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 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>Public Charter School (“School A”) Local Educational Agency (“LEA”),</p> <p>Respondent</p> <p>Case # 2018-0311</p> <p>Date Issued: January 17, 2019</p>	<p>REVISED CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: January 3, 2019 January 14, 2019</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, January 17, 2019, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

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 January 3, 2019, and January 14, 2019,² at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112, and Hearing Room 423 respectively.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.³ Student resides with Student’s parent (“Petitioner” or “the parent”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”). During school year (“SY”) 2017-2018 and SY 2018-2019 Student was enrolled at a public charter school in the District of Columbia (“School A”) that is Student’s local educational agency (“LEA”).

On December 3, 2018, Petitioner filed a due process complaint against School A (“Respondent”). In the due process complaint, Petitioner alleges that Respondent denied Student a free appropriate public education (“FAPE”) by, inter alia, failing to conclude, at a manifestation determination review (“MDR”), that Student’s conduct (fighting) on September 28, 2018, that resulted in the Student’s change in placement from School A to an interim alternative placement, was a manifestation of Student’s disability.

Relief Sought:

Petitioner seeks a finding that School A has denied Student a FAPE, and that the conduct that was the basis of Student’s change of placement be deemed a manifestation of Student’s disability. In the alternative, Petitioner requests that School A be ordered to hold an MDR and placement meeting and determine the appropriate placement and location of services for Student, by and through the appropriate IEP team members, including but not limited to Petitioner, Student, Petitioner’s attorney, and advocate. Petitioner also seeks an independent functional behavior assessment (“FBA”), development of a behavior intervention plan (“BIP”), and that the LEA provide Petitioner all educational and behavior records. Lastly, Petitioner requests that School A fund appropriate compensatory education.

² On this date Counsel for both parties made closing arguments by telephone.

³ The student’s current age and grade are listed in Appendix B.

LEA Response to the Complaint:

Respondent filed a response to the complaint on December 10, 2018, and denies that there has been any failure to provide Student with a FAPE. In its response the LEA asserted, inter alia, the following:

School A denies that it failed to hold an appropriate MDR meeting, provide an appropriate interim alternative educational setting, conduct a functional behavior assessment or otherwise comply with the discipline procedures of IDEA. As a result of Student's expulsion, an MDR meeting was held, and it was determined that Student's behavior was not a manifestation of Student's disability. As a result of Student's expulsion, services have been made available in an appropriate interim alternative educational setting. These services are designed to enable Student to make progress towards Student's IEP goals and continue to participate in the general education setting. Student's attendance has been sporadic, interfering with Student's ability to benefit from the services made available. As a result of Student's expulsion, School A agreed to conduct an FBA, among other evaluations. School A also denies that it failed to provide the parent with access to Student's education records. The parent has not requested a copy of the student's records. The attorney for Student's aunt requested copies of the records. Those records have been provided.

Resolution Meeting and Pre-Hearing Conference:

The parties convened a resolution meeting, but did not resolve the complaint. The complaint requires an expedited hearing to be held within 20 school days of the date the complaint was filed, by January 10, 2019. The Hearing Officer's Determination ("HOD") is due 10 school days following the hearing, on January 17, 2019,

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on December 18, 2018, and issued a pre-hearing order ("PHO") on December 21, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:⁴

The issues adjudicated are:

1. Whether the LEA denied Student a FAPE by failing to: (a) conduct an appropriate MDR meeting⁵ and/or determine that Student's conduct on September 28, 2018, was a manifestation of Student's disability, and/or (b) provide Student an appropriate alternative placement, and/or (c) conduct an updated FBA and/or develop or update

⁴ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁵ Petitioner is alleging that the LEA did not review all the relevant records and take Student's evaluations and previous behavior into account, and discuss it in detail, before reaching its conclusion at the MDR.

Student's BIP following Student's long term suspension/expulsion for the incidents that occurred on or about September 17, 2018, and September 28, 2018.

2. Whether the LEA denied Student a FAPE by failing to provide Petitioner access to all of Student's educational records and/or make sufficient requests to Student's previous LEA for all records.

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 30 and Respondent's Exhibits 1 through 16) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

The Hearing Officer concluded that Respondent conducted an appropriate MDR and correctly determined Student's conduct on September 28, 2018, for which Student was removed from School A and provided an interim alternative placement was not a manifestation of Student's disability. However, the Hearing Officer concluded that the alternative placement School A provided was inappropriate, as the weight of the evidence demonstrates that the placement either could not, or did not, implement Student's IEP. The Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that Respondent denied Student a FAPE as a result of the alleged failure to update Student's FBA or BIP, and did not sustain the burden of persuasion by a preponderance of the evidence regarding provision of Student's educational records to Petitioner. As a result of the determined denial of FAPE, the Hearing Officer granted the Student compensatory education.

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

⁷ Petitioner presented five witnesses: (1) Student's Mother ("Petitioner"), (2) Student, (3) Student's Aunt, (4) an Educational Advocate who is employed by the law firm representing Petitioner and who was qualified as an expert witness in psychology, and (5) another Educational Advocate who is employed by the law firm representing Petitioner and who was qualified as an expert witness in special education and IEP development. Respondent presented three witnesses: (1) School A's Clinical Director, (2) School A's Principal and (3) School A's Director of Student Support.

FINDINGS OF FACT:⁸

1. Student resides with Petitioner in the District of Columbia and has been determined eligible for special education and related services pursuant to IDEA, with a disability classification of SLD. During SY 2017-2018 and SY 2018-2019, Student was enrolled at School A, a public charter school in the District of Columbia. School A is Student's LEA. (Petitioner's testimony, Petitioner's Exhibit 10-1)
2. Prior to attending School A, Student attended a District of Columbia Public Schools ("DCPS") school and DCPS was then Student's LEA. On May 23, 2016, DCPS developed an individualized educational program ("IEP") for Student. The IEP indicated that Student's behavior impeded Student's learning or that of others. The IEP cited the results of a May 4, 2016, assessment - the Global Appraisal of Individual Needs ("GAIN") screener tool used to identify behavioral health disorders. The IEP noted that based on Student's self-reported information on that screener, it was recommended that Student's continue with, or be referred for, mental health services and anger management. The IEP notes, in the description of how Student's disability affects Student's access to the general education curriculum, that Student had been diagnosed with SLD, Oppositional Defiant Disorder ("ODD") and Attention Deficit Hyperactivity Disorder ("ADHD"). The IEP noted that in addition to academic challenges, Student exhibited behaviors such as low frustration tolerance, inattention, hyperactivity/impulsivity, aggression, non-compliance and difficulty with peer relations. Student's IEP included goals in reading, written expression and emotional/social/behavioral development and prescribed that Student be provided 5 hours per week of specialized instruction inside general education and 120 minutes per month of behavioral support services. (Petitioner's Exhibit 6-1, 6-2, 6-7, 6-9)
3. DCPS updated Student's IEP on March 30, 2017. The IEP indicated that Student's behavior impeded Student's learning or that of others. The emotional/social/behavioral development section of the IEP cited Student's June 10, 2012, evaluation and a diagnosis of SLD in reading, ODD and ADHD - Combined Type (Provisional). A provisional ADHD diagnosis means that more information, or another evaluation, is required to definitively make the diagnosis. The IEP noted that based on Student's self-reported information on the Strengths and Difficulties Questionnaire ("SDQ") administered on February 28, 2017, Student's responses were close to the Average range for overall stress, emotional distress, behavioral difficulties, hyperactivity, concentration difficulties, and difficulties getting along with others. In the description of how Student's disability affects Student's access to the general education curriculum, the IEP notes state that Student had been diagnosed with SLD, ODD, and ADHD. The IEP noted that in

⁸ The evidence (documentary and/or testimonial) that is the source of the Findings of Fact ("FOF") is noted within 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 (or the page number of the entire disclosure document) 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.

addition to academic challenges, Student exhibited behaviors such as low frustration tolerance, inattention, hyperactivity/impulsivity, aggression, non-compliance, and difficulty with peer relations. Student's IEP included goals in reading, written expression and emotional/social/behavioral development, and prescribed that Student be provided 5 hours per week of specialized instruction inside general education and 120 minutes per month of behavioral support services. (Witness 1's testimony, Petitioner's Exhibit 7-1, 7-2, 7-5, 7-6, 7-7)

4. After Student began attending School A, School A conducted an annual review of Student's IEP on March 22, 2018. The IEP does not indicate that Student's behavior impedes Student's learning or that of others. The IEP includes goals in reading, written expression, and emotional/social/behavioral development, and prescribes that Student be provided 5 hours per week of specialized instruction inside general education and 120 minutes per month of behavioral support services outside general education. (Petitioner's Exhibit 10-1, 10-3, 10-4, 10-5, 10-6, 10-9)
5. At the time School A updated Student's IEP, Student's academic performance was close to Average, and Student was noted to have made significant gains in behavioral progress as well as other IEP performance areas. However, the IEP developed for Student on March 22, 2018, makes reference to Student having various behavioral issues which included concerns related to Student engaging in physical and verbal altercations with students and teachers. (Witness 1's testimony)
6. In the area of emotional/social/behavioral development, Student's March 22, 2018, IEP states that Student showed a decrease in defiant behaviors but struggles when called upon in class or when asked to complete an undesirable task, becomes frustrated easily, and will become irritated when there is a lot of noise in the classroom. (Petitioner's Exhibit 10-7)
7. During Student's March 2018 IEP meeting, the Student's teachers noted Student had severe attendance issues, and as a result, Student had large gaps in content knowledge. School A provided interventions such as Saturday school, and after school programs, to assist Student in making up academic gaps. The meeting notes also indicate that Student had various behavioral concerns, some of which resulted in mediation with other students due to physical and verbal altercations. Student also had chronic absenteeism, and had verbal altercations with teachers. (Petitioner's Exhibit 9-3, 9-4)
8. While Student attended School A, Petitioner did not receive many telephone calls about Student's behavior, but did receive telephone calls about Student's absences from school. Petitioner admitted that Student was late for school on most days and often did not attend school. (Petitioner's testimony)
9. Student returned to School A for SY 2018-2019. Soon after the start of SY 2018-2019 School A's principal discovered that there was an ongoing dispute between Student's group of friends and another student group. The students involved had been using social media to taunt one another. School A conducted mediation with the two groups in an

attempt to resolve the issues. However, the social media taunts continued. Parents were alerted and a second mediation was conducted. This mediation was also unsuccessful. Following the mediation Student and Student's family members, including Petitioner, were involved in a shouting match with the other group of students and a family member in front of a corner store near School A. Police officers and school staff de-escalated the confrontation. (Witness 5's testimony, Petitioner's Exhibit 16-1, 16-2)

10. On September 18, 2018, Student engaged in a physical altercation at school with another student. The incident report indicates that after an exchange of words in the hallways, Student aggressively stormed down the hallway toward the other student and initiated a physical altercation that was broken up by school staff. As result of the fight, Student was suspended from school for five days. (Petitioner's Exhibit 13-1, 13-3)
11. Student returned to school on September 26, 2018. On September 28, 2018, Student's group of friends were outside of a classroom taunting the other group of students, then Student's group physically attacked the other group in the hallway during the transition between classes. There were eight students involved in the fight, and all the students, including Student, were arrested and transported off campus. As a result of the fight, Student initially received another five-day out-of-school suspension. (Witness 5's testimony, Petitioner's Exhibits 14-1, 14-3)
12. On October 5, 2018, School A convened an expulsion review meeting. Petitioner and Student attended, and Petitioner's sister participated by telephone. School A expelled Student for the fight that occurred on September 28, 2018. (Witness 5's testimony, Petitioner's Exhibit 11)
13. As a result of the expulsion, School A issued a prior written notice ("PWN") stating that Student was being provided an interim alternative placement. (Petitioner's Exhibit 15)
14. On October 6, 2018, School A convened an MDR meeting. School A determined that Student's conduct on September 28, 2018, was not a manifestation of Student's disability. The MDR discussed Student's IEP, IEP goals, evaluations, and accommodations as well as the fact that Student had received some services while Student attended DCPS that were not being prescribed in Student's School A IEP. (Witness 3's testimony, Petitioner's Exhibit 12)
15. Although Petitioner attended Student's MDR, she does not recall the name of the meeting and did not look at the paper she was given about the meeting. Petitioner was shown a video clip of Student's fight, but blames social media and other students for provoking Student, as the cause of Student's behavior. Petitioner believes Student was targeted and "thrown under the bus" for expulsion. Petitioner attended a parent meeting after the first fight Student engaged in, and Petitioner viewed the meeting as pointless, due to the body language of the students involved. Student is not a fighter, and the two fights Student was involved in were the result of social media. (Parent's testimony)

16. The clinical coordinator at School A supervises the social worker who provided behavior support services to Student while Student attended School A and is familiar with Student and Student's diagnosis of ADHD and ODD. However, School A does not have a current documentation of the ADHD diagnosis. The clinical coordinator participated in Student's MDR and considered Student's physical aggression as outside of Student's normal behavior at School A. The MDR team agreed that Student's fighting with the other group of students was not something that occurred in the moment; rather, it appeared to be planned. (Witness testimony, Petitioner's Exhibit 9-3)
17. On October 24, 2018, Petitioner's attorney requested that School A conduct a psychological evaluation and an FBA for Student, and requested that School A provide Petitioner's attorney with a copy of Student's entire academic file. (Petitioner's Exhibit 22)
18. Student attended the alternative placement ("School B"). School B's hours of operation were from 9:00 a.m. to 2:30 p.m. School B had three teachers who had undergone background checks. The building used by School B is old and in need of renovations. School A's Director of Student Support visited School B on a quarterly basis. Student attended School B for no more than 12 days. Although School A agreed to perform an FBA and a psychological assessment following Student's expulsion and MDR meeting, Student was not in attendance at School B when School A evaluator(s) attempted to perform the assessments. (Witness 6's testimony, Petitioner's Exhibits 7-5, 9-3)
19. Student frequently left School B early, when Student did attend. At School B Student, and another student were in a room with one teacher and other students were in another room. One teacher provided Student instruction in Math, Spanish, History, and English. After instruction, the teacher provided Student with worksheets. Student was of the opinion that there was not much teaching being done. Student did not receive tests or quizzes in any subject. During Student's stay at School B, Student complained to ■■■ mother that students in the other room at School B were too loud. Student attempted to attend School B for about a week during December 2018 when no one was there at all and School B appeared to have been closed. (Student's testimony, Petitioner's Exhibit 21)
20. During the time Student attended School B, Student's mother received telephone calls from Student advising her that younger students were running upstairs and provoking Student and another student. There were days when Petitioner did not send Student to School B. Student's mother was eventually advised that School B did not want Student to return to the school. (Parent's testimony)
21. School B was eventually closed due to a problem with its certificate of occupancy. Petitioner was not advised that School B would be closing. School A has now informed Petitioner that Student's interim alternative placement will be conducted at School A. (Witness 6's testimony, Parent's testimony)

22. Once Student was expelled from School A and placed at School B, Petitioner's educational advocate went to visit the school. The educational advocate saw lights on and people inside the building, but the outside gates were locked. The advocate saw debris in the backyard of the building, and noted that the banister in the rear of the building was broken. (Witness 1's testimony)
23. Petitioner's second educational advocate had previously gone to School B to perform an observation of another student she represented. School B was in a row house with broken windows in the rear and a back door that was boarded up. When the advocate entered the row house, she saw three students, a couple of desks, and some chairs. The students were working from worksheets. The appearance of the interior building was old and run down, with chipped paint on the walls. (Witness 2's testimony)
24. Petitioner's educational advocate requested Student's comprehensive record from the LEA as well as Student's class schedule and the credentials of the teachers at School B. The advocate received a list of the classes Student was taking at School B. (Witness 2's testimony)
25. Student's aunt sent an email to School A requesting that she be provided a list of specific educational records that had accrued over last few school years. (Petitioner's Exhibit 22-8)
26. On November 19, 2018, Respondent's attorney emailed some of Student's educational records to Petitioner's attorney. (Petitioner's Exhibit 22-9)
27. On December 7, 2018, Respondent's attorney emailed additional educational records to Petitioner's attorney. School A has provided Petitioner and/or her representatives all educational records School A has for Student. (Witness 6's testimony, Petitioner's Exhibit 23)
28. On December 20, 2018, Petitioner's educational advocate sent an email to Respondent's attorney requesting additional records for Student and requesting documentation regarding the credentials of Student's teachers at School B. (Petitioner's Exhibit 24)
29. The compensatory education plan developed for Student requests that Student receive 120 hours of tutoring and 20 hours of counseling as the Student's award for the LEA's failure to provide Student with a FAPE. Based upon the evidence of Student's academic deficits Student would benefit from academic tutoring. (Witness 1's testimony, Petitioner's Exhibit 29)

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. In this instance there has been no challenge to Student's IEP. The sole question is whether School A has complied with the procedures set forth in the Act.

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held both the burden of production and persuasion on issue (1)(a) and (1) (c) and issue 2. Although the PHO stated that Petitioner held the burden of persuasion on all issues adjudicated, actually pursuant to D.C. law, Respondent retained the burden of persuasion as to the appropriateness of the interim alternative placement after Petitioner met a prima facie case on that element of the issue.⁹ The normal

⁹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

standard is for the burden of persuasion is a preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied Student a FAPE by failing to: (a) conduct an appropriate MDR meeting, and/or determine that Student's conduct on September 28, 2018, was a manifestation of Student's disability, and/or (b) provide Student an appropriate alternative placement, and/or (c) conduct an updated FBA and/or develop or update Student's BIP following Student's long term suspension/expulsion for the incidents that occurred on or about September 17, 2018, and September 28, 2018.

CONCLUSION: Petitioner did not sustain the burden or persuasion by a preponderance of the evidence that School A failed to conduct an appropriate MDR or failed to appropriately determine that Student's September 28, 2018, conduct that led to Student's removal from School A was a manifestation of Student's disability, or that School A failed to update Student's FBA and/or develop or update Student's BIP. However, the Hearing Officer concluded based on the evidence adduced during the hearing that the interim alternative placement that School A selected and placed Student following the removal was inappropriate.

34 C.F.R. §300.530 states:

(a) 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)(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 §300.536).¹⁰

(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.

¹⁰ 34 C.F.R § 300.536 states: Change of placement because of disciplinary removals. (a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if— (1) The removal is for more than 10 consecutive school days; or (2) The child has been subjected to a series of removals that constitute a pattern— (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. (b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. (2) This determination is subject to review through due process and judicial proceedings.

34 C.F.R. §300.530 (c) states:

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.

34 C.F.R §300.530 (d) states in pertinent part:

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 §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)... of this section may be provided in an interim alternative educational setting.

Pursuant to the requirements 34 C.F.R. § 300.530 (e) 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.¹¹ A student should not be removed from school if his or her behavior is determined to be a manifestation of his or her disability.

34 CFR § 300.101 requires that FAPE must be provided to all children with disabilities residing within the state including children who have been suspended or expelled from school.

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:

¹¹ 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.

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 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.

According to D.C. Code §38-235 et seq.¹² "Expulsion" means the removal of a student from the student's school enrollment for disciplinary reasons for the remainder of the school year or longer, in accordance with local education agency policy. Student's expulsion constituted a change of placement for which School A was required to provide Student with an interim alternative placement.

Pursuant to 5E DCMR 3002.1(a) School A is required to "make FAPE available" to students with disabilities including those who are suspended and expelled. Thus, School A was responsible for continuing to provide FAPE to Student after Student's expulsion.

The weight of the evidence demonstrates that Student's conduct of September 28, 2018, that resulted in Student's removal from School A was not a manifestation of Student's disability. Student disability classification is SLD. In addition to the disability classification, Student has been diagnosed with ODD and ADHD. Although these diagnoses are referenced in Student's prior evaluations and/or IEPs prior to Student attending School A, there was scant evidence, prior to the ongoing student group disputes that Student engaged in with Student's friends and other students, that such behaviors were directly related to Student's SLD disability or any other condition that had been previously diagnosed.

¹² (Sept. 19, 2013, D.C. Law 20-17, § 201, 60 DCR 9839; Aug. 25, 2018, D.C. Law 22-157, § 2(b), 65 DCR 7499.)

During Student's first year at School A in SY 2017-2018, Student engaged in some behaviors that were addressed with Student mediation. However, the bulk of Student's school related difficulties were related to chronic absences, rather than behavioral difficulties. In addition, there was evidence presented that prior to the student group conflict that developed and was stoked on social media at the start of SY 2018-2019, Student's behaviors had improved. There was little evidence that in recent years Student's disabilities were significantly related to the conduct of fighting that Student was engaged in on September 28, 2018, that resulted in Student's removal from School A.

The evidence demonstrates that at the MDR meeting School A conducted due to this incident, the team considered and discussed Student's IEP and services and there was no indication that Student's IEP was not being implemented. In addition, the credible testimony of the School A staff, who participated in the MDR meeting, was that the team considered Student's behavior to be planned rather than impulse-based. This was a reasonable basis for the team to have concluded that Student's September 28, 2018, fight was not directly related to, or in any way a manifestation of, Student's disability. Even Petitioner testified that Student was not generally a fighter and that Student's conduct was associated with the social media activity that had been ongoing among Student, Student's friends, and a group of other students.

Although Petitioner presented an educational advocate expert witness who theorized that based on Student's previous documented diagnoses, Student's fighting was related to Student's disability, the Hearing Officer did not find this testimony convincing. The advocate had not evaluated Student and seemed to have been familiar with Student mostly through her review of documentation and Student's educational records.

Based upon the evidence adduced, the Hearing Officer concludes that the weight of the evidence sufficiently favors a conclusion that Student's conduct of fighting on September 28, 2018, for which Student was removed from School A, was not a manifestation of Student's disability.

Petitioner also alleged that the MDR that School A conducted was not appropriate because School A team members did not consider all factors and documentation that should have been considered during their determination. However, the evidence reflects that the team considered Student's IEP, evaluations and data, and sufficiently considered the factors that School A was required to, and should have, considered in making the MDR determination.

Petitioner also asserts that School A did not conduct an FBA, and develop, or update, a BIP for Student. The evidence demonstrates through the testimony of School A's Director of Student Support that School A made attempts to conduct an FBA while Student was assigned to School B. However, Student was not present. The evidence demonstrates through both documentation and testimony that Student was absent from School B a significant amount of time while assigned there. The Hearing Officer concludes, based upon this evidence, that School A made a good faith effort to follow through with the requirement to conduct the FBA and develop a BIP for Student, but could not do so because of Student's significant number of absences from School B. Consequently, the Hearing Officer concludes that Student was not denied a FAPE. However, the Hearing Officer directs in the order below that School A conduct an FBA and develop a BIP for Student.

Lastly, Petitioner alleges that School A failed to provide Student an appropriate interim alternative placement. The weight of the evidence demonstrates that School B was an inappropriate placement for Student. Although School A's Director of Student Support testified that School B had three certified teachers that provided Student with appropriate services, and that he visited School B quarterly and monitored the services provided there, the Hearing Officer found Student's testimony about the services Student received, and those not received, to be convincing. Although Student stated Student received instruction in a number of subjects, Student stated that most of what was provided was work sheets, and little instruction and support. In addition, there was no evidence that at School B Student received behavioral support services that were prescribed in Student's IEP, or that Student's IEP was actually being implemented at School B. School A's clinical director testified that after Student began attending School B, she was no longer responsible for Student's behavioral support services.

Although Student had a significant attendance problem at School A that seemed to continue at School B, Student credibly testified there were days Student attempted to attend School B, but the School was closed, and no one was there. In addition, the physical conditions that were described by multiple witnesses, including one of School A's witnesses, was of a location that was physically inappropriate to be a school. School A's witness testified that School B was eventually closed due to a problem with its certificate of occupancy that is issued by the District of Columbia government to ensure that the location has met the legal requirements for human occupancy. Based upon this cumulative evidence, the Hearing Officer concludes that School A failed to provide Student an appropriate interim alternative placement and thus, denied Student a FAPE.

Issue 2: Whether the LEA denied Student a FAPE by failing to provide Petitioner access to all of Student's educational records and/or make sufficient requests to Student's previous LEA for all records.

CONCLUSION: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that Student was denied a FAPE due to School A's failure to provide Student's educational 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.

School A must permit a parent to inspect and review any education records relating to her child that are collected, maintained, or used by the school, to include special education records accessible in SEDS. *See* 34 CFR § 300.613(a).

The evidence demonstrates that Petitioner's attorney and educational advocate requested School A to provide copies of all of Student's education records. On November 19, 2018, Respondent's attorney emailed some of Student's educational records to Petitioner's attorney.

On December 7, 2018, Respondent's attorney emailed additional educational records to

Petitioner's attorney. School A's Director of Student Support credibly testified that School A had provided all of the education records it had for Student.

Petitioner provided insufficient evidence that there were special education records maintained by Student's prior LEA, or by School A, that were withheld from Petitioner. The Hearing Officer concludes that Petitioner did not meet her burden of persuasion on this issue.

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.)

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.

The Hearing Officer considered the compensatory education plan that Petitioner proposed. The evidence supports the fact that Student would benefit from tutoring and the amount of tutoring requested is reasonable in light of the inappropriate interim alternative placement Student was given, and the resulting lack of services, including behavioral support services. The amount of compensatory education requested will serve to put Student in the place Student would have been, had the violation not occurred. The testimony of Student, and Petitioner's advocate, and the educational records, support these components of compensatory education.

ORDER: ¹³

1. Respondent LEA shall, within 20 school days of the issuance of this order, provide Petitioner authorization for 120 hours of independent tutoring and 20 hours of independent counseling at the OSSE prescribed rates.
2. Respondent LEA shall, within 20 school days of the issuance of this order, conduct an FBA of Student and develop a BIP.
3. All other relief requested by Petitioner is denied.

¹³ 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.

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 ninety (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: January 17, 2019

Copies to: Counsel for Petitioner
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