

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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**Confidential**

<b>Parent on behalf of Student<sup>1</sup></b>	)	<b>Case No. 2020-0138</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: September 22, 23, and 28, 2020</b>
	)	<b>Conducted by Video Conference</b>
<b>v.</b>	)	
	)	<b>Date Issued: October 6, 2020</b>
<b>Public Charter School</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student (“Student”) attending a DCPS Public School. On July 30, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that School A denied Student a free appropriate public education (“FAPE”) by failing to implement her/his Individualized Education Program (“IEP”), (2) failing to provide appropriate IEPs, and (5) expelling him/her on or about February 6, 2020. On August 10, 2020, School A filed a *Response to the Due Process Complaint* (“*Response*”), denying that Student’s expulsion constituted a denial of FAPE.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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<sup>1</sup> Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### PROCEDURAL HISTORY

On July 30, 2020, Petitioner filed the *Complaint* alleging, *inter alia*, that School A denied Student a free appropriate public education (“FAPE”) by (1) failing to implement her/his 2018-19 IEP, (2) failing to provide an appropriate IEP for the 2018-19 school year, (3) failing to provide an appropriate IEP for the 2019-20 IEP, (4) failing to implement her/his 2019-20 IEP, and (5) expelling him/her on or about February 6, 2020 despite her/his objectionable behavior being a manifestation of her/his disability. Petitioner also alleged violation of Section 504 of the Rehabilitation Act, the Elementary and Secondary Education Act, and Title VI of the Civil Rights Act of 1964. On August 10, 2020, Respondent filed its *Response*, denying that Student’s expulsion constituted a denial of FAPE.

The prehearing conference in this case took place by video conference on August 14, 2020. Respondent’s counsel objected to expedited adjudication on any issue other than those contemplated in 34 C.F.R. Section 300.532. I invited counsel to file a motion to dismiss or bifurcate on or before August 17, 2020. Petitioner’s reply would be due on August 20, 2020, and the prehearing conference was postponed until August 27, 2020 and was completed that day.

On August 17, 2020, Respondent filed School A’s *Motion to Dismiss or, in the Alternative, to Bifurcate* (“*Motion to Dismiss*”). On August 20, 2020, Petitioner filed *Petitioner’s Opposition to Respondent’s Motion to Dismiss Non-Expedited Matters or to Bifurcate Those Matter; Petitioner’s Response to other Issues Noted in Respondent’s Motion; and Notice of Respondent’s Failure to Give Notice Pursuant to S.O.P. 406(A)*. On August 25, 2020, I issued an Order on Motion to Dismiss bifurcating the issues relating to the manifestation determination from all other allegations in the *Complaint*.

The prehearing conference was reconvened on August 27, 2020. I issued the Prehearing Order on August 28, 2020. On September 12, 2020, Petitioner filed *Petitioner’s Response to the Pre-Hearing Order of August 28, 2020*. On September 4, 2020, Petitioner filed *Petitioner’s Supplemental Response to the Pre-Hearing Conference Order of August 28, 2020*. On September 4, I issued an Amended Prehearing Order.

On September 14, 2020, Petitioner filed *Petitioner’s Motion for Partial Summary Judgment*. On September 18, 2020, I issued an Order denying this motion, as attachments to the motion revealed a genuine dispute of the facts at issue.

The due process hearing was conducted on September 22, 23, and 28, 2020 by video conference and was closed to the public. The hearing was interpreted in Spanish. Respondent’s Disclosures, submitted on September 15, 2020, contained a witness list of eight witnesses and documents R-1 through R-27, including R11A. On September 18, 2020, Petitioner filed objections to Respondent’s disclosures. Petitioner objected to expert testimony from Staff Member D, Witness H, Psychologist A, Social Worker A, and Witness G as “the credentials or expertise stated in their resumes are insufficient to support expert status.” Petitioner also objected to proposed exhibits R5-R9, R11-R14, and R18. I sustained

the objections to R11 and R14, and overruled all other objections to Respondent's exhibits. Thus, Respondent's Exhibits R1-R10, R12-R13, and R15-R27, including R11A, were admitted into evidence.

Petitioner's disclosure statement, submitted on September 15, 2020, included a witness list of eight individuals and 296 pages of exhibits. On September 18, 2020, Petitioner filed objections to Petitioner's disclosures; the witnesses were not properly identified nor was their testimony proffered consistently with the requirements set forth in the Amended Prehearing Order, and the exhibits were not properly numbered. By email on September 18, 2020, I directed Petitioner's counsel to file corrected disclosures by the close of business on September 21, 2020, which she did on September 21, 2020. The corrected disclosures revealed that there were 28 proposed exhibits. Respondent's objections related to P1-P4, P8, P10, P12, P14-P16, P19, P22, and P24-P28. I sustained objections to a blank page in P8, deferred ruling on P2, and sustained objections to P15, P19, P22, P24, P27, and P28. Petitioner's proposed Exhibit 28 was a Psychoeducational Evaluation conducted after the expulsion hearing at issue. I ruled it to be inadmissible as it was unavailable to the decision-makers at the time of the expulsion hearing. Therefore, at the inception of the hearing, Petitioner's Exhibits P1, P3-P14, P16-P18, P20-P21, P23, and P25-P26 were admitted into evidence, and a determination of the admissibility of P2 was deferred. At the close of testimony, I sustained the objection to P2.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, and Witness G. Petitioner offered Witness B as an expert in Special Education, Speech and Language Pathology, and Auditory Processing. I sustained Respondent's objection to the proposed expertise in Special Education, but allowed opinion testimony as to Speech and Language Pathology and Auditory Processing. Respondent presented only Witness H for direct testimony. Respondent offered Witness H as an expert in Special Education. I overruled Petitioner's objection. At the conclusion of the testimony, the parties' representatives provided oral closing arguments.

## ISSUES

As identified in the *Amended Prehearing Order*, the issues to be determined in this case are as follows:

1. Whether the behavior that led to Student's expulsion on February 6, 2020 was the direct result of School A's failure to implement the Student's IEP and Student's Behavior Plan ("BIP").
2. Whether School A denied student a FAPE by expelling her/him on or about February 6, 2020 despite her/his objectionable behavior being a manifestation of her/his disability.

## FINDINGS OF FACT

1. Student is X years old and was in grade I at School A during the 2019-2020

school year.<sup>2</sup>

2. On May 1, 2017, when Student was in grade F at School B, the District of Columbia Public Schools completed a Comprehensive Psychological Evaluation of him/her.<sup>3</sup> The evaluation reported that:

[Student] is reported to have experienced a number of serious head traumas when living with [her/his] maternal grandmother in Honduras. The first incident happened when [s/he] was 5. [S/he] fell from something high and required stiches. The second incident happened when [s/he] was 7. [S/he] was ejected from a car in which [s/he] was a passenger and needed 10 stiches. An additional head injury was reported to school personnel. That incident resulted when [Student] was riding a bicycle down a rocky hill. [S/he] hit [her/his] head and [her/his] scalp was exposed. However, [his/her] family attempted to treat the head injury at home rather than seek medical care...

[Student] is reported to have witnessed the murder of [his/her] grandfather when [s/he] was between the ages of 6-8. In addition, [Student] is reported by [his/her] mother to have experienced significant trauma, resulting in Post Traumatic Stress Disorder, following in [her/his] journey from Honduras to the U.S. before being detained by Immigration and Customs Enforcement and reunited with [her/his] mother.<sup>4</sup>

On the Woodcock-Johnson Tests of Achievement, Student presented with levels of cognitive functioning that fell within the significantly below average range. His/her skills appear to be inadequately developed in reading, broad reading, mathematics, broad mathematics, mathematics calculations, written language and broad written language as compared to his/her grade level peers. The results of the adaptive behavior assessment were inconclusive as Petitioner and Student's teacher did not agree that Student's behavior was inconsistent with that of an average same-age student. Examiner A opined that Student met the criteria for Intellectual Disability.<sup>5</sup>

3. On May 11, 2017, School B found Student eligible for services as a student with Intellectual Disability.<sup>6</sup>

4. School A completed a Functional Behavior Assessment on March 20, 2019.<sup>7</sup> The Background Information provided the following:

It is reported that [Student] experienced multiple, serious head traumas/injuries while [s/he] was living in Honduras with [her/his] maternal

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<sup>2</sup> Petitioner's Exhibit ("P:") 8 at page 2 electronic page number 37. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P8:2 (37).

<sup>3</sup> Respondent's Exhibit ("R:") 1 at page 1 electronic page number 6. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R1:1 (6).

<sup>4</sup> *Id.* at 2 (7).

<sup>5</sup> *Id.* at 11 (16).

<sup>6</sup> P12:1 (82).

<sup>7</sup> R3:1 (26).

grandmother. In addition to head traumas, it is also reported that [Student] witnessed the murder of [her/his] grandfather between ages 6 and 8, which resulted in Post Traumatic Stress Disorder (PTSD) and was intensified in [her/his] immigration to the United States. During [her/his] journey to the United States, [Student] was detained by Immigration and Customs Enforcement before [s/he] was ultimately reunited with [her/his] mother.<sup>8</sup>

The Behavioral Data included the list of 58 behavioral incidents during the 2018-19 school year: 12 off-task, 9 cellphone usage, 7 inappropriate language, 6 skipping, 5 eloping, 4 refusals to follow directions, 2 headphone usage, 2 roaming, 2 other, 1 vandalism, 1 running in hall, 2 harassments (1 sexual), 1 food/drink during class, 1 possession of lighter, 1 trespassing, and 1 play-fighting.<sup>9</sup> The Functional Assessment Screening Tool determined that Student's desire for access to preferred items and to escape from tasks or activities were the most likely reasons for Student's disruptive and off-task behaviors.<sup>10</sup>

The suggested Noncontingent Reinforcement with Extinction was that Student "will receive positive social reinforcement (praise, positive adult attention) on scheduled intervals, whether or not [s/he] has engaged in a target behavior during the period of time. Social reinforcement is given to [Student] even if off-task or disruptive tasks have occurred during the scheduled period of time (every 5 minutes)... However, reinforcement is withheld if [Student] is engaging in the target behavior at the time of the scheduled delivery. If the target behavior is happening at the time of the scheduled delivery, withhold social reinforcement until there has been an absence of the target behavior for 1 minute. All target behaviors should be ignored, unless they are unsafe. If a behavior is unsafe and cannot be ignored, follow the discipline protocol (formal warning, conference, referral) ..."<sup>11</sup>

5. On June 29, 2019, Examiner B completed a Bilingual Neuropsychological Evaluation of Student.<sup>12</sup> Student was referred for the evaluation due to a "request for more data given recent misbehaviors and concern that [her/his] initial psychological evaluation did not fully investigate prior head trauma."<sup>13</sup> On the Behavior Assessment System, two of Student's teachers described Student as a student "with Clinically Significant Externalizing Problems (hyperactivity, aggression, and conduct problems). Both teachers also endorsed symptoms of depression. Both teachers identified Clinically Significant School Problems associated with attention and learning problems. Teachers also endorsed At-Risk to Clinically Significant Adaptive Skills problems associated with deficits in adaptability, social skills, leadership, study skills, and functional communications."<sup>14</sup> Examiner B concurred with the classification of Intellectual Disability:

Results from this evaluation support continued eligibility as a student with an Intellectual Disability. It also revealed Very Low language proficiency in both languages. Results also suggest low reasoning, working memory, and

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1-2 (26-27).

<sup>10</sup> *Id.* at 6, 23 (31, 48).

<sup>11</sup> *Id.* at 24 (49).

<sup>12</sup> R4:1 (52); P17:1 (167).

<sup>13</sup> R4:1 (52)

<sup>14</sup> *Id.* at 7 (57).

processing speed deficits that may lead to poor decision making especially when needing to make decisions fast, when the situation (stimulus) changes, or when [s/he] needs to explain/communicate [his/her] thoughts. Results also suggest that these deficits are manifested as clinically significant externalizing problems (hyperactivity, conduct problems, aggression).<sup>15</sup>

The only reference to head trauma in the evaluation is as follows:

A 2017 psychological evaluation reported, and [Petitioner] confirmed, several head injuries. She was unable to confirm if they resulted in concussions or loss of consciousness because they occurred when she was in the United States.<sup>16</sup>

6. On July 8, 2019, upon a review of the Bilingual Neuropsychological Evaluation, School A issued a Final Eligibility Determination changing his/her disability classification to Traumatic Brain Injury (“TBI”).<sup>17</sup> In the Evaluation Summary Report, the Description of Concerns in mathematics was as follows: “[Student’s] math teacher reports that in class, [s/he] has improved in being able to advocate for [her/himself] by asking clarifying questions and taking notes in class. [His/her] teachers would like to see [Student] continue to ask questions when [s/he] is confused and engage in lessons. [Student] struggles to stay on task and is often distracted by peers, [her/his] chromebook, or listening to music.”<sup>18</sup> In Reading, the Description of Concerns was as follows:

[Student] is able to work more effectively with the use of chunked materials, visual organizers, and a quiet environment. [Student] is engaged in [her/his] readings when [s/he] is on task. [S/he] also enjoys being given responsibility. [His/her] decoding skills can increase over time and can be seen as a relative strength for [her/him], as well as [her/his] vocabulary. At times [Student] advocates for [him/herself] and will ask questions if [redacted] is unclear or uncertain about what [s/he] is supposed to do, but often [s/he] doesn’t ask for help unless approached by a teacher. His/her listening comprehension outstrips [her/his] reading comprehension, but is often not enough to help her/him with more complex analysis of characters or text structure on grade level. [S/he] is able to engage in analytical discussion of high-interest material on [her/his] independent level, but struggles to stay focused and comprehending during whole-group work of grade level texts.<sup>19</sup>

In Written Expression, the Description of Concerns was as follows:

It has been recommended that [s/he] attend lunch tutoring to receive attention on Tuesdays and Thursdays, but [Student] has not shown up. If [Student] is to successfully pass English for Q4, [s/he] will need to get to class on time,

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<sup>15</sup> *Id.* at 8 (59).

<sup>16</sup> *Id.* at 2 (53).

<sup>17</sup> R5:1 (70), *see* “Adverse Impact;” R6:1 (86)

<sup>18</sup> R5:6 (75).

<sup>19</sup> *Id.* at 7 (76).

remain in class, ignore peer distractions during class, refrain from distracting [her/his] peers, and produce work. [Student's] English teacher knows that [s/he] is capable of producing quality work, based on [her/his] class participation, which can be meaningful at times and the fact that [s/he] has done well in English in the past. However, [s/he] needs to produce written work and complete assigned assessment to receive a grade for English.<sup>20</sup>

In Emotional, Social and Behavioral Development, the Description of Concerns was as follows:

[Student] experiences large challenges with defiance toward adults and rules, impulse control, emotion regulation, and emotional awareness. With academic work, it appears as though [Student] has very little intrinsic motivation, and [s/he] requires great amounts of attention and prompting to do academic work. In [Student's] attempts to connect with others, [s/he] can be found socializing with individuals outside of school who are not healthy for [Student's] overall well being, and these friends encourage [Student] to engage in unsafe behavior. During the school day, this translates to [Student] exhibiting increased aggression, although not always physical, towards peers and a growing disinterest in engaging in academic work.<sup>21</sup>

Based on findings from a recent Occupational Therapy ("OT") evaluation, Student was found to be qualified for increased OT services to improve his/her visual perception, handwriting, typing, sensorial, and self-regulation skills, and would benefit from 180 minutes/month of OT services outside of general education.<sup>22</sup>

The IEP team concluded that having met developmental milestones, "[s/he] does not qualify under the classification of Intellectual Disability."<sup>23</sup> The team determined that Student was eligible for special education services under the classification of Traumatic Brain Injury ("TBI").<sup>24</sup>

7. On August 26, 2019, School A issued an Amended IEP changing Student's classification to TBI and prescribing three hours per month of OT services inside general education.<sup>25</sup> In the area of Emotional, Social, and Behavioral Development, the Present Levels of Academic Achievement and Functional Performance included the following:

Over the past year, [Student] has been working with different counselors through local clinics for therapeutic support and mentorship. Through these sessions, counselors note that [Student] is a kind and thoughtful student but has experienced challenges with managing [her/his] impulses, distress or frustration, and [Student] is working toward healthy ways to express [her/his] anger... When asked about any concerns she might have, [Student's] mother

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<sup>20</sup> *Id.* at 10 (79).

<sup>21</sup> *Id.* at 11 (80).

<sup>22</sup> *Id.* at 14 (83).

<sup>23</sup> R6:3 (88).

<sup>24</sup> *Id.* at 7-8 (92-93).

<sup>25</sup> R7:1, 14 (97, 110).

shared that she is concerned about [Student's] defiant and angry behavior at home, which she notes began after [Student's] cell phone was taken away... In counseling at [School A], [Student] is inconsistent in [his/her] engagement with sessions. Initially, [Student] was focused and participated openly and fully in conversations and activities. Over time, [Student] has become more disengaged, and it has been challenging for the counselor to motivate and engage with [Student]. In response, [Student] has been doing play therapy and theraplay to build a stronger attachment to the counselor and counseling setting. According to the Strengths and Difficulties questionnaire administered to [Student's] teacher in April 2018, [Student] scored into the high range for levels of overall stress, challenges with focus and concentration, and behavior difficulties. [Student's] team is currently working toward implementing a new BIP for [Student] to help [her/him] have better tools that assist [him/her] with focusing and self-regulation in the classroom. Moving forward, [Student] should work toward increasing an awareness about how [s/he] is feeling and utilizing age appropriate coping strategies that help [her/him] manage challenging emotions.<sup>26</sup>

The Amended IEP included two behavioral goals:

- (1) [Student] will gain an increased awareness about how [s/he] is feeling, as evidenced by identification of [her/his] triggers and an ability to share how [s/he] is feeling...
- (2) [Student] will utilize age appropriate coping strategies and modes of self-expression, such as mindfulness skills or expressing [her/his] feelings, to handle emotions such as anger, sadness, and frustration...<sup>27</sup>

The Amended IEP prescribed 23 hours per month of specialized instruction outside general education, 38.5 hours per month of specialized instruction inside general education, 120 minutes per month of BSS, and 180 minutes per month of OT services.<sup>28</sup>

8. On January 8, 2020, at the recommendation of the Metropolitan Police, Student's "team assembled for a family meeting to review behavior expectations and discuss [her/his] gang affiliation... The expectations included: (1) surrender of cellphone when arriving to campus, (2) no gang signs displayed on campus as intimidation, and (3) no elopement."<sup>29</sup>

9. On January 9, 2020, Student was suspended for three days for pointing fake finger guns at students and staff, kicking a chair in class, skipping two classes, and calling a staff member a bitch.<sup>30</sup>

10. On January 15, 2020, School A developed a Behavior Intervention Plan

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<sup>26</sup> R7:11 (107).

<sup>27</sup> *Id.* at 12 (108).

<sup>28</sup> *Id.* at 14 (110).

<sup>29</sup> R10:15 (145).

<sup>30</sup> R8:1 (124).



(“BIP”). The BIP was developed to address off-task behavior, “e.g. looking around, looking at another website on computer, noncompliance, etc.,” and disruptive behavior, “When the student is engaging in behaviors that cause interruption to classroom and/or peers (e.g. calling out, inappropriate language, talking to peers during instruction, etc.),”<sup>31</sup> The BIP required Student to receive positive social reinforcement (praise, positive adult attention) on scheduled intervals, whether or not s/he has engaged in a target behavior, except it is to be delayed so as not to provide reinforcement while actually engaged in a target behavior. “All target behaviors should be ignored, unless they are unsafe. Do not verbally engage (ex. ‘don’t do that,’ ‘stop that’), do not follow/chase [REDACTED], do not block an exit). If a behavior is unsafe and cannot be ignored, follow the [School A] discipline protocol. Unsafe behaviors are defined as behaviors that can potentially cause physical danger to [Student], school staff, or [her/his] classmates, but also verbal threats or explicit language that make others feel unsafe.” The BIP also would reward Student with five-minute breaks for completed work assignments. If Student leaves campus without permission, s/he would not be admitted back into the building that day. If s/he refuses to turn in his/her cellphone, his/her mother would be contacted to come to school to get the phone. If the phone still cannot be acquired, Student would receive an in-school suspension.<sup>32</sup>

11. Between September 19, 2019 and January 29, 2020, Student received 80 “referrals” for inappropriate conduct.<sup>33</sup> Of this total, Student was cited for using her/his cellphone in the building 31 times, for skipping class, roaming the halls, or eloping 21 times, and inappropriate language seven times.<sup>34</sup> On September 16, 2019, Student received a one-day in-school suspension for making a “gesture of having a gun and shooting towards the front of the class and staying too long in the bathroom.”<sup>35</sup> On October 24, 2019, Student received a one-day in-school suspension for eloping from class, using his/her cellphone, disrupting class, and flashing gang signs.<sup>36</sup> On November 4, 2019, Student received a “lunch detention” for shaking a soda bottle and pretending to ejaculate.<sup>37</sup> On December 19, 2019, s/he received a one-day in-school suspension for eloping, using his/her cellphone, and inappropriate language.<sup>38</sup> On January 8, 2020, Student received a one-day in-school suspension for igniting a cigarette lighter and using his/her cellphone in class.<sup>39</sup> On January 9, 2020, s/he was suspended for three days for being physically aggressive with staff members trying to search [REDACTED], pointing fake finger guns at students and staff, kicking a chair in class, skipping two classes, and calling a staff member a bitch.<sup>40</sup> That day s/he also received a one-day in-school suspension for skipping his/her seventh period class.<sup>41</sup> On January 14, 2020,

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<sup>31</sup> R9:1 (127).

<sup>32</sup> *Id.* at 2 (128).

<sup>33</sup> R10:16-21 (146-51).

<sup>34</sup> There were multiple violations on some occasions. For example, on November 19, 2019, s/he was referred for “Off-task” behavior, but the report also indicates s/he was using her/his cell phone in class. That day s/he was also referred for “Skipping” class, but the report indicates s/he also used inappropriate language. *Id.* at 18 (148).

<sup>35</sup> *Id.* at 21 (151).

<sup>36</sup> *Id.* at 20 (150).

<sup>37</sup> *Id.* at 19 (149).

<sup>38</sup> *Id.* at 17 (147).

<sup>39</sup> *Id.*

<sup>40</sup> R8:1 (124).

<sup>41</sup> R10 at 17 (147).

Student received a one-day suspension for harassment of a staff member.<sup>42</sup>

12. Service Trackers indicate that Student received 190 minutes of BSS in September 2019, 120 minutes in October 2019, 90 minutes in November 2019 (Social worker was out sick once, school was closed for Thanksgiving once), 60 minutes in December 2019 (Student was unavailable once, and school was closed for winter break once), and 90 minutes in January 2020 (Student was unavailable for three 30-minute sessions).<sup>43</sup>

13. On January 27, 2020, Student was referred for “Threat/Intimidation: Throwing gang signs.” The parent was contacted, School A’s Discipline Team was notified, and there was “Police Involvement.”<sup>44</sup> On January 29, 2020, Teacher A notified School A officials by text that Student was using hands signs and was advised to submit a referral.<sup>45</sup> That day, Student was again cited for flashing gang signs and was informed of an in-school suspension. “When [Student] found out that [s/he] would have ISS [in-school suspension] tomorrow for gang signs, [s/he] went to [Teacher A], got in her face and said, “Why the fuck would you say I was throwing signs?” [S/he] then left her room and in the hall said, “I’m going to shoot [Teacher A].”<sup>46</sup>

14. On January 29, 2020, School A notified Petitioner of Student’s immediate suspension and that it would initiate expulsion proceedings for Student “due to [her/his] tier 4 behavior outlined as use of, threatened use, or transfer of any weapon.”<sup>47</sup>

15. School A convened a Manifestation Determination Review (“MDR”) meeting on February 5, 2020.<sup>48</sup> The team reviewed statements taken from students and staff members about the incidents on January 29, 2020.<sup>49</sup> Staff Member B<sup>50</sup> reported that Staff Member A came into Staff Member B’s office for her to translate for Petitioner that Student was being suspended for “using had gestures” in Teacher A’s classroom. Student “became visibly upset,” indicated that s/he needed to speak with Teacher A, and headed in the direction of Teacher A’s classroom. Staff Member A tried to get Student to say to her what Student intended to say to Teacher A, to prevent making “matters worse.” Student responded, “I don’t give a fuck.” Upon reaching Teacher A’s classroom, Student “got centimeters from her face and said, “Why the fuck did you say I did that?” Upon leaving Teacher A’s classroom, s/he told Staff Member A “I’m going to shoot [Teacher A]. [S/he] then walked into a corner and was on [his/her] phone. A few minutes later [s/he] left with [his/her] social worker and mother.”<sup>51</sup> Staff Member A’s report was consistent with Staff Member B’s.<sup>52</sup>

Teacher A reported that Student was sitting in the classroom:

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<sup>42</sup> *Id.* at 16 (146)

<sup>43</sup> R19:1-6 (205-210).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 14 (144).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1-2 (131-32).

<sup>48</sup> Testimony of Witness H.

<sup>49</sup> R10:7-13 (137 -143).

<sup>50</sup> See R5:3 (72) in which Staff Member B was identified as a translator.

<sup>51</sup> R10:7 (137).

<sup>52</sup> *Id.* at 7-8 (137-38).

“on [his/her] Chromebook watching a movie or video or some sort but was quiet throughout class. At one point, [Student] got up from [her/his] seat to throw [her/his] cookie wrapper away. On the way back to [her/his] seat, [s/he] made some hand gestures in the light of the projector which was seen on the board. I asked [Student] to have a seat and [s/he] obliged. Then I chatted [Translator A] to alert her that [Student] had made some hand signs and to ask what to do next. After several minutes, [Staff Member B] and [Staff Member C] told me that I needed to place a referral. Since I was in the middle of teaching, I never got around to putting in the referral at that point in time. [Student] was then called to the front desk for early dismissal.

Since students were working on independent/partner practice, I then went to my computer to start a referral but never completed it. [Student] came back into the room a few minutes after being dismissed and said in my ear “Why did you fucking say I was throwing up gang signs?...”

Later in the conference room with [Staff Member B], [Staff Member A], and two DCPD officers, I was informed about the threat that was made to me. According to [Staff Member B] and [Staff Member A], after leaving class the second time [Student] said “I’m going to shoot [Teacher A].” However, it is important to note that I never heard [her/him] say this and [s/he] never said it in my presence.”<sup>53</sup>

Student 1 confirmed Student’s distracted behavior in class before the hand signs incident and confirmed that upon Student’s return to the classroom, “when [s/he] came in [s/he] was cussing at [Teacher A] and [his/her] mom was right there.”<sup>54</sup>

Student 3 confirmed Student’s distracted behavior in some detail, but did not mention the hand signs incident. “Later on they called on the phone asking for [him/her] at the front desk... [S/he] then later came back after like five minutes and seemed mad and [s/he] did curse and was mad to why [s/he] had to leave...”<sup>55</sup>

The statements of a total of twelve students was reviewed at the meeting. Their statements were generally consistent that Student was behaving in a distracted manner at the beginning of the class, none mentioned seeing hand signs, Student was called out of the classroom, when s/he returned s/he used profanity towards Teacher A, then left the room with her/his mother and staff members.<sup>56</sup> Student 9, Student 11, and Student 12 all confirmed that Student used profanity while asking Teacher A why she said something.<sup>57</sup>

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<sup>53</sup> *Id.* at 8/9 (138-39).

<sup>54</sup> *Id.* at 9 (139).

<sup>55</sup> *Id.* at 10 (140).

<sup>56</sup> *Id.* at 9-13 (139-43).

<sup>57</sup> *Id.* at 11-13 (141-43).

Student also testified at the MDR hearing. Concerning her/his alleged comments to and/or about Teacher A on January 29, 2020, Student stated: “‘I did not want to say it to her, if I say this to her I would get in trouble.’ Asked: Did you want to hurt her? ‘No. I do not want to be at [School A]. I want to be at Bell.’ Asked: Why? Too hard? Too many rules? ‘No’ Asked: Do you think [School A] has been fair to you: ‘No.’ Then, ‘Yes.’”<sup>58</sup> Social Worker A testified that “PTSD is still affecting [her/his] decision-making in the building, even though it is not considered a disability by IDEA.”<sup>59</sup>

16. The MDR team determined unanimously that Student’s actions toward Teacher A on January 29, 2020 were not a manifestation of Student’s disability.<sup>60</sup> The team’s decision was influenced largely by the comments of Psychologist A,<sup>61</sup> who participated in the meeting by telephone and opined that Student’s behavior was not a manifestation of his/her disability, TBI.<sup>62</sup> Witness F, Student’s Case Manager at a youth center, attended the MDR meeting at Petitioner’s request. When asked if she believed Student’s behavior towards Teacher A was a manifestation of Student’s disability, Witness F testified that she concurred with Dr. [REDACTED] that it was not a manifestation, but was, instead, due to Student’s involvement with “negative peers.”<sup>63</sup> Witness H testified that Witness F stated that she knew that Student’s behavior was not a manifestation of a disability and specifically attributed the behavior to Student’s gang activity, not just “negative peers.” Petitioner also indicated that she had no disagreement with Dr. [REDACTED]’ determination.<sup>64</sup>

17. School A conducted a “judiciary review” meeting, immediately after the MDR meeting, to consider Student’s expulsion.<sup>65</sup>

18. On February 6, 2020, School A notified Petitioner of Student’s expulsion “due to tier 4 behavior outlined as use of, threatened use, or transfer of any weapon.”<sup>66</sup>

19. On February 7, 2020, School A offered to provide Student FAPE through online services for the remainder of the school year if Petitioner did not enroll Student elsewhere.<sup>67</sup>

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local

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<sup>58</sup> *Id.* at 24 (153); R12:2 (172).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 25 (154), Testimony of Witness F and Witness H; R12:3 (173).

<sup>61</sup> *See curriculum vitae*, R20:1 (213). Dr. [REDACTED]’ *curriculum vitae* indicates that he has earned a doctorate in Education and a national certification in School Psychology, but holds no license in the District of Columbia.

<sup>62</sup> Testimony of Witness H. *See* R12:3 (173).

<sup>63</sup> *See* R12:3 (173).

<sup>64</sup> Testimony of Witness F, Witness H and R13:3-4 (179-80).

<sup>65</sup> Testimony of Witness H; R12: 3-4 (173-74).

<sup>66</sup> R10:27-28 (155-56). School A’s Expulsion Process, which includes the definition of “tier 4” behaviors, is set forth at R10:29-32 (157-160).

<sup>67</sup> R15-1 (184).

legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

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: 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.<sup>68</sup>

The issues in this case involve the alleged failure to implement Student's IEP and BIP, and the appropriateness of the manifestation determination. It does not involve the appropriateness of Student's IEP or placement as Petitioner did not allege that Respondent failed to provide an appropriate interim placement. Therefore, under District of Columbia law, the Petitioner bears the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence.<sup>69</sup>

**Whether the behavior that led to Student's expulsion on February 6, 2020 was the direct result of School A's failure to implement the Student's IEP and Student's Behavior Plan ("BIP").**

The IDEA regulations that govern the expulsion of students with disabilities provides as follows:

(e) Manifestation determination.

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.<sup>70</sup>

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<sup>68</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>69</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>70</sup> 34 C.F.R. §300.530(e).

The parties offered conflicting information as to what was considered at the MDR meeting. Witness F, Student's case manager, testified that the only materials with which she was provided were Petitioner's procedural rights and the witness statements described in paragraph 14 and cited in footnote 47 above. Witness F testified that there was no discussion of Student's IEP or BIP. However, Witness H was School A's Director of Student Support Services at the time of the MDR meeting and prepared materials for that meeting. Witness H testified that the team members were provided a packet including Student's IEP, BIP, FBA, evaluations, an MDR form, the witness statements, and procedural safeguards. The last three documents were provided in English and Spanish. Witness H also testified that before Psychologist A gave his opinion as to manifestation, he reviewed Student's evaluations, FBA, and BIP.

While there is conflicting evidence as to whether the team discussed Student's IEP and BIP, the evidence is overwhelming that incident that led to Student's expulsion was not a consequence of a failure to implement the IEP or BIP. As Student was expelled for the threatened use of a weapon against a teacher, the relevant portion of the IEP is the section on Emotional, Social, and Behavioral Development and the services prescribed for this Area of Concern. Witness G, School A's Social Worker, testified that she consistently provided the services prescribed in the IEP, and that Student made progress on one goal, but "not much" on the second. The service trackers reveal that Student received considerably more services in September 2019 than were prescribed and s/he received the amount prescribed in October. In November, s/he received 90 of the 120 hours prescribed; the social worker was absent on one other occasion and the other scheduled session was during the Thanksgiving break. In December, s/he received 60 of the prescribed 120 minutes of BSS, but was absent once and the other scheduled session was during the winter break. In January 2020, s/he received 90 of the 120 minutes, but was absent for three sessions that would have made up for the sessions missed in November and December. Thus, there is no persuasive evidence that School A failed to provide the BSS prescribed in Student's IEP.

As for Student's BIP, that document closely tracked the FBA conducted in March 2019. As set forth in paragraph 9 above, the BIP required that "All target behaviors should be ignored, unless they are unsafe." Petitioner's counsel argued that when Student flashed gang signs in Teacher A's class on January 29, 2020, Teacher A violated the BIP by failing to ignore the behavior, which was not inherently unsafe. Petitioner's argument fails for two obvious reasons. First, Teacher A, in fact, complied with the BIP by not confronting Student when s/he flashed the gang signs. Instead, Teacher A sent a text to school officials notifying them of Student's repeated violation; Student was cited for the same offense two days earlier. Teacher A was directed to submit a referral for Student's offense, but the record indicates that she may not have done so that day.<sup>71</sup> Second, Student was not expelled for flashing gang signs. The behavior for which s/he was expelled was threatening the use of a weapon against Teacher A. Such behavior is inherently unsafe, and School A did not fail to comply with Student's BIP by electing not to ignore it. Again, "ignore" in the BIP does not mean that inappropriate behavior should not be addressed. Rather, it directed staff members to refrain from confronting Student for behavior that is not unsafe in front of classmates.

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<sup>71</sup> See Teacher A's statement in paragraph 15 above.

I conclude that Petitioner has failed to meet her burden of proving that Student's expulsion on February 6, 2020 was the direct result of School A's failure to implement the Student's IEP and Student's BIP.

**Whether School A denied student a FAPE by expelling him/her on or about February 6, 2020 despite his/her objectionable behavior being a manifestation of her/his disability.**

When Student arrived at School A in the fall of 2017, her/his School B IEP classified her/his disability as Intellectual Disability. This was consistent with Examiner A's May 1, 2017 Comprehensive Psychological Evaluation. On June 29, 2019, Examiner B completed a Bilingual Neuropsychological Evaluation of Student due to expressed concerns about Student's history of head trauma. Examiner B's evaluation concurred with the classification of Intellectual Disability. He noted the reports of head trauma when Student lived in Honduras, but stated that Petitioner was unable to confirm that the injuries resulted in concussions or loss of consciousness, because they occurred when she was in the United States and Student was in Honduras. Thus, the record includes no medical diagnosis related to head trauma. Nevertheless, shortly thereafter, School A's IEP team issued a Final Eligibility Determination changing Student's disability classification to TBI.

The regulations define Intellectual Disability as follows:

Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. The term "intellectual disability" was formerly termed "mental retardation."<sup>72</sup>

It defines TBI as follows:

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

While Student had a history of being a habitual nuisance in class, her/his indiscretions were generally harmless until January 2020. As noted in the FBA discussed in paragraph 4 above, none of ■ 58 incidents of misconduct during the 2018-19 school year involved physical aggression or threats to adults or peers. During the 2019-20 school year, of the 80 "referrals" for inappropriate conduct, 59 were for using her/his cellphone, skipping class, or

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<sup>72</sup> 34 C.F.R. §300.8(c)(6).

inappropriate language. Thus, prior to January 2020, none of Student's referrals involved aggressive physical behavior or threats towards any student or staff member. However, in January 2020, School A officials became concerned about Student's alleged gang involvement. On January 8, 2020, at the recommendation of the Metropolitan Police, Student's "team assembled for a family meeting to review behavior expectations and discuss her/his gang affiliation... The expectations included: (1) surrender of cellphone when arriving to campus, (2) no gang signs displayed on campus as intimidation, and (3) no elopement."<sup>73</sup> After Student was suspended the next day for pointing fake finger guns at students and staff, kicking a chair in class, skipping two classes, and calling a staff member a bitch, School A developed Student's BIP on January 15, 2020. The incidents leading to her/his expulsion occurred two weeks later.

Petitioner's classification of TBI is questionable, as the record includes no treatment documentation, or medical diagnosis related to a head injury. Petitioner reported the injuries to Examiner B, but admitted that she had no first-hand knowledge of them, as she was in the United States when they occurred. Student was in Honduras at the time, and s/he did not receive medical attention for the alleged injuries. Therefore, Examiner B confirmed the prior classification of Intellectual Disability. Despite the lack of a medical diagnosis or recommendation from a licensed psychologist, School A reclassified Student with a TBI on the basis of Petitioner's representation as to the prior undocumented head injuries.

Witness G testified that the MDR team also discussed Petitioner's history of PTSD. However, like TBI, there is no medical diagnosis of PTSD in the record, and it is not listed among the recognized disabilities in 34 C.F.R. Section 300.8. Petitioner offered no testimony that a PTSD trigger led Student to threaten harm to Teacher A.

Petitioner has offered no evidence that Student's threats were a product of either Intellectual Disability or TBI.<sup>74</sup> Student's aggressive behavior towards others seemed to escalate rapidly in January 2020 along with apparent gang affiliation. Until then, while s/he had continually violated school rules, the infractions were relatively minor and did not motivate School A to develop a BIP. The BIP was developed only after the school learned of Student's gang involvement and an incident exhibiting uncharacteristic aggressiveness on January 9, 2020.

Witness F, Student's case manager, testified that at the MDR meeting, both she and Petitioner agreed that Student's threat was not the product of her/his disability, but was due

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<sup>73</sup> R10:15 (145).

<sup>74</sup> At the inception of the hearing, I excluded testimony of Psychologist B concerning a Psycho-educational Evaluation she conducted of Student seven weeks after the MDR meeting on the grounds that it was unavailable to the MDR team at the time it made its determination. During the hearing, Petitioner's counsel requested leave to have Psychologist B testify as to the validity of the MDR team's determination based on the information available to them at the time. I denied this request because Petitioner's counsel's disclosure statement indicated that Psychologist B would testify only as to the evaluation she conducted. Petitioner's counsel was aware weeks before the hearing that Examiner A was unwilling to testify as to his evaluation, prompting Petitioner's counsel to request a Notice to Appear for him on September 1, 2020, which I issued on September 9, 2020. Thus, knowing that Examiner A was unlikely to appear, if Petitioner's counsel desired to present expert testimony concerning the validity of the MDR team's determination based on the documentation available to them, she was obligated to divulge that intent in her witness list consistent with the directive in the Prehearing Order: "The witness list must include... a brief description of the nature of the witness' testimony."



to her/his association with “negative peers.” Both Petitioner and Witness F signed the MDR sign-in sheet indicating that they had no disagreement with the determination that the behavior was not a manifestation of Student’s disability.<sup>75</sup> Witness H testified that Witness F emphatically stated that she knew that Student’s behavior was not a manifestation of a disability and Witness F specifically attributed the behavior to Student’s gang activity, not just “negative peers.” At any rate, there was unanimous agreement at the MDR meeting that Student’s behavior was due to peer pressure or gang activity, not her/his disability.

Petitioner had the opportunity to rebut this testimony at the hearing, or to claim confusion or a misunderstanding as to what was occurring during the MDR meeting, but she elected not to testify. Therefore, I conclude that Petitioner has failed to meet her burden of proving that the behavior that led to Student’s expulsion was a manifestation of her/his disability.

### **RELIEF**

For relief, Petitioner requested (1) expungement of all School A records relating to Student’s expulsion, (2) funding for independent comprehensive psychological, speech and language, auditory processing, and occupational therapy evaluations; (3) compensatory education, (4) and attorney’s fees.

### **ORDER**

Upon consideration of the *Complaint*, Respondent’s *Response*, the exhibits from the parties’ disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

### **APPEAL RIGHTS**

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

*Terry Michael Banks*

Terry Michael Banks

Hearing Officer

Date: October 6, 2020

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<sup>75</sup> R13:3-4 (179-80).

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