services, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Sec. 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) Manifestation determination.

(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.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's 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; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

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.

Petitioner asserts that School A inappropriately determined that the student's conduct on December 2, 2014, that led to his off-site suspension was not a manifestation of this disability. The evidence in this case demonstrates that on December 2, 2014, the student purchased marijuana in school from another student and then was caught with the drug on his person by school personnel. The Hearing Officer considered and credited Respondent's expert witness' opinion that the student's behavior was not a manifestation of his disability.¹⁶ Petitioner's expert witness did not provide any contrary testimony and could not discern based upon the facts that were presented to him whether the conduct was a manifestation of his disability. There were no factors that indicated that his possession of the drug in school was related to his MD, SLD or OHI for ADHD disability. The Hearing Officer concludes that DCPS met the burden of demonstrating that the student's conduct was not a manifestation of his disability.

34 C.F.R. § 300.530 (d) provides: (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must-- (i) Continue to receive educational services, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

The evidence demonstrates that the student was removed from school for a total of thirteen (13) school days after the incident during the first semester of SY 2014-2015 and from January 5, 2015, to January 26, 2015, sixteen (16) days in the second semester for a total 29 school days from the day after the incident to the time he returned to school on January 27, 2015, once the student's suspension had been reduced by the OAH ALJ.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to implement the student's IEP (from December 3, 2014, to January 27, 2015) by failing to provide him with an interim alternative placement when he was placed on long-term suspension for the December 2, 2014, incident.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the LEA failed to provide the student with an interim alternative placement when he was placed on long-term suspension for the December 2, 2014, incident.

¹⁶ FOF #s 23, 24, 25

Pursuant to 34 C.F.R. § 300.530 (g) School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child-- (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA;

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “Savoy v. District of Columbia (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that the student was suspended for possessing marijuana, but not for possessing a weapon although it appears that the student was initially charged with that violation as well. The regulation cited above allows the school personnel to remove the student to an interim alternative educational setting for not more that 45 school days. However, the evidence demonstrates that the student was simply sent home with work packets and not provided an alternative school placement to attend while he was removed from School A.¹⁷

Although DCPS asserted that the provision of the work packets was accompanied with the assess to the special education staff the student during his period of absence had no contact with the staff and the work packets were either never turned in by the student or if they were turned in were not checked by the special education teacher. Absent any authority that such an arrangement would constitute an interim alternative placement, the Hearing Officer relies upon the plain meaning of the language of the regulation and concludes School A should have provided the student an alternative school program to attend during his suspension at which is special education services could have continued to be provided. The student testified that although he completed the work packets that work did not seem to relate to the work he did in school either before his departure or after his return. The twenty-nine (29) days the student missed was far from de-minimus and the Hearing Officer concludes DCPS’ failure to provide an interim alternative placement to the student was a denial of a FAPE.

¹⁷ FOF #s 28, 29

ISSUE 4: Whether DCPS denied the student a FAPE by failing to comprehensively re-evaluate the student for his triennial review because it did not conduct a comprehensive psychological and/or new FBA.

Conclusion: Petitioner has did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to comprehensively re-evaluate the student for his triennial review because it did not conduct a comprehensive psychological and/or new FBA.

34 C.F.R. § 300.303(a)(2) make clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child’s educational needs. *See also Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an “LEA *shall ensure* that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, *hearing, social and emotional status...and motor abilities.*” (emphasis added).

34 C.F.R § 300.305 requires

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--

(1) Review existing evaluation data on the child, including-

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--(i)(A) Whether the child is a child with a disability, as defined in

Sec. 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services;

The evidence in this case demonstrates that DCPS conducted evaluations and reviewed data and input from the student’s teachers in February 2013 and in January and February 2014, to sufficiently determine the student’s continued eligibility and his special education needs.¹⁸ There was no authority presented or that the Hearing Officer is aware of that requires a LEA in conducting a student’s triennial evaluation to administer the exact same assessments or evaluations that were previously conducted. There was insufficient evidence presented by Petitioner to demonstrate that the triennial evaluation DCPS conducted for the student was not

¹⁸ FOF #s 3, 5, 6, 7

appropriate or that a comprehensive psychological or a new FBA was requested or warranted.¹⁹

There was no requirement or request that another FBA be conducted or the student's BIP be reviewed and/or revised. The FBA was conducted when the student attended School B. The evidence demonstrates that the behavior addressed in the BIP was being consistently addressed at School A. There insufficient evidence that a new FBA was warranted or requested or that the BIP be revised. Consequently, despite evidence that the student continued to display inattention related to his ADHD and behavioral difficulties, there was insufficient evidence presented that DCPS should have been put on notice or was required to take any action as to a new FBA or revised BIP sufficient to demonstrate that its not conducting the FBA or revising the BIP denied the student a FAPE.

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 submitted a compensatory education proposal that requested services for alleged violations and denials far beyond what the Hearing Officer concluded warrants a remedy in this HOD.

Because the proposal was based on violations and missed services that were not proved the Hearing Officer concludes the compensatory education Petitioner proposed was exorbitant and not based upon the actual services missed or needed to put the student where he would have been had an alternative interim placement been provided and his IEP implemented. But to award no compensatory education when a denial of a FAPE has been established would be inequitable.²⁰

Consequently, the Hearing Officer grants Petitioner an amount of independent tutoring as compensatory education to assist the student in making up any deficit in classwork and or learning that he missed during his twenty-nine days without an interim alternative placement. There was enough of a basis for the Hearing Officer to conclude that the amount of instruction granted below was a reasonable. The student testified that he can benefit from tutoring and more

¹⁹ Although Petitioner presented an expert witness as to the student's evaluations the Hearing Officer did not find this testimony to contradict the notion that the exact same assessments need not be conducted nor was it persuasive that the evaluation DCPS conducted was inappropriate or that a comprehensive psychological and/or FBA should have been conducted.

²⁰ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

instructional time with the teacher, thus the Hearing Officer concludes that independent tutoring is an appropriate remedy for the student along with independent counseling.²¹

ORDER:

1. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education one hundred (100) hours of independent tutoring and ten (10) hours of independent counseling both and at the DCPS/OSSE prescribed rates to be used by Petitioner by August 31, 2015.
2. All other requested relief is denied.

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

Coles B. Ruff, Esq.
Hearing Officer
Date: March 18, 2015

²¹ FOF # 35