DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
March 28, 2013

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),
On behalf of ,

Respondent.

Date Issued: March 28, 2013

Hearing Officer: Jim Mortenson

Case No: 2013-0096

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on February 22, 2013. The Petitioner is represented by Miguel Hull, Esq., and the Respondent is represented by Daniel McCall, Esq., and Yair Inspektor, Esq. A resolution meeting was convened on March 1, 2013, and resulted in no agreements. A timely response to the complaint was filed on March 4, 2013. A prehearing was also convened on March 4, 2013 and a prehearing order was issued on March 7, 2013.

Because this matter must be expedited, pursuant to OSSE interpretation of 34 C.F.R. § 300.532[2], and the request of the Petitioner, the due process hearing was required to be held

---

[1] Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

[2] OSSE has interpreted 34 C.F.R. § 300.532 to require an expedited hearing on any matter relating to discipline or a manifestation determination, not merely an appeal of a manifestation determination or a challenge to a disciplinary change of educational placement as described at 34 C.F.R. § 300.532(a). (*See also* D.C. Mun. Regs 5-B2910.14 "If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a[n expedited] hearing.") Furthermore,

within 20 school days of the complaint (no later than March 25, 2013), and was convened and timely held on March 15, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is March 29, 2013 (10 school days following the hearing). This HOD is issued on March 28, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

1. Whether the Student is eligible for special education and related services under the definition of emotional disturbance (ED) or other health impairment (OHI)?

2. Whether, under the IDEA, the Respondent was required and failed to convene a meeting to determine whether the Student's behavior for which he was disciplined on February 11, 2013, was a manifestation of his disability?

3. Whether, under the IDEA, the Respondent was required and failed to conduct a functional behavioral assessment (FBA) and implement a behavior intervention plan (BIP) for the Student following the behavior for which he was disciplined on February 11, 2013?

The Petitioner is seeking a determination that the Student is eligible for special education and related services under the IDEA, including an IEP team meeting to develop an IEP and determine placement. The Petitioner is also seeking an independently provided FBA, and

---

OSSE has determined that an expedited hearing must be held under its described circumstances regardless whether the Petitioner requests one. The Petitioner requested one in this case, without a motion.

compensatory education services to address his poor grades and disciplinary removals, consisting of academic tutoring.

The Student is eligible for special education and related services. The Respondent was not required to convene a meeting to determine whether the Student's behavior for which he was disciplined on February 11, 2013, was a manifestation of his disability, nor to conduct a new FBA. The Student already had a BIP.

IV. EVIDENCE

Seven witnesses testified at the hearing, three for the Petitioner and four for the Respondent. The Petitioner's witnesses were:

1) Petitioner, Student's Mother, (P)
2) [redacted] Student's tutor, (A.C.)
3) [redacted], Petitioner's expert in special education and programming, providing opinion on Student's eligibility, (L.D.)

The Respondent's witnesses were:

1) [redacted] Student's English teacher, (A.A.)
2) [redacted] Grade Level Counselor, (E.G.)[3]
3) [redacted], Special Education Coordinator, (K.F.)
4) [redacted] Respondent's expert in psychology and evaluations, providing opinion on Student's eligibility, (M.S.)

[3] This witness's testimony was questionable given her conclusions about the Student's educational performance were contradicted by much of the documentary evidence.

26 of the Petitioner's 29 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. Six of the Respondent's seven disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The witnesses testified credibly except as noted. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a [redacted] learner enrolled in the 8th grade at Respondent school.[4] The Student is accommodated at school with a "Section 504 plan" as a result of suffering from attention deficit hyperactivity disorder (ADHD).[5]
2. The Student had an individualized education program (IEP) when he attended elementary school in Virginia.[6] He was exited from special education, following his return to the District of Columbia, in December 2008.[7] That determination was upheld by a hearing officer.[8]

[4] Testimony (T) of P, P 4, R 2.
[5] T of P, T of L.D., P 4, P 12, P 27.
[6] T of P, P 12, R 3.
[7] HOD #2009-1437, R 3.
[8] HOD #2009-1437.

3. The Student is very bright and has significant behavioral problems.[9] Over the course of the last two school years, the Student has been repeatedly disruptive and disrespectful, gets into fights in class at school, and often fails to complete classwork and homework, to the detriment of his grades, despite his high cognitive ability.[10] There are over 30 recorded incidents of this significantly poor behavior over the last two school years.[11] He failed English, Algebra, and Science the first quarter of the current school year, while earning Bs in History, French and Art.[12] The second quarter he failed Algebra, Science, French, and Art, while earning a C in English and an A in History.[13] He has been put on academic probation this year, as well as social probation, at school.[14]
4. The Student has been suspended from school three times this school year for fighting, being disruptive, disrespectful, and attempting to destroy school property.[15] The Student was suspended from school for five days in September.[16] The Student was suspended from school for two days in December 2012, on December 5, and December 6, 2012.[17] The Student was suspended from school three days in February 2013, from February 11, 2013, through February 13, 2013.[18]
5. The Responded conducted an FBA on the Student and a report was written on November 4, 2011.[19] A BIP was also written describing the targeted behaviors and intervention strategies

[9] T of P, T of L.D., P 6, P 7, P 8, P 9, P 10, P 11, P 12, P 14, P 15, P 16, P 19, P 20, P 21, P 22, P 24, P 25, P 26, P 27, R 3, R 4.
[10] T of A.A., P 11, P 14, P 18, P 25, P 26, R 3.
[11] P 21.
[12] P 26.
[13] P 26.
[14] P 6, P 18.
[15] T of P, P 7, P 8, P 9.
[16] T of P, P 9.
[17] P 8.
[18] P 7.
[19] P 10.

to use with the Student.[20] Targeted behaviors include: inability to follow directions; frequently disrupts students during class time; and makes inappropriate comments and gestures to teachers and peers.[21] Interventions in the BIP include student objectives and teacher strategies.[22] The student objectives are: meeting with a counselor once per week to discuss ways to deal with inappropriate behaviors; identifying and utilizing appropriate interpersonal skills (following rules); remaining on task until completion of task; and learning appropriate ways to communicate displeasure and anger.[23] The teacher strategies include: assisting student with appropriate ways to communicate with peers and staff; reinforcing appropriate social skills; providing constant, positive reinforcement for appropriate behavior; and daily check in with support person and scheduled breaks as needed during instruction.[24]

6. The Student underwent a psycho-educational evaluation, conducted by the Family Court - Social Services Division of the Superior Court of the District of Columbia in May 2012.[25] The Student was diagnosed with Mood Disorder, NOS and Developmental Disorder, NOS.[26] Among other things, the evaluation shows the Student's behavior is a result of deficits in coping, an inability to quickly manage stressful situations, misunderstanding and misperceiving his environment, and seeking attention in inappropriate ways.[27] His thinking tends to be concrete and less sophisticated and he fails to attend to important information.[28]

---

[20] P 11.
[21] P 11.
[22] P 11.
[23] P 11.
[24] P 11.
[25] P 12.
[26] P 12.
[27] P 12.
[28] P 12.

He attempts to avoid stressful cognition.[29] His attention seeking behaviors result from self-esteem concerns and his ineffective coping skills and impulsivity impede his frustration tolerance.[30] Despite his impulsivity, the Student is not currently displaying significant features of ADHD.[31]

7. The Respondent conducted and initial evaluation of the Student in the fall of 2012, to determine whether he is currently eligible for special education and related services.[32] The IEP team met on December 20, 2012, and the Respondent's position was that the Student was not eligible for special education and related services under the definition of other health impairment (OHI) because ADHD did not adversely affect the Student's educational performance.[33] The Respondent also took the position that the Student was not eligible under the definition of emotional disturbance (ED) because his "inability to make adequate progress overall is the result of non-compliance with demands of the classroom and is situation specific with [Student] choosing to complete work and meet teacher expectations in some classes and not in others."[34] The Petitioner disagreed with the Respondent's conclusions about eligibility.[35]

8. The Student's non-compliance with demands of the classroom is precisely what had been identified by the Respondent previously as a result of the Student's disability.[36] Subsequent assessments support that, as well as the fact that his responses to the environment are,

---

[29] P 12.
[30] P 10.
[31] P 12, R 3.
[32] T of P, T of K. P., T of M.S., P 2, P 14, P 20, R 2, R 3, R 4, R 5.
[33] R 3.
[34] R 3.
[35] T of P, R 4.
[36] P 11.

obviously, situation specific, because it is the particular environment he is in (e.g. a particular classroom at a particular time) to which he is responding when he is misbehaving.[37]

9. At hearing the Respondent further elaborated on its position by presenting testimony from school staff that they believed the Student was not eligible because the Student only needed interventions such as redirection, frequent check-ins with teachers, the use of hand-signals to communicate mood, and opportunities to make up missed work, among other things, and required no differentiated instruction.[38]

10. An "Evaluation Summary Report" was written on or about December 21, 2012, and contains only a summary of information provided by the Parent and a reference to the Social History report, and none of the other assessment tools reviewed as part of the evaluation.[39] The report also does not address whether the assessment procedures were valid for the purposes intended and valid for the child.[40] The Prior Written Notice dated December 20, 2012, refers to a Psychological Evaluation (presumably the Court conducted pyscho-educational assessment) and only offers the conclusion that the Student is not eligible because the "MDT" determined so, without explanation of why and without addressing the fact that the IEP team was not in agreement about the eligibility determination.[41]

---

[37] P 12.
[38] T of A.A., T of E.G.
[39] R 4.
[40] R 4.
[41] R 5.

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e. g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The Student was evaluated and, at a team meeting on December 20, 2012, there was a disagreement as to whether the Student was eligible for special education and related services under the IDEA. The Petitioner has argued the Student is eligible under the definition of emotional disturbance or other health impairment. The Respondent has argued that the Student is not eligible because the Student's disability does not adversely affect his education. The definition of educational disturbance under IDEA is:

> a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
> (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.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
> (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8(c)(4), *see also* D.C. Mun. Regs. 5-E3001.1. The evidence shows that the Student has inappropriate types of behavior under normal circumstances. When in class, the

gets into fights, is disruptive, and disrespectful. These behaviors have been occurring throughout the Student's education. While the Student was determined not eligible for special education and related services in 2009, the Student's behavior has adversely affected his educational performance over at least the last year. He frequently fails to complete class or homework, he has been put on academic probation, he has been put on social probation, and he has had repeated incidents (at least 34 recorded) of being disruptive to the school environment during the last two school years. These behaviors are described, in part, as being the result of his deficits in coping, inability to quickly manage stressful situations, and misunderstanding or misperceiving his environment, among others. Thus, the Student meets the definition of emotional disturbance under the IDEA.

3. Because the Student is eligible for special education and related services under the definition of emotional disturbance, it is not relevant whether he also meets other definitions, such as other health impairment, as long as all of his special education and related service needs are identified and addressed with an IEP. However, it is noted that the Student's condition does not meet the definition of other heath impairment. Other health impairment, under IDEA, means:

> having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis,
> rheumatic fever, sickle cell anemia, and Tourette syndrome; and
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9), *see also* D.C. Mun. Regs. 5-E3001.1. The evidence does not show the Student has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, despite his various diagnoses, including attention deficit hyperactivity disorder.

4. The Respondent's position that the Student was not eligible because he did not require special education is in error. It's explanation for its position that the Student is not eligible. which was not documented in the prior written notice but that its witnesses testified about, was that the Student does not need differentiated instruction, but rather only interventions such as frequent check-ins with the teacher, use of hand signals to communicate mood, and opportunities to make-up work, among other things. Special education is specially designed instruction, at no cost to the parent, to meet the unique needs of a child with a disability, including the instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. *See:* D.C. Mun. Regs. 5-E3001.1 & 34 C.F.R. § 300. 39. Specially designed instruction is the adaptation of content, methodology, or delivery of instruction, as appropriate to meet the unique needs of a child with a disability in order to ensure access to the general curriculum, so that the child can meet the educational standards that apply to each child within the jurisdiction of the District. *See:* D.C. Mun. Regs. 5-E3001.1 & 34 C.F.R. § 300. 39(b)(3). There is no requirement that special education be delivered by a special education teacher in all instances. Furthermore, best teaching practices that are beneficial to all children and used by regular education teachers, may be special education if it is necessary to meet the unique needs of a child with a disability. As OSEP recently explained: "The face that some of those [special education and related] services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP." Letter to Chambers, OSEP, May 9, 2012. Because the Respondent is using specific teaching interventions that are needed by

the Student, they are specialized instruction, and that is not a basis to conclude the Student's disability does not adversely affect his education rendering him ineligible under IDEA.

5. When a child with a disability under IDEA engages in behavior that results in discipline that will change the Student's educational placement, a manifestation determination must be made. 34C.F.R. § 300.530(e). A change in educational placement occurs if the disciplinary removal is for more than 10 consecutive school days, or the child has been subject to a series of removals that constitute a pattern because the series of removals total more than 10 school days in the school year, the behavior resulting in the removals is substantially similar, and because of consideration of such factors as: the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).

6. The Student was eligible for special education and related services as of December 20, 2012, because that is when the IEP team met and should have made the determination, rather than disagree. Thus, prior to that date, the Student was not a child with a disability under IDEA, and any behavioral removals during that time should not, in fairness, be used to calculate whether the Student has been removed for more than 10 school days during the school year. The Student, as a child with a disability under the IDEA, has only been removed for three school days this school year, since he should have been determined to be eligible under the IDEA. As a result, no manifestation determination was required. Even if the days prior to the Student's eligibility are counted, the Student has been suspended a total of ten school days as of the completion of his February 2013 suspension.

7. Because no manifestation determination was required, the requirements under 34 C.F.R. § 300.530(f), requiring an FBA or review of the BIP, were also not triggered.[42]

8. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). In addition to a determination of eligibility and a meeting to develop an IEP and determine placement, the Petitioner is seeking an independently provided FBA and compensatory education. Because there was a dispute about eligibility that occurred on December 20, 2012, the appropriate resolution of that dispute is the determination herein, that the Student is eligible and that the requisite meeting(s) occur along with the proper notice, including the required documentation of the assessment report. *See:* 34 C.F.R. § 300.503, D.C. Mun. Regs. 5-E3025.1, and D.C. Mun. Regs. 5E-3006.5. There is no basis for requiring a new FBA, although the IEP team may determine to do one if it has reason to conclude it is necessary. Furthermore, because it has been a relatively short time since the dispute over eligibility arose, the Student already has a 504 plan, and has the opportunity to make up failing grades, there is no reason to award compensatory education services for the failure to accurately determine the Student's eligibility on December 20, 2012. Furthermore, the Petitioner's compensatory education plan adds little evidence supporting such an award. The plan describes the denial of FAPE as a failure to timely identify the Student, going back to the 2011-2012 school year. The Petitioner's claim and argument in this case, however, concerned the dispute over eligibility at the December 20, 2012, team meeting. The report

[42] FBAs and BIPs are educational tools. They are not specific to IDEA or any other law and there are no legal standards for their creation and use, other than, for example, when they are or should be employed for children with disabilities under the IDEA. This is noted here because it was brought up during hearing that because the Student's FBA and BIP were created while he had a plan to provide FAPE under Section 504 of the Rehabilitation Act they were somehow different than an FBA conducted or BIP developed for a student eligible under IDEA. There is no reason this would be the case.

describes the Student as having suffered "significant academic and emotional-behavioral harm," and this is specified only as "lowered grades" as a result of a lack of behavioral support. Thus, the report does little to support the Petitioner's request for compensatory education as a remedy to the dispute herein. Finally, there has not been a conclusion that the Student was denied a FAPE in this case, only that the child is a child with a disability under the Act. *See* 34 C.F.R. § 300.507(a) (A parent may file a complaint on any matter "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child." In this case, the issue determined in the Petitioner's favor concerns the identification of the child.) Thus, because there has been no finding of a denial of FAPE, compensatory education is not warranted in this case.

VII. DECISON

1. The Student is a child with a disability under the IDEA, meeting the definition of Emotional disturbance.
2. Because the Student was not identified as a child with a disability under the IDEA prior to December 20, 2012, the Student was only removed from school, as a child with a disability under the IDEA, three days in February 2013, and so no manifestation determination was required.
3. Because no manifestation determination was required for the Student's disciplinary removal in February 2013, the Respondent was not required to review the Student's BIP.

VIII. ORDER

1. The Respondent will convene a properly constituted IEP team, no later than April 12, 2013, to prepare a written evaluation report, including the following:

   (a) information provided by the parent;

   (b) results of assessment procedures considered and used as a basis for making an eligibility determination;

   (c) a statement that the assessment procedures were valid for the purposes intended and valid for the child;

   (d) that the child is a child with a disability (specifically, that the child is eligible under the definition of emotional disturbance);

   (e) that the child needs special education and related services; and

   (f) the signatures of team members participating in the determinations.

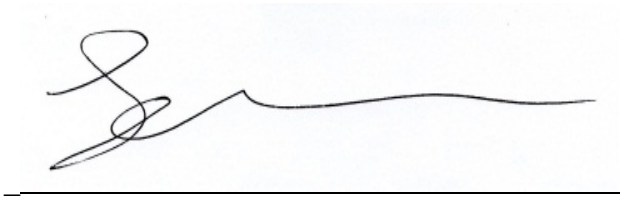
2. The team will then develop an individualized education program (IEP) for the Student. If another team meeting is required, it must be held within five school days of the first meeting.

3. Following the development of the IEP the Respondent will have five business days to propose it to the Petitioner. When the IEP is proposed to the Petitioner it will be accompanied by a prior written notice, in conformity with 34 C.F.R. § 300.503 and D.C. Mun. Regs. 5-E3025.1. The Petitioner will have ten business days from the date she receives the proposal to consent to the initial provision of special education and related services. If the Petitioner refuses to provide consent and does not challenge the proposed IEP during the ten day period, the Respondent will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the Respondent requests consent, unless the

Respondent has failed to provide the Petitioner with prior written notice, in conformity with 34 C.F.R. § 300.503 and D.C. Mun. Regs. 5-E3025.1, by which to obtain informed written consent from the Petitioner.

4. IEP team meetings will be proposed, following discussion between the Case Manager and the Petitioner about the scheduling of the IEP team meeting. If no mutually agreeable dates and times for the first meeting are found before April 17, 2013, the April 12 deadline will be extended day-for-day up to April 26, 2013. If no mutually agreeable dates and times are found, including with alternative means for the Petitioner to participate, the Respondent will propose three dates and times, not consecutive, within the April 12, 2013 deadline, and advise the Petitioner to choose one. The Respondent will also advise the Petitioner of the date and time it will proceed with the meeting, of the three proposed dates and times, if the Petitioner fails to choose one of the proposals.

IT IS SO ORDERED.



Date: March 28, 2013

Independent 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 USC §1415(i).