DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT, [1]	)
Petitioner,	)
v.	)
	)
	) **Bruce Ryan, Hearing Officer**
	)
Respondent.	) **Issued: February 12, 2012**
	)
	)

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent The Complaint was filed December 27, 2011, by an -year old adult student ("Petitioner" or the "Student") who resides in the District of Columbia and attended until September 2011. Petitioner claims that that denied him a free appropriate public education ("FAPE") by: (1) failing to identify, locate and evaluate him as a student with a suspected disability; (2) failing to provide him with an appropriate interim alternative placement; and/or (3) failing to provide him an appropriate educational placement.

On December 29, 2011, filed its Response, which denies the allegations of the Complaint that the Student was not provided with a FAPE. Specifically, responds that (1) "Based on academic performance there appeared no reason to test this student for special education"; (2) "On September 12, 2011, [Student] threatened a teacher with bodily harm and as a general education student was expelled pursuant to the procedures provided for by the Code of Conduct"; and (3) did not fail to provide an appropriate placement.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On January 5, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues. At the PHC, the parties reported that they had not yet held a resolution meeting and agreed to hold a further PHC on or about January 19, 2012, following completion of resolution. Based on the discussion at the 1/5/2012 PHC, the Hearing Officer notified the parties in writing that it was appropriate to treat the Complaint as requesting a hearing under 34 C.F.R. 300.532 (a) and 300.534, for purposes of the expedited due process hearing provisions of 34 C.F.R. 300.532 (c) and Section 1008 A of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). [2] Accordingly, the resolution period was to end on January 11, 2012; and the expedited hearing period was to end on January 31, 2012.

On January 10, 2012, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the statutory resolution period early.

On January 13, 2012, the Hearing Officer issued a Prehearing Order. The Due Process Hearing was scheduled for January 30, 2012, as agreed by the parties. The parties filed their five-day disclosures on January 25, 2012.

The Due Process Hearing was then held in hearing room 2004 on January 30, 2012, at 9:00 A.M. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-13.

Respondent's Exhibits: R-1 through R-4.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Student; and (2) Educational Advocate ("EA") (testifying as an expert by stipulation).

Respondent's Witnesses: (1) Principal; (2) Registrar; and (3) David Cranford, Ph. D., Clinical Director (testifying as an expert by stipulation).

moved for a directed finding following presentation of Petitioner's case; ruling on the motion was taken under advisement; presented it case; and oral closing statements were presented by both parties at the conclusion of the hearing.

[2] This classification decision for processing the Complaint was stated to be without prejudice to any ultimate determination regarding the merits of such claim, either on motion or after hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is February 13, 2012.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

> **(1) Child Find** — Did deny the Student a FAPE by failing to identify, locate, and evaluate Petitioner as a student with a disability who is in need of special education and related services during the 2010-11 school year?
>
> **(2) Discipline Procedures/Placement** — Did deny the Student a FAPE by failing to comply with the requirements of 34 C.F.R. §§ 300.530-537, including failing to provide an appropriate interim alternative placement (or, alternatively, any appropriate placement) for Petitioner upon expelling him on or about September 13, 2011?
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> As noted in the Prehearing Order, to prevail under Issue 2, Petitioner must first prove (*inter alia*) that he is entitled to assert the protections of the IDEA discipline procedure provisions pursuant to 34 C.F.R. 300.534.

Petitioner requests that the Hearing Officer make appropriate findings and order that: (a) Petitioner be immediately placed back at (b) fund an independent comprehensive psychological evaluation; (c) Options convene an IEP team meeting to review the evaluations and to discuss and determine eligibility; and/or (d) Petitioner be awarded appropriate compensatory education, including credit recovery courses to allow him to graduate this year.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Petitioner is an year old adult student who is a resident of the District of Columbia. *See P-1; Pet. Test.* He has never been determined to be eligible for special education and related services as a child with a disability under the IDEA. *Id.*
2. is a D.C. public charter school which has a significant proportion of special education children and other students with behavioral issues. *See Allen Test.; EA Test.* acts as its own local educational agency under the IDEA ("LEA").
3. Petitioner attended for the 2010-11 school year (11th grade) and the beginning of the 2011-12 school year (12th grade). *See P-1; Pet. Test.; see also P-5 – P-9.* Prior to that, Petitioner attended School for 9th and 10th grades. *Pet. Test.*
4. During the 2010-11 school year, Petitioner had a number of behavior incidents in school, including disrespecting staff and fighting on a school bus. *Pet. Test.; Allen Test.* However, despite the misbehaviors and 13 days of unexcused absences, Petitioner's grades improved. He received two A's, three B's, and two C's as final grades on his report card that year. *See R-1.*
5. Near the end of the 2010-11 school year, the *Wide Range Achievement Test, Fourth Edition* ("*WRAT-4*") was administered to all students at *See R-2.* Petitioner received scores of 89 (6.8 grade equivalency) on Sentence Comprehension and 102 (11.2 grade equivalency) on Math Computation. *Id.*
6. Petitioner's grades, *WRAT-4* results, and other evidence of academic performance during the 2010-11 school year did not justify referring Petitioner for special education evaluation. *See Cranford Test.*
7. During the beginning of the 2011-12 school year, Petitioner engaged in several additional misbehaviors. These included: Classroom Disruption on 08/23/2011; Classroom Disruption on 08/31/2011; and Disrespect/Talking Back to Staff on 09/08/2011. *See R-3.*
8. On or about September 12, 2011, Petitioner was again cited for Disrespect/Talking Back to Staff, as well as Threats of Injury to Person/Property, and recommended expulsion. This disciplinary action resulted from an incident in which Petitioner refused the Principal's request that he move to a certain location in the cafeteria for seating, used

profanity and became verbally abusive, and moved toward the Principal in a threatening manner. *R-3, p. 4; P-10; Allen Test.*

9. As a result of the 09/12/2011 incident and recommended expulsion, Petitioner withdrew from as of 09/20/2011, ostensibly to enroll in another D.C. public school. *P-11.* His last day of school attendance was 09/19/2011. *Id.* Petitioner has not enrolled in or attended any school since that date. *Pet. Test. See also Adams-Banks Test.*
10. did not evaluate Petitioner for special education eligibility, and neither Petitioner nor his parent ever requested an evaluation prior to filing the Complaint in this matter.
11. Petitioner's parent never expressed concern in writing to supervisory or administrative personnel of or to one of Petitioner's teachers, that Petitioner was in need of special education or related services prior to filing the Complaint in this matter.
12. No personnel of including Petitioner's teacher, ever expressed specific concerns about a pattern of behavior demonstrated by Petitioner directly to the director of special education or other supervisory personnel of

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to prove by a preponderance of the evidence that has denied him a FAPE, [3] as alleged under Issues 1 and 2.

1. Child Find

The "child find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §300.111(a). Child find must include any children "suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. §300.111(c) (1). OSSE regulations

[3] Under the IDEA, FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

further require LEAs, such as to ensure that such procedures are implemented for all children residing in the District. 5-E DCMR §3002.1(d). As the courts have made clear, these provisions impose an affirmative duty to identify, locate, and evaluate all such children. *Reid v. District of Columbia,* 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Hawkins v. District of Columbia,* 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the "child find" obligation "extends to all children ***suspected*** of having a disability, not merely to those students who are ultimately determined to have a disability." *N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008) (emphasis in original).

Petitioner claims that failed to identify, locate and evaluate him as a student with a suspected disability, in violation of its affirmative child-find obligations, during the 2010-11 and 2011-12 school years. However, Petitioner never alleges what disability (or disabilities) he should have been suspected as having, or why he believes he meets the IDEA eligibility criteria for such disabilities. There also is no evidence that Petitioner or his parent ever informed anyone at that they thought he was disabled or that he had been diagnosed with some disabling condition. Nor did they ever request to evaluate Petitioner while he attended school there. Instead, Petitioner's entire argument seems to be that (a) he misbehaved in school, and (b) based solely on such misbehavior should have suspected a disability and evaluated him under the IDEA.

The IDEA does not dictate that every child with behavioral problems in school must be suspected of having an emotional or other disability. To the contrary, the IDEA expressly cautions that the "emotional disturbance" disability category "does not apply to children who are socially maladjusted" unless they meet the specific criteria for emotional disturbance. 34 C.F.R. §300.8 (c) (4) (ii). *See also N.C. v. Bedford Central School Dist.,* 51 IDELR 149 (2d Cir. 2008) (distinguishing qualifying emotional disturbance from mere "bad conduct"). For Petitioner to have a "serious emotional disturbance" as defined under the IDEA, his condition would need to exhibit one or more of the specific characteristics set forth in Section 300.8 (c) (4), [4] over a long

[4] The characteristics include: "(A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; [and] (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. §300.8 (c) (4) (i).

period of time and to a marked degree that adversely affected his educational performance. 34 C.F.R. §300.8 (c) (4) (i) (A) – (E).

In this case, Petitioner failed to allege or prove which, if any, of these characteristics were exhibited – let alone "over a long period of time" and "to a marked degree" – such that should have suspected that Petitioner had such a condition. Moreover, Clinical Director/ Psychologist testified that he did not see any pattern of behavior that would cause the school to suspect that Petitioner had a disability, as opposed to his being socially maladjusted. *Cranford Test.* The Hearing Officer finds Dr. Cranford's testimony to be credible, and Petitioner did not present any contradicting expert testimony. There also is no evidence that was ever presented with information reflecting any evaluation or diagnosis of such serious emotional disturbance, or of any qualifying "Other Health Impairment" such as Attention Deficit Hyperactivity Disorder ("ADHD"). *Cf. N.G. v. District of Columbia, supra.*

In addition, Petitioner failed to present any evidence to suggest that any such condition adversely affected his educational performance, as is required for both an emotional disturbance and ADHD. *Id.,* §§300.8 (c) (4), (9) (ii). To the contrary, the objective evidence presented by indicates that Petitioner's educational performance was ***not*** adversely affected. *See R-1, R-2; see also Cranford Test.*

Accordingly, the Hearing Officer concludes that Petitioner failed to prove by a preponderance of the evidence that should have identified, located and evaluated the Student as a child with a suspected disability prior to September 12, 2011. Thus, prevails under Issue 1.

2. Discipline Procedures/Placement Claim

Issue 2 concerns the discipline procedures of the IDEA, contained at 34 C.F.R. §§ 300.530 through 300.537.[5] The IDEA extends these protections to children not yet determined eligible for special education and related services only under certain specified circumstances.

[5] Section 300.530(b) provides that school personnel "may remove a child with a disability who violates a code of student conduct from his or her current placement ...for not more than 10 consecutive school days...as long as those removals do not constitute a change of placement under §300.536." 34 C.F.R. § 300.530 (b). Section 300.536, in turn, provides that a "change of placement" occurs if either (1) the removal is for more than 10 consecutive school days, or (2) the child is subject to a series of removals totaling more than 10 school days in a school year that constitute a "pattern," determined on a case-by-case basis consistent with the factors spelled out in

Thus, Section 300.534 (a) provides that a "child who has not been determined to be eligible for special education and related services under [IDEA, Part B] and who has engaged in behavior that violated a code of conduct, may assert any of the protections provided for in this part ***if the public agency had knowledge (as determined in accordance with paragraph (b) of this subsection) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."*** 34 C.F.R. §300.534 (a) (emphasis added). Paragraph (b) of that section goes on to provide that a "public agency must be deemed to have [such] knowledge ...if before the behavior that precipitated the disciplinary action occurred" –

> (1) The ***parent of the child expressed concern in writing*** to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, ***that the child is in need of special education and related services;***
>
> (2) The ***parent of the child requested an evaluation of the child*** pursuant to [IDEA]; or
>
> (3) The teacher of the child, or other ***personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child*** directly to the director of special education of the agency or to other supervisory personnel of the agency.'

Id. § 300.534(b) (emphasis added).

In this case, Petitioner has failed to prove that any of the above three conditions existed prior to the September 12, 2011 incident that resulted in his expulsion and/or withdrawal from

There is no evidence that the parent expressed concern in writing that Petitioner needed special education and related services; there is no evidence that the parent requested an evaluation of Petitioner; and there is no evidence that Petitioner's teacher or other LEA personnel expressed specific concerns about a pattern of behavior.[6] As a result, is not deemed to have knowledge that Petitioner was a child with a disability prior to 09/12/2011, and Petitioner is not entitled to the protections of the IDEA's discipline procedures.

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the rule. 34 C.F.R. §300.536. If such a "change of placement" occurs, then within 10 school days, the LEA must convene a meeting of the IEP team to make a "manifestation determination" as provided in Section 300.530 (e). The IEP Team is to review all relevant information and then determine if the conduct in question was "caused by, or had a direct and substantial relationship to, the child's disability" or was "the direct result of the LEA's failure to implement the IEP." 34 C.F.R. §300.530 (e) (1). If the IEP Team determines that the conduct was a manifestation of the child's disability, then the Team must either (i) conduct an FBA and implement a BIP, or (ii) review and modify an existing BIP. 34 C.F.R. §300.530 (f) (1). In addition, the child generally must be returned to the placement from which the child was removed. *Id.*, §300.530 (f) (2).

[6] Petitioner's educational advocate testified that, in her expert opinion, the three incidents occurring between 08/23/2011 and 09/08/2011 "should have been reported" to an administrator at *EA Test.* However, even assuming that they had been, there is no evidence that a teacher or other personnel reported any specific concerns about a pattern of behavior sufficient to trigger the protections of 34 C.F.R. §§ 300.530-300.537 as of 09/12/2011 disciplinary action.

Accordingly, the Hearing Officer concludes that Petitioner failed to prove his discipline procedures claim by a preponderance of the evidence. Thus, prevails under Issue 2.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in his Due Process Complaint filed December 27, 2011 are hereby **DENIED;** and

2. The Complaint is **DISMISSED, With Prejudice.**

IT IS SO ORDERED.

Dated: February 12, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).