

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 6, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2016-0074

v.

Hearing Date: April 28, 2016

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2003
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner appeals the determination of the CITY SCHOOL 2 Manifestation Determination Review (MDR) team that Student's March 14, 2016 code of conduct violation was not a manifestation of his IDEA disability. The Petitioner also alleges that since September 2015, Respondent District of Columbia

¹ Personal identification information is provided in Appendix A.

Public Schools (DCPS) has not offered Student an appropriate Individualized Education Program (IEP).

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 28, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 30, 2016. The parties met for a resolution session on April 7, 2016. No settlement agreement was reached. On April 24, 2016, I convened a prehearing telephone conference with counsel to confirm the expedited hearing date, and to discuss issues to be determined and other matters. The final decision in this case is due by May 13, 2016.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on April 28, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, and NONPUBLIC SCHOOL PRINCIPAL. DCPS called as witnesses SCHOOL PSYCHOLOGIST and LEA Representative. In her prehearing disclosures, Petitioner disclosed 129 proposed exhibits. Of the disclosed exhibits, the following exhibits were admitted without objection: Exhibits P-3, P-4, P-7, P-8, P-9, P-11, P-14, P-23, P-24, P-25, P-27 through P-31, P-36, P-40, P-41, P-42, P-54, P-56, P-57, P-62, P-63, P-70, P-71 P-128 and P-129. The following exhibits were admitted over DCPS' objections: Exhibits P-10, P-12, P-13, P-15, P-18, P-26, P-43, P-59, P-68, P-90, P-100, P-108 and P-109. DCPS' objections to the following exhibits were sustained: P-16, P-32, P-

44, P-88, P-95, P-112, P-122, and P-125. Petitioner's remaining proposed exhibits were withdrawn. DCPS' Exhibits R-1 through R-6 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. DCPS' Counsel waived opening argument. Due to the late hour when the evidence phase was completed, there was not time to receive closing arguments. At the request of Petitioner, the parties were allowed, but not required, to file written closing argument by May 2, 2016. On May 2, 2016, Petitioner's counsel filed, by email, a written closing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be resolved in this case, and relief requested, as set forth in my April 25, 2016 Prehearing Order are:

- Whether the City School 2 Manifestation Determination Review (MDR) team erroneously determined on March 22, 2016 that Student's March 2016 code of conduct violation was not a manifestation of his IDEA disability;
- Whether since September 2015, DCPS has failed to offer Student an appropriate IEP which meets his requirement for additional behavioral support services, a more restrictive therapeutic setting, meaningful and measurable annual goals to address his aggression and poor engagement with peers and staff and maladaptive and aggressive/disrespectful behaviors and communication style, and which provides for ESY services;
- Whether DCPS denied Student a free appropriate public education (FAPE) by failing to provide an appropriate Alternative Interim Educational Setting following his March 2016 suspension.

For relief, Petitioner requests that the Hearing Officer order DCPS to fund Student's placement, with transportation, to a public or non-public school that can provide Student with educational benefit or, alternatively, convene a multidisciplinary

team (MDT) meeting with the parent and counsel to discuss and determine an appropriate placement; order DCPS to ensure that Student's IEP team develops an appropriate IEP, with appropriate annual goals, behavioral supports, counseling services and ESY services; order DCPS to ensure that Student's placement team determines and implements a sufficiently restrictive IEP placement in Student's least restrictive environment; order that DCPS ensure that Student's functional behavioral assessment and behavior intervention plan are appropriately updated and order DCPS to fully implement Student's IEP. Petitioner further requests that the hearing officer overturn the MDR team determination that Student's code of conduct violation was not a manifestation of his disability and order DCPS to provide the parent full access to Student's educational records, including a video of the March 14, 2016 discipline incident. In addition, Petitioner seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

In February 2015, the Petitioner filed a prior due process complaint concerning Student, Case No. 2015-0056. Following a due process hearing on March 30 and 31, 2015, former Impartial Hearing Officer John Straus issued a Hearing Officer Determination on April 25, 2015 (the April 25, 2015 HOD). Counsel for the respective parties agreed that I may adopt Findings of Fact from the April 25, 2015 HOD, Exhibit P-3, which I consider relevant to the present case. I adopt the following Findings of Fact from the April 25, 2015 HOD:

On January 11, 2007, the Student was administered the Wechsler Intelligence Scale for Children-Fourth Edition which yielded a Full Scale

Intelligence Quotient (FSIQ) of 67 or extremely low. On May 25, 2010, the Student received an Adaptive Behavior Assessment which yielded lower functioning skills. On November 16, 2010, Student's IEP team reviewed the Adaptive Behavioral Assessment and, notwithstanding the low FSIQ and adaptive scores, determined the Student is not a student with mental retardation because the assessments were not an accurate measure of the Student's cognition and adaptive functioning.

Findings 2, 4.

Student was administered the Woodcock Reading Mastery Test on December 15, 2010, December 20, 2011, and October 7, 2013. Each time, the assessments yielded very low academic achievement scores. Finding 6.

On November 8, 2013, the IEP team at PRIOR SPECIAL SCHOOL convened and noted the Student had poor peer relationships, could be oppositional and defiant, and had difficulty managing his anger and frustration. Strategies used to support the Student's behaviors included isolating him from peers until he can be more focused for the classroom; afternoon breaks from his classroom to take a walk to expel excessive energies and being able to earn rewards for appropriate behaviors. Finding 3.

The November 8, 2014 IEP team determined the Student required 23.5 hours of specialized instruction per week outside the general education setting, 30 minutes of Occupational Therapy (OT) per week outside the general education setting, and 2.5 hours of behavioral support services per week outside the general education setting. The team also reviewed the impact of break in service on critical skills, degree of regression of critical skills, time required for recoupment of critical skills, analysis of data to support Extended School Year (ESY) services,

ESY designation, and goals and eligibility for ESY transportation, and subsequently determined the Student required ESY services. Finally, the team determined the Student would remain at Prior Special School. Finding 7.

The Petitioner was not satisfied with the services at Prior Special School and requested that the Student be removed from the school. On June 3, 2014, DCPS issued a prior written notice that stated the Student must remain at Prior Special School. The Petitioner enrolled the Student in CITY SCHOOL 1, his neighborhood [REDACTED] school at the beginning of the 2014-2015 school year. Finding 8.

On November 3, 2014, the City School 1 IEP team convened with the Petitioner but not with her attorney or advocate present. The team noted that since his enrollment, Student had experienced significant behavioral difficulties. As of November 3, 2015, he had been suspended on two separate occasions for possession of a weapon and inciting others to physical violence. Aside from suspensions, the Student had been absent five times and arrived late daily. When in attendance, the Student was often observed being out of his assigned location. He was observed walking hallways or running from staff members attempting to return him to class. He had also been in verbal altercations with both staff and peers. The team determined that Student required 23.5 hours of specialized instruction per week outside the general education setting and 120 minutes of OT per month outside the general education setting. The team reduced the Student's behavioral support services to 240 minutes of per month outside the general education setting. The team determined they would discuss ESY eligibility at a later date. Finding 11.

On December 18, 2014, the school social worker completed a functional behavioral assessment (FBA). Student's teachers completed Ohio Scale reports that stated the Student argued and had fits of anger most of the time, caused trouble for no reason and broke rules. The Student was administered the Global Assessment for Individual Needs (GAIN) which placed the Student in the low severity range on the internalizing disorders, substance use and crime/violence. However the school social worker cautioned that the results may not be accurate due to Student's reluctance to participate. Based on teacher interviews and direct observations, the school social worker noted Student left class without permission and roamed the hallway for the duration of the class period on a daily basis. As a result Student was not receiving instruction. The school social worker hypothesized the function of Student's behaviors was to escape the structure of the academic environment and gain peer attention. The school social worker recommended that the IEP team review the FBA, develop a behavior intervention plan (BIP) and that Student receive behavior support services. Finding 12.

On January 26, 2015, the IEP team convened without the Petitioner or her attorney. The team noted that the Student was responding to behavioral interventions that had been implemented in the Behavioral and Educational Supports (BES) program at City School 1. The team further noted the Student was producing satisfactory class work; therefore, his behavioral services hours were decreased due to improvement in his behavior. In written expression, the team noted the Student continued to rely heavily on the teacher and other staff members, requiring multiple prompts to stay on task and not to disrupt other classmates; however, he was producing satisfactory class work. The team

determined that Student continued to be a student with a Specific Learning Disability and an Other Health Impairment under the IDEA. The team developed measurable goals for the Student. The team determined that Student required 23.5 hours of specialized instruction per week outside the general education setting, 120 minutes of behavior support services per month outside the general education setting, and 30 minutes of OT per month. The team did not discuss the need for ESY services, but the Student did not regress during the winter break.

Finding 19.

On March 2, 2015, the Student was administered the Woodcock Johnson Tests of Achievement-Third Edition, which yielded significantly below average scores in all areas of academic achievement. Finding 21.

Additional Findings of Fact

After considering all of the evidence received at April 28, 2016 due process hearing in the present case, as well as the argument and legal memorandum of counsel, this Hearing Officer's additional Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Mother. Testimony of Mother.
2. Student is eligible for special education and related services. His April 21, 2016 IEP identifies his disability classification as Multiple Disabilities (MD) based upon the underlying impairments Specific Learning Disability (SLD) and Other Health Impairment - Attention Deficit or Attention Deficit Hyperactivity Disorder (OHI-ADHD). His last special education eligibility meeting date was July 22, 2015. Exhibit R-5.
3. Student attended nonpublic special education schools for a number of years. From the 2010-2011 school year through the 2013-2014 school year, Student

attended Prior Special School. For the 2014-2015 school year, Student attended City School 1. Student has attended City School 2 since the beginning of the 2015-2016 school year. Exhibit P-26, Testimony of Mother.

4. Student's May 13, 2015 DCPS IEP, developed by his IEP team at City School 1, provided annual goals for Mathematics, Reading, Written Expression, Emotional, Social and Behavioral Development and Motor Skills/Physical Development. For Special Education and Related Services, the IEP provided 23.5 hours per week of Specialized Instruction, outside general education, and 120 minutes per month of Behavioral Support Services. The IEP also provided 30 minutes per month of Occupational Therapy (OT) Consultation Services. The IEP team determined that Extended School Year (ESY) services were not required for the provision of FAPE. Exhibit P-9.

5. The May 13, 2015 IEP team specified that Student's behavioral and emotional concerns required full-time therapeutic intervention. The IEP team affirmed that Student's behavior impedes his learning or that of other students. The IEP states that Student has poor peer relationships, can be oppositional and defiant and has difficulty managing his anger and frustration; that he struggles to maintain appropriate behaviors for the school environment and his need to interact with peers often interrupts his academic process where he is overly engaged with his peers and will encourage them to act out negatively; that Student struggles to have positive relationships with staff; that Student can be verbally aggressive often making threats to staff; that in one instance, Student had actually struck a staff member; that Student is defensive with adults and will become agitated when given directives that he does not want to comply with; that when angry, Student will "AWOL from his classroom" and is resistant to taking breaks to reorganize his thoughts. Exhibit P-9.

6. For Present Levels of Performance in the Emotional, Social and Behavioral Development area of concern, the May 13, 2015 IEP Team reported that since his enrollment at City School 1, Student had experienced significant behavioral difficulties. To date, he had been suspended on two separate occasions for possession of a weapon and inciting others to physical violence. In addition, aside from suspensions, Student had been absent 5 times and arrived late daily. When in attendance, Student was often observed being out of his assigned location. He was observed walking hallways or running from staff members attempting to return him to class. He had also been in verbal altercations with both staff and peers. Student was reported to struggle to have positive relationships with staff. He was described as defensive with adults and would become agitated with directives. When given a directive, Student was quick to become defensive where he would start to argue, curse and make threats towards staff. Student was reported to also struggle with maintaining his anger and frustration. During those times, he would curse and yell at staff, push staff and threaten to punch staff. In one incident, Student had become physically aggressive with staff. Student was reported to usually require “space and one-to-one intervention in order to calm himself.” Exhibit P-9.

7. On June 8, 2015, INDEPENDENT PSYCHOLOGIST conducted an Independent Educational Evaluation (IEE) Comprehensive Psychological Reevaluation of Student (the IEE Evaluation). Student’s full-scale IQ tested in the Extremely Low range, but Independent Psychologist felt this score was an underestimate of his actual abilities due to motivational factors. Based on Student’s presentation, Independent Psychologist felt that Student’s actual functioning was significantly higher and above the range of IQ scores associated with an Intellectual Disability (ID). Student’s scores on the

Woodcock-Johnson III Tests of Achievement indicated that his overall level of achievement was Very Low. Independent Psychologist reported that Student's social-emotional functioning was an area of serious concern. She recommended that Student's MDT team consider restoring Student's disability classification of Emotional Disturbance (ED). (Independent Psychologist reported that the ED disability had appeared on Student's 2009 IEP and it was unclear why it "disappeared" on subsequent IEPs.) Independent Psychologist diagnosed Student with Specific Learning Disability, Severe, with impairments in Reading, Written Expression, and Mathematics; Oppositional Defiant Disorder (ODD), Mild; and ADHD, Combined Presentation. Exhibit P-26.

8. On July 22, 2015, City School 1 convened an MDT eligibility meeting for Student. CITY SCHOOL 1 PSYCHOLOGIST recommended that the MDT team reject the IEE Evaluation because of "great concern" with Independent Psychologist's comment on Student's performance on cognitive testing as being an underestimate of Student's actual abilities due to motivational factors. School Psychologist 1 opined that based upon cognitive testing in 2010, which yielded a full-scale IQ score of 67 and adaptive behavior ratings in the Extremely Low range, and upon Independent Psychologist's July 2015 testing, Student's profile indicated real and significant deficits which warranted a suspicion of possible ID. City School 1 Psychologist stated there was insufficient data to determine that Student did not demonstrate an ID. At the July 22, 2015 MDT meeting, the MDT team "rejected" the IEE psychological evaluation and declined to find Student eligible for the ED disability classification. The team determined that Student remained eligible for special education services under the MD (SLD and OHI-ADHD) disability. The DCPS representative recommended that Student be given another comprehensive psychological reevaluation and an OT assessment. Exhibits P-25, P-36.

9. DCPS has not conduct a psychological or OT reevaluation of Student since the July 22, 2015 MDT meeting. Testimony of LEA Representative.

10. For the current, 2015-2016, school year, Student is placed in the BES program at City School 2. He attends “Specials” classes with nondisabled peers. His grades are mostly A’s and B’s. Testimony of LEA Rep. Grade-wise, Student is performing well. Testimony of Educational Advocate.

11. On March 14, 2016, Student was involved in an incident in which he allegedly assaulted ASSISTANT PRINCIPAL. Assistant Principal reported that she was standing next to the scan station at the school entrance ensuring that students did not try to sneak cell phones into the school building. According to Assistant Principal’s account, when Student entered the building the scan machine alarm sounded. Assistant Principal asked Student to turn in his cell phone and walk through the scan machine once again. Although Student claimed he did not have a cell phone, the device fell out of his jacket and Assistant Principal retrieved it. Student told Assistant Principal, “B_____ give me my mother-f_____ing cell phone” which Assistant Principal refused to do. Very irate, Student went behind the table where Assistant Principal was standing, punched her right arm, and then grabbed her wrist and attempted to take the phone from her. When a security officer intervened, Student also assaulted her on the arm. Student then breached security and entered the building. After the incident was over, Assistant Principal went to the school nurse, who attended to her wrist where skin had been broken. Exhibit R-2.

12. Subsequent to the incident, on March 15, 2016, the City School 2 principal issued a Notice of Proposed Disciplinary Action, stating that he was proposing a 25-day out of school disciplinary suspension of Student for Assault/Physical Attack on Student

or Staff, and further that Student would not be readmitted to the school until the DCPS office of Instructional Superintendent reviewed the matter and either authorized or modified the proposed suspension. Exhibit P-56. The disciplinary suspension was upheld by the Instructional Superintendent. Testimony of Educational Advocate.

13. On March 22, 2016, City School 2 convened a Manifestation Determination Review (MDR) meeting to determine whether Student's March 14, 2016 code of conduct violation (alleged assault on school staff) was a manifestation of Student's disability. The team considered Assistant Principal's written report on the incident, Student's May 13, 2015 IEP, his February 11, 2016 Behavior Intervention Plan, the July 6, 2015 IEE comprehensive psychological evaluation and reported observations of Student's behavior. The team noted that while Student had a history of aggressive behavior, physical aggression had not been observed in the current school year at City School 2. The team determined that Student knew that he was not allowed to bring a cell phone into the school building and that he was aware of the consequences for violating the rule. The MDR team decided that Student's March 14, 2016 code of conduct violation was not a manifestation of his disability because, since transferring to City School 2, Student's aggression had only been expressed verbally – not physically. The MDR team also determined that the violation was not a result of DCPS' failure to implement Student's IEP. Mother, Petitioner's Counsel and Educational Advocate attended the MDR meeting. They disagreed with the MDR team determination. Exhibits R-3, P-41; Testimony of LEA Rep, Testimony of Educational Advocate.

14. When the City School 2 Principal issued the Notice of Proposed Disciplinary Action on March 15, 2016, Mother was told that Student would be allowed to attend the school's daily "Twilight" program until there was a hearing on the appeal of

his 25-day suspension. At the Twilight program, Student would have been able to continue to receive services from his special education teacher and behavioral support counseling. Testimony of LEA Rep. When Mother took Student to the Twilight program, there were problems getting Student admitted to the building because he had previously been excluded from the school. Testimony of Mother. Student only attended the Twilight session two or three times. Testimony of LEA Rep.

15. Student returned to school, after his disciplinary suspension ended, on April 26, 2016. Testimony of LEA Rep.

16. Nonpublic School is a special education day school in suburban Maryland. Student has not been issued an acceptance letter by Nonpublic School, pending a pre-admissions interview. Testimony of Principal.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006). For student discipline appeals, the DCMR, 5B DCMR § 2510.16, places the burden of proof on DCPS to demonstrate that the student's behavior was not a manifestation of his disability.

Analysis

A.

Did the City School 2 MDR team erroneously determine on March 22, 2016 that Student's March 14, 2016 code of conduct violation was not a manifestation of his IDEA disability?

On March 14, 2016, Student allegedly assaulted Assistant Principal and a security guard after Assistant Principal confiscated Student's cell phone, which Student had attempted to take into the school building in violation of school rules. As a consequence of the incident, Student was placed on a long term, 25 day, out-of-school suspension. On March 22, 2016, the City School 2 Manifestation Determination Review (MDR) team determined that Student's alleged assault on the school staff, was not a manifestation of his IDEA disability. DCPS maintains that the MDR team's determination was correct. Petitioner contends that the March 14, 2016 code of conduct infraction was a manifestation of Student's disability.

The IDEA prohibits the punishment of a student with a disability for misbehavior that is a manifestation of the disability. Prior to suspending a student with a disability for more than 10 school days, the school must conduct a "manifestation determination" during which the student's parents and educators consider the relevant information in the student's file, as well as information provided by teacher observations and the parents, to determine whether the conduct at issue "was caused by, or had a direct and substantial relationship to, the child's disability" or "was the direct result of the local educational agency's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E).² If the

²

FN8. Section 1415(k)(1)(E) provides in full:

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the

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

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

2510.12 In carrying out a review, the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team:

- (a) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including:
 - (1) Evaluation and diagnostic and results, or other relevant information supplied by the parents of the child;
 - (2) Observations of the child;
 - (3) The child's IEP and placement; and
 - (4) Any other material deemed relevant by the IEP Team,

IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

- (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

Id.

including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel; and

(b) Then determines that:

(1) In relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(2) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

Id.

Based upon the testimony of DCPS' witnesses, it appears that the March 22, 2016 MDR team's decision that Student's alleged assault on school staff was not a manifestation of his disability was based upon two factors: first, that Student knew he was not allowed to bring his cell phone into the school and was aware of the consequences of breaking that rule and second, that since transferring to City School 2 at the beginning of the 2015-2016 school year, Student had not previously exhibited physically aggressive behavior. For example, School Psychologist testified that she agreed with the MDR determination because she believed that Student was aware of the consequences of his behavior and LEA Rep testified that school staff had not seen any aggressive behaviors by Student since he started at City School 2. However, these considerations do not directly address the relevant MDR query required by the IDEA, that is, whether Student's conduct on March 14, 2016 was "caused by, or had a direct and substantial relationship" to his disability. *See* 20 U.S.C. § 1415(k)(1)(E), *supra*.

The May 13, 2015 IEP, developed at City School 1, described how the social emotional aspect of Student's disability affected him. Student was reported to struggle with maintaining his anger and frustration. He had been in verbal altercations with both staff and peers. Significantly, Student was described in the IEP as defensive with adults and, when given a directive, would become agitated and quick to become defensive – where he would start to argue, curse and make threats towards staff. During such times, Student would curse and yell at staff, push staff and threaten to punch staff. The May 13, 2015 IEP team reported that in these crises, Student usually required space and one-to-one intervention in order to calm himself. In the May 13, 2015 IEP, Student was provided specific annual goals, as well as behavioral support services, designed to address his social emotional concerns, including keeping his hands to himself and positively managing his anger and frustration. The July 6, 2015 IEE psychological reevaluation report also highlighted Student's social-emotional functioning as an area of serious concern and recommended that Student's MDT team consider restoring Emotional Disturbance (ED) as a disability classification for Student.

Assistant Principal's report of Student's reaction, when she confiscated his cell phone in the March 14, 2016 incident, appears to describe the very type of behavior which the May 13, 2015 IEP team described as a social emotional concern for Student, namely agitation, defensiveness, cursing and physical aggressiveness when given a directive by an adult. In the March 14, 2016 incident, Assistant Principal first directed Student to turn over his cell phone and then confiscated the device when it fell out of Student's jacket. Student suddenly became "very irate", cursed the Assistant Principal, and allegedly punched her and grabbed her wrist in an attempt to recover the cell phone. He then allegedly assaulted the school security officer when she intervened. This account

of Student's aggression is quite consistent with the May 13, 2015 IEP's explanation of how student's disability affects him socially-emotionally, and how he struggles with maintaining his anger and frustration when given a directive by an adult. I find, therefore, that the MDR team erred in determining that Student's code of conduct violation on March 14, 2016 did not have a direct and substantial relationship to his disability and I conclude that DCPS has not met its burden of proof to demonstrate that Student's behavior on March 14, 2016 was not a manifestation of his disability.

B.

Did DCPS deny Student a FAPE by failing to provide an appropriate Alternative Interim Educational Setting following his March 2016 suspension?

Petitioner also alleges that DCPS denied Student a FAPE by not providing him educational services for the 25-day disciplinary suspension following his March 14, 2016 code of conduct violation. When a code of conduct violation is not a manifestation of a student's disability, the IDEA requires that, when the student is removed from his current educational placement for more than ten consecutive school days for the violation, the student must continue to receive educational services, known as alternative interim services, so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. *See* 34 CFR § 300.530(d).

Because in this decision, I overturn the MDR team's determination that Student's March 14, 2016 code of conduct violation was not a manifestation of his disability, the IDEA's provision for alternative interim services is not applicable. Notwithstanding, for completeness I will address this issue. After issuing notice of the proposed 25-day disciplinary suspension of Student, the City School 2 principal authorized Student to

attend the school's Twilight program, where he would continue to be offered instruction and IEP services. Although due to errors made by the security staff, Student was initially barred from entering the school for the Twilight program, Student did attend at least two sessions of the program. Student did not attend the Twilight program for the rest of his suspension, but it is not clear from the evidence whether his nonattendance was due to a failure by Student or Mother to make a reasonable effort for Student to attend the program or to school staff's excluding him from the building. I conclude that Petitioner has not met her burden of proof to show that following Student's March 15, 2015 disciplinary suspension, DCPS failed to provide Student alternative interim services, so as to enable him to continue to participate in the general education curriculum.

C.

Since September 2015, has DCPS failed to offer Student an appropriate IEP which meets his requirement for additional behavioral support services, a more restrictive therapeutic setting, meaningful and measurable annual goals to address his aggression and poor engagement with peers and staff and maladaptive and aggressive/disrespectful behaviors and communication style, and which provides for ESY services?

Student's 2015-2016 school year IEP was developed on May 15, 2015 when he was still attending City School 1. At City School 1, Student was placed in the self-contained Behavior and Emotional Support (BES) classroom. For the Emotional, Social and Behavioral Development area of concern, the May 15, 2015 IEP included annual goals to address Student's issues with peer interaction, anger/frustration management, and life stressors including social skills, anger management and self awareness. The IEP provided Student 23.5 hours per week of Specialized Instruction outside general education and 120 minutes per month of behavioral support services. For the 2015-2016 school year, Mother enrolled Student in City School 2, where he was placed in that

school's BES classroom. DCPS offered Student a revised IEP on April 21, 2016, that increased his behavioral support services to 240 minutes per month.

Mother argues that by September 2015, City School 2 should have revised Student's May 15, 2015 IEP to increase his behavioral support services to 240 minutes per month and that Student should have been placed in a stand-alone special education day school. In support of this argument, she points to the facts that Student had been placed in a special school before Mother enrolled him in City School 1 for the 2014-2015 school year and that DCPS has now agreed to increase Student's behavioral support services. *See* Petitioner's Written Summation, filed May 2, 2016.

The IDEA requires that an LEA must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP, as appropriate. *See* 34 CFR § 300.324(b). Student's IEP was reviewed near the end of the 2014-2015 school year. Petitioner has not alleged in this case that the May 15, 2015 IEP was inappropriate for Student when it was developed or that she requested that the IEP be revised in fall 2015. Moreover, Student's grades at City School 2 have been very good and his teachers have reported that in the BES classroom, Student is compliant and completes his work, although he sometimes needs redirection when off task. Absent a request from the parent, the IDEA did not require DCPS to ensure that the May 15, 2015 IEP was reviewed in September 2015, just because Student changed DCPS schools.

Petitioner also contends that City School 2 should have added Extended School Year (ESY) services to Student's IEP. ESY services are necessary to a FAPE when the benefits a child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *MM ex rel. DM*

v. School Dist. of Greenville County, 303 F.3d 523, 537-538 (4th Cir. 2002). The May 13, 2015 IEP team at City School 1 IEP team determined that ESY services were not required to provide Student a FAPE. When Student entered City School 2, the 2015 summer program was, of course, already over. Therefore, there was no reason for City School 2 to consider revising Student's IEP to add ESY services between September 2015 and March 28, 2016, when the due process complaint in the present case was filed. In sum, I find that Petitioner has not met her burden of proof to establish that Student was denied a FAPE by the failure of DCPS to revise Student's IEP since September 2015.

Remedy

In this decision, I have found that DCPS did not carry its burden of proof to establish that Student's March 14, 2016 code of conduct violation was not a manifestation of his IDEA disability and I overturn the MDR team's determination. I will also order DCPS to review and update Student's Behavior Intervention Plan pursuant to 34 CFR § 300.530(f). Student missed some 25 school days of his special education program as a result of the erroneous MDR determination. This was a denial of FAPE and Student is entitled to compensatory education to put a him "in the position he would be in absent the FAPE denial." *See B.D. v. District of Columbia*, 2016 WL 1104846 at 4 (D.C.Cir. Mar. 22, 2016).

The proper amount of compensatory education depends upon how much more progress a student might have shown if he had received the required special education services, and upon the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). This means that the Petitioner has

the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.” *Phillips ex rel. T.P. v. District of Columbia*, 736 F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.)). *See, also, Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012). (The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate.)

Educational Advocate proposed a compensatory education plan, which does not correlate to the denial of FAPE in this case. (For example, Educational Advocate seeks compensation “for the past two years when [Student] has remained in the setting/location/placement where he has not been able to fully access his education . . .” The appropriateness of Student’s placement prior to the current school year was not at issue in this case.) There was a lack of other evidence, supported by the hearing record, upon which to craft an “individualized,” “fact-specific,” compensatory education award. *See Reid, supra*, 401 F.3d at 242. *See, also, Friendship Edison Public Charter School Collegiate Campus v. Nesbitt* 532 F.Supp.2d 121, 124 (D.D.C.2008) (“In the present case, there is no doubt that the record did not enable the Hearing Officer to craft an award that can pass muster under *Reid*.”) Therefore, I deny, without prejudice, Petitioner’s request for a compensatory education award and I encourage, but will not order, the parties to endeavor to reach a voluntary agreement on appropriate compensatory education to compensate Student for missing some 25 days of his regular school program following his March 15, 2016 disciplinary suspension.

Petitioner also requested the hearing officer to order DCPS to provide her a copy of a video recording of the March 14, 2016 disciplinary incident, allegedly captured on a

City School 2 security camera. Under the IDEA, DCPS must provide parents an opportunity to inspect and review their child’s educational records. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). The term “education records” is defined as those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution, or by a party acting for the agency or institution. *See* 34 CFR §§ 300.611(b), 99.3. Petitioner has not shown how the school’s security camera video recordings are records directly related to Student. I find that the IDEA does not require that DCPS provide the parent a copy of the purported security camera recording of the March 14, 2016 incident.

ORDER

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

ORDERED:

1. The City School 2 March 22, 2016 MDR determination is set aside as erroneous. Student’s disciplinary suspension from City School, for the March 14, 2016 code of conduct violation is annulled. DCPS shall ensure that all references to Student’s suspension from City School 2 because of the March 14, 2016 incident, are expunged from Student’s education records;
2. DCPS shall ensure that Student’s behavior intervention plan is promptly updated, pursuant to 34 CFR § 300.530(f).
3. Petitioner’s request for a compensatory education award is denied without prejudice and
4. All other relief requested by the Petitioner herein is denied.

Date: May 6, 2016

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team