

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
September 05, 2013

Parent,<sup>1</sup> on behalf of,  
Student,

Petitioner,

Date Issued: September 4, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

Case No: [REDACTED]

District of Columbia Public Schools,

Respondent.

Hearing Date: August 19, 2013

Room: 2006

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a thirteen (13) year old [REDACTED] who is a rising 8<sup>th</sup> grade student and attended School A for the 2012-2013 school year. The student's current individualized education program (IEP) lists Multiple Disabilities (MD) as [REDACTED] primary disability and provides for him to receive thirty and one half (30.5) hours per week of specialized instruction outside of the general education environment and one and one half (1.5) hours per week of behavioral support services outside of the general education environment.

On [REDACTED], Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to convene a manifestation determination review meeting; in the alternative, failing to timely convene a manifestation determination review meeting; failing to provide an interim alternative placement; and failing to provide an appropriate placement. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that DCPS place and fund the student at School B or a comparable nonpublic, full-time therapeutic placement, with transportation; an independent functional behavioral assessment (FBA), and any other evaluation the assessment recommends, at market rate; DCPS to convene an IEP Team meeting within ten (10) days of receiving the final independent evaluation to review all independent evaluation and review and revise the student's IEP including [REDACTED] behavior intervention plan (BIP); DCPS to

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<sup>1</sup> Personal identification information is provided in Appendix A.

\*The student is a minor.

discuss and determine appropriate compensatory education; in the alternative for DCPS to fund an independent evaluation, at market rate, to determine appropriate compensatory education.

On July 24, 2013, Respondent filed a timely Response to the Complaint. In its Response, the Respondent asserted that during the 2012-2013 school year, the student received a total of three out-of-school suspensions for a total of nine school days; the school suspensions do not amount to a change in placement and therefore no manifestation determination review or interim alternative placement was warranted; on January 16, 2013, the student's IEP Team reviewed the student's December 3, 2012 and December 12, 2012 independent evaluations and revised the student's IEP and BIP accordingly; the student completed the 2012-2013 school year having made academic progress in all areas; there was no claim that the student's location of services was unable to implement the student's IEP; the student's program during the 2012-2013 school year was appropriate for the student.

The parties held a Resolution Meeting on July 25, 2013 and failed to reach an agreement. Given the expedited nature of the issues, the parties agreed that the 20 school-day timeline started to run on July 17, 2013, and ends on September 5, 2013. The Hearing Officer Determination (HOD) is due on September 9, 2013, 10 school days after the due process hearing.

On July 26, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on July 26, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. On July 31, 2013, the Petitioner clarified that the Petitioner alleged that Issue #3 should indicate that the program did not provide crisis management rather than crisis intervention, did not meet the student's unique needs and did not provide educational benefit. The Petitioner also commented that the Petitioner alleged that the program was not a therapeutic program however the Hearing Officer requested that the Petitioner define "therapeutic" during the prehearing conference and included the elements of the Petitioner's definition of "therapeutic" within the issue.

On August 5, 2013, Petitioner submitted two Notices to Appear to the Hearing Officer. The Notices to Appear were not accompanied by a motion or with the information that the witnesses were necessary and that the witnesses had indicated that they would not appear voluntarily. On August 8, 2013, the Hearing Officer requested that the Notices to Appear be accompanied by a motion for the Notices to Appear to be issued including the information that the witnesses were relevant and were not appearing voluntarily. The Petitioner did not submit the requested information.

On August 12, 2013, Petitioner filed Disclosures including thirty (30) exhibits and ten (10) witnesses.<sup>2</sup> On August 12, 2013, Respondent filed Disclosures including eleven (11) exhibits and five (5) witnesses.

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

The due process hearing commenced at approximately 9:31 a.m. on August 19, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 4-30 were admitted without objection. The Hearing Officer did not admit Petitioner's Exhibits 1-3 because the documents were duplicative of the record. Respondent's Exhibits 1-11 were without objection. While Petitioner's Exhibits 16, 17 and 20 (IEP Team meeting notes written by Petitioner's attorney) were admitted into the record, the Hearing Officer did not afford the same weight to the notes as to Respondent's Exhibits 2, 7 and 8 (IEP Team meeting notes written by the Special Education Coordinator). The Special Education Coordinator testified that the meeting notes taken by Petitioner's counsel were not provided to DCPS prior to the 5-day Disclosures and DCPS was not given an opportunity to comment on the accuracy of the notes. Therefore, Respondent had no opportunity to cross-examine Petitioner's attorney regarding the notes.

Following the close of Petitioner's case, the Respondent motioned for a Directed Finding arguing that Petitioner had not presented sufficient evidence to meet its burden with respect to all issues. Specifically, the Petitioner argued that even had the student been suspended in June 2013, the student suffered no educational harm; that DCPS has acknowledged that a manifestation determination review was not held because the student was not suspended for more than 10 days; and that the testimony regarding the inappropriateness of the student's placement was based on the psychologist's observation for one hour and the mother's observation on one day through a window. The Petitioner argued that the testimony provided established a clear violation of DCPS' failure to conduct a manifestation determination review and an appropriate placement for the student. Because the Hearing Officer had not reviewed the entire record and did not agree that the record was complete, the Hearing Officer denied the Respondent's Motion for a Directed Finding.

The hearing concluded at approximately 2:44 p.m. following closing arguments by both parties.

#### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

### **ISSUES**

The issues to be determined are as follows:

1. Whether DCPS failed to conduct a manifestation determination review during the 2012-2013 school year upon suspending the student for more than 10 school days, and if so, whether this failure constitutes a denial of a FAPE?

2. Whether DCPS denied the student a FAPE by failing to provide an interim alternative placement for the student on or about May 6-7, 2013 and June 17-18, 2013?
3. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate program during the 2012-2013 school year, specifically a program that met the student's unique needs, included crisis management, low student-teacher ratio, an on-site therapist, individual therapy sessions, crisis prevention strategies and provided the student with educational benefit?

### **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. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student has been diagnosed with Mood Disorder, Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 6, 9, 11 and 12; Psychologist's Testimony)
3. A BIP was developed for the student on March 27, 2012 which provided intervention strategies/positive behavior supports, rewards/reinforcements for appropriate behaviors and notice of consequences for inappropriate behavior. (Petitioner's Exhibit 13)
4. On April 11, 2012, the student was classified as a student with an emotional disturbance (ED). (Petitioner's Exhibit 14)
5. On April 11, 2012, in reading, the student could identify the author's purpose. (Petitioner's Exhibit 14)
6. The student's April 11, 2012 IEP prescribed 30.5 hours per week of specialized instruction outside of the general education environment and one and one half hours per week of behavioral support services outside of the general education environment. (Petitioner's Exhibit 14)
7. The student attended School A for the 2012-2013 school year. (Stipulated Fact)
8. During the 2012-2013 school year, the student received individual therapy for one and one half hours per week and group counseling through a "Boys Club." (Petitioner's Exhibit 16; Mother's Testimony; Special Education Coordinator's Testimony)
9. During the 2012-2013 school year, the student participated in softball. (Special Education Coordinator's Testimony)
10. During the 2012-2013 school year, the student's behavior improved during the time period when ■ had visitation with ■ father. When visitation with ■ father ceased, the student's behavior declined. (Special Education Coordinator's Testimony)
11. During the 2012-2013 school year, the student's behavior declined during times the student's mother was present at school and when the mother involved the police for incidents occurring in the home. (Mother's Testimony; Special Education Coordinator's Testimony)

12. During the 2012-2013 school year, the Special Education Coordinator saw the student daily. (Special Education Coordinator's Testimony)
13. During the 2012-2013 school year, the mother observed the student for moments on two separate occasions. (Mother's Testimony)
14. The student's program at School A during the 2012-2013 school year had seven students and three adults. (Mother's Testimony; Special Education Coordinator's Testimony; Respondent's Exhibit 10)
15. One of the adults in the student's classroom during the 2012-2013 school year was a dedicated aide for another student. (Special Education Coordinator's Testimony)
16. During the 2012-2013 school year, the School A program had four behavioral specialists/counselors available on-site every day. The behavioral specialists provided art therapy, music therapy, individual and group counseling. (Special Education Coordinator's Testimony)
17. School A has an "ABC Room" which is used for de-escalation, in-school suspension (ISS) and for rewards such as pizza parties. (Special Education Coordinator's Testimony)
18. When used for de-escalation, a student is in the ABC Room for approximately 30 minutes. (Special Education Coordinator's Testimony)
19. When students were sent to the de-escalation room, they were accompanied by a teacher or a social worker. (Special Education Coordinator's Testimony)
20. The School A program implemented a point/level system named "Rocket Academy." (Petitioner's Exhibits 13 and 22; Respondent's Exhibit 6; Special Education Coordinator's Testimony)
21. The point/level system included daily point sheets where target behaviors were tracked every 30 minutes. (Petitioner's Exhibit 13; Respondent's Exhibit 6; Special Education Coordinator's Testimony)
22. Students were able to earn rewards based on points accrued on the point/level system. (Petitioner's Exhibit 13; Respondent's Exhibit 6; Special Education Coordinator's Testimony)
23. During the student's September 2012 FBA, the evaluator conducted six observations of the student. (Petitioner's Exhibit 10; Respondent's Exhibit 5)
24. Two of the six observations for the student's September 2012 FBA were in the student's classroom. (Petitioner's Exhibit 10; Respondent's Exhibit 5)
25. During the first observation in the student's classroom for [REDACTED] September 2012 FBA, the student was engaged in the activity and was able to remain focused during minor distractions such as foot tapping and bag moving in the classroom and the student stated that [REDACTED] would ignore the one more significant distraction when another student made excessive noise. (Petitioner's Exhibit 10; Respondent's Exhibit 5)
26. During the second observation in the student's classroom for [REDACTED] September 2012 FBA, the student was not attentive to the lesson and the evaluator noted that a few students were talking among themselves and the student made multiple inappropriate comments. (Petitioner's Exhibit 10; Respondent's Exhibit 5)
27. During the observation for the student's September 19, 2012 Comprehensive Psychological Reevaluation, the student was seated and focused on the math instruction. (Respondent's Exhibit 10)

28. During the observation for the student's September 19, 2012 Comprehensive Psychological Reevaluation, for the student's reading and language arts lessons, the student completed ■ work and requested and received assistance as needed. (Respondent's Exhibit 10)
29. In September 2012, the student demonstrated good academic skills, willingness to complete ■ work and participate in classroom activities and progress toward behavior goals. (Respondent's Exhibit 10)
30. In September 2012, the student continued to have difficulty with identifying social cues. (Respondent's Exhibit 10)
31. On December 3, 2012, a Comprehensive Psychological Evaluation was completed for the student. (Petitioner's Exhibits 11, 12 and 20; Psychologist's Testimony)
32. The Psychologist conducted a one hour observation of the student in School A to inform the December 3, 2012 evaluation. (Psychologist's Testimony)
33. The December 3, 2012 Comprehensive Psychological Evaluation recommended that the student have a "full-time" IEP. (Petitioner's Exhibit 11)
34. The December 3, 2012 Comprehensive Psychological Evaluation recommended that the student receive instruction in a setting with a small class size. (Petitioner's Exhibit 11)
35. The December 3, 2012 Comprehensive Psychological Evaluation recommended that the student have access to a social worker/counselor/therapist in the school setting and the "maximum services allowed" for ■ emotional difficulties. (Petitioner's Exhibit 11)
36. The December 3, 2012 Comprehensive Psychological Evaluation recommended that a reward system be developed for the student, that in exchange for academic and behavioral success, the student would be allowed to participate in sports. (Petitioner's Exhibit 11)
37. From August 2009 to December 2012, the student's Reading Comprehension grade equivalency score increased slightly. (Petitioner's Exhibits 6 and 11; Special Education Coordinator's Testimony)
38. From August 2009 to December 2012, the student's scores in Word Reading, Numerical Operations, Spelling, Pseudoword Decoding, Listening Comprehension and Oral Expression significantly increased. (Petitioner's Exhibits 6 and 11)
39. Between August 2009 and December 2012 the "descriptive classifications" on the Wechsler Individual Achievement Tests (WIAT) were changed. (Psychologist's Testimony)
40. The student was suspended on December 3, 2012 for two school days. (Stipulated Fact)
41. The December 3, 2012 suspension was for using profane language, disruptive behavior, failure to obey directions of an administrator/teacher and fighting on school property. (Petitioner's Exhibit 24)
42. The student was not sent home on the day of the December 3, 2012 suspension. (Mother's Testimony)
43. The student was sent to the ABC Room on December 10, 2012 for the first block of instruction. (Petitioner's Exhibit 23)
44. On December 12, 2012, a Psychiatric Evaluation was completed for the student. (Petitioner's Exhibit 12)

45. The December 12, 2012 Psychiatric Evaluation recommended that the student have a “full-time” IEP. (Petitioner’s Exhibit 12)
46. The December 12, 2012 Psychiatric Evaluation recommended that the student receive instruction in a setting with a small class size and a high teacher to student ratio. (Petitioner’s Exhibit 12)
47. The December 12, 2012 Psychiatric Evaluation recommended that the student have access to an on-site school therapist with regular therapy sessions and the potential for group therapy. (Petitioner’s Exhibit 12)
48. The December 12, 2012 Psychiatric Evaluation recommended that the student have access to the supports of “crisis intervention” and “crisis prevention strategies.” (Petitioner’s Exhibit 12)
49. The student was sent to the ABC Room on December 17, 2012 for an unknown amount of time. (Petitioner’s Exhibit 23)
50. The student was sent to the ABC Room on January 8, 2013 for two hours. (Petitioner’s Exhibit 22)
51. The student was sent to the ABC Room on January 14, 2013 for one hour. (Petitioner’s Exhibit 22)
52. A BIP was developed for the student on January 15, 2013 which provided intervention strategies/positive behavior supports, rewards/reinforcements for appropriate behaviors and notice of consequences for inappropriate behavior. (Respondent’s Exhibit 6)
53. The student’s IEP Team met on January 16, 2013 and determined that the student’s primary disability category was MD. (Petitioner’s Exhibits 18, 19 and 20; Respondent’s Exhibits 3 and 4)
54. On January 16, 2013, in reading, the student was able to make valid predictions; summarize in ■■■ own language, including important characters’ names, some details, and many of the important events in sequence from beginning, middle and end; understand important text implications with supporting details as well as the significant message or event from the story, with relevant reason for ■■■ opinion. (Petitioner’s Exhibit 18; Respondent’s Exhibit 3)
55. The student’s January 16, 2013 IEP prescribed 30.5 hours per week of specialized instruction outside of the general education environment and one and one half hours per week of behavioral support services outside of the general education environment. (Petitioner’s Exhibit 18; Respondent’s Exhibit 3)
56. The student was suspended on February 11, 2013 for three school days. (Petitioner’s Exhibit 24)
57. On February 11, 2013, the student was suspended for taking a phone belonging to a teacher. (Petitioner’s Exhibit 24; Mother’s Testimony)
58. The February 11, 2013 incident occurred in the late afternoon. (Mother’s Testimony)
59. The student was sent to the ABC Room on March 11, 2013 for an unknown amount of time. (Petitioner’s Exhibit 23)
60. The student was suspended on March 19, 2013 for three school days. (Stipulated Fact)
61. The March 19, 2013 suspension was for acts that cause damage to or destroy property, using profane language, disruptive behavior and fighting on school property. (Petitioner’s Exhibit 24)

62. For the first three quarters of the 2012-2013 school year in English, the student earned the grade letters "A," "C" and "C" respectively. In math, the student received the grade letters "B," "A" and "B." In science, the student received the grade letter "A" for the first quarter and "C" for the second quarter. In Health and Physical Education, the student received the grade letters "A," "B" and "B" for the first three quarters. For the third quarter the student received a "C" in World History and Geography. (Respondent's Exhibit 11)
63. On Monday, June 17, 2013, the student was involved in a fight. (Mother's Testimony)
64. The student was transported home via bus on June 17, 2013. (Mother's Testimony)
65. The School A Program Director informed the mother that the student was suspended for fighting but was not suspended for the last two days of school. (Mother's Testimony)
66. The student is not always honest. (Petitioner's Exhibits 5 and 11; Mother's Testimony)
67. The student's emotional state is greatly affected by [REDACTED] relationship with [REDACTED] father. (Respondent's Exhibits 7 and 11; Special Education Coordinator's Testimony)

### **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:

#### **Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See 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); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services "be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a

child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

#### Issue #1

The Petitioner alleged that DCPS failed to conduct a manifestation determination review during the 2012-2013 school year upon suspending the student for more than 10 school days. The Respondent argued that the student was not suspended for more than 10 days during the 2012-2013 school year.

The IDEA regulations discipline procedures provide that school personnel may remove a child with a disability who violates a code of student conduct from ■■■ or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconducts (as long as those removals do not constitute a change in placement under §300.536). After a child with a disability has been removed from ■■■ or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required in 34 CFR §300.530(d). 34 CFR §300.530(b).

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the 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 if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR §300.530(e)(1). This process is known as a manifestation determination review. *See* 34 CFR §300.530(e).

For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if – (1) the removal is for more than 10 consecutive school days; or (2) The child has been subjected to a series of removals that constitute a pattern – (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR §300.536(a).

In the present matter, the parties agreed that the student was suspended for two school days on December 3, 2012 and for three school days on March 19, 2013. The December 3, 2012 suspension was for using profane language, disruptive behavior, failure to obey directions of an administrator/teacher and fighting on school property. The March 19, 2013 suspension was for acts that cause damage to or destroy property, using profane language, disruptive behavior and fighting on school property. The record contains suspension notices for the December 3, 2012

and March 19, 2013 suspensions as well as a suspension notice for an incident occurring on February 11, 2013.

On February 11, 2013, the student was found to have taken a phone belonging to a teacher. The Mother testified that the incident occurred in the late afternoon. The suspension notice indicated that the student could return to school on September 19, 2012. The Petitioner argued that the suspension lasted six days however between September 11, 2012 and September 19, 2012 there were only three school days.

The Mother testified that student informed her that ■ was suspended in May for fighting however was not able to provide the dates in May that the student was allegedly suspended or the amount of time. The Mother stated that the suspension “may have been for two days but not more.” The record does not contain an incident report for an incident in May nor does the record contain a suspension notice for May.

The Mother also testified that the student was suspended on the Monday of the last week of school for fighting. The Mother stated that the suspension was for three days. The Mother also testified that although the student was not suspended for the last two days of school, she chose to keep the student at home for the last two days of school. The last day of school for the 2012-2013 school year was June 20, 2013. The Mother stated that the school bus driver had a “document” for the suspension. The document was not included in the record. The Mother testified that after receiving notice of suspension from the student and the bus driver she called the School A Program Director to confirm the suspension.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the student was suspended for more than ten days during the 2012-2013 school year. The record is clear that the student was suspended for two school days on December 3, 2012, for three school days on February 11, 2103 and for three school days on March 19, 2013. While the Mother testified that the student was suspended in May 2013, the mother could not provide the dates of the suspension or the amount of time for the suspension.

The record does not contain an incident report for an incident in May 2013 and the record indicates that the student is not always honest.

The Mother also testified that the student was suspended for fighting on Monday of the last week of school (June 17, 2013) but not for the final two days of school (June 19-20, 2013). If the student attended school on Monday of the last week of school and was not suspended for the final two days of school, at most, the student was suspended for one school day (June 18, 2013). While the record does not contain the suspension “document” reportedly provided to the mother by the bus driver on June 17, 2013, the Hearing Officer concludes that the student’s suspension on June 18, 2013 is more probable than its nonexistence. Therefore, the Hearing Officer concludes that that student was suspended for a total of nine school days during the 2012-2013 school year.

The Petitioner argued that the days of suspension should also include the day of the incident since the student was sent home on the day of the incident. The record does not support this argument. For the December 3, 2012 suspension, the Mother testified that the student was not sent home on the day of the suspension. For the February 11, 2013 incident, the Mother testified that the incident occurred toward the late afternoon. The record indicates that the March 19, 2013 incident occurred in the morning however the record contains no other information regarding the remainder of the school day for the student. For the June 18, 2013 suspension, the Mother testified that the student was transported home on the bus on June 17, 2013.

The Petitioner also argued that the “days” the student spent in ISS should be included when calculating days of suspension for purposes of 34 CFR §300.530. The Mother testified that the student said that ■ was in ISS “10 to 20 times.” However, on several occasions the mother has stated that the student does not tell the truth. The Special Education Coordinator testified that the ABC Room was used for de-escalation, ISS and for rewards such as pizza parties. When used for de-escalation, a student is in the room for approximately 30 minutes.

The record indicates that the student was sent to the ABC room on December 10, 2012 for the first block of instruction, on December 17, 2012 for an unknown amount of time, on January 8, 2013 for two hours, on January 14, 2013 for one hour and on March 11, 2013 for an unknown amount of time. The December 10, 2012, December 17, 2012 and March 11, 2013 incident reports indicated that a “de-escalation strategy” was used prior to the Office Discipline Referral Form being completed. There was no evidence presented regarding whether or not the student received specialized instruction and/or related services while in the ABC room. The Hearing Officer concludes that the record does not contain adequate evidence to classify the student’s trips to the ABC room as suspensions. The Special Education Coordinator testified that when used for de-escalation, a student is typically in the ABC room for 30 minutes. The record suggests that the student’s average stay in the ABC room was between one and two hours. Further, there was no evidence regarding whether or not the student received specialized instruction and related services while in the ABC room.

Therefore, the Hearing Officer concludes that the student did not receive a removal for more than ten consecutive days, or a series of removals totaling more than ten days during the

2012-2013 school year. Therefore, DCPS was not required to conduct a manifestation determination during the 2012-2013 school year.

The Petitioner failed to meet its burden with regard to Issue #1.

#### Issue #2

A child with a disability who is removed from the child's current placement must continue to receive services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. The services may be provided in an interim alternative educational setting. 34 CFR §300.530(d)(1).

The Petitioner alleged that DCPS denied the student a FAPE by failing to provide an interim alternative placement for the student on or about May 6-7, 2013 and June 17-18, 2013.

As discussed in Issue #1, the Petitioner did not meet its burden in proving that the student was suspended for more than ten days during the 2012-2013 school year. Therefore, the Hearing Officer concludes that DCPS was not required to provide the student services in an interim alternative placement May 6-7, 2013 or June 17-18, 2013.

The Petitioner failed to meet its burden with respect to Issue #2.

#### Issue #3

The Petitioner alleged that DCPS denied the student a FAPE by failing to provide the student with an appropriate program during the 2012-2013 school year, specifically a program that met the student's unique needs, included crisis management, low student-teacher ratio, an on-site therapist, individual therapy sessions, crisis prevention strategies and provided the student with educational benefit.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

On the student's April 11, 2012 IEP, the student was classified as a student with ED. In December 2012, independent psychological and psychiatric evaluations of the student were conducted. Both evaluations concluded that the student has ADHD and would therefore qualify for special education and related services as a student with an other health impairment (OHI) in

addition to a student with ED. The student's IEP Team met on January 16, 2013 and determined that the student's primary disability category was MD.

The December 3, 2012 Comprehensive Psychological Evaluation and the December 12, 2012 Psychiatric Evaluation both recommended that the student have a "full-time" IEP. The student's April 11, 2012 and January 16, 2013 IEPs prescribed 30.5 hours per week of specialized instruction outside of the general education environment and one and one half hours per week of behavioral support services outside of the general education environment. There was no evidence presented which suggested that the School A program was unable to provide the specialized instruction and related services prescribed in the student's IEP or that the specialized instruction and related services in the student's IEP do not constitute a "full-time" IEP.

The December 3, 2012 Comprehensive Psychological Evaluation recommended that the student receive instruction in a setting with a small class size and the December 12, 2012 Psychiatric Evaluation recommended that the student receive instruction in a setting with a small class size and a high teacher to student ratio. The student's program at School A during the 2012-2013 school year had seven students and three adults however one adult was a dedicated aide for another student. Therefore, the student's classroom had a 7:2 student-teacher ratio.

The December 3, 2012 Comprehensive Psychological Evaluation recommended that the student have access to a social worker/counselor/therapist in the school setting and the "maximum services allowed" for [REDACTED] emotional difficulties. The December 12, 2012 Psychiatric Evaluation recommended that the student have access to an on-site school therapist with regular therapy sessions and the potential for group therapy. The School A program had four behavioral specialists/counselors available on-site every day. The behavioral specialists provided art therapy, music therapy, individual and group counseling. The student received individual therapy for one and one half hours per week and group counseling through a "Boys Club."

The December 12, 2012 Psychiatric Evaluation recommended that the student have access to the supports of "crisis intervention" and "crisis prevention strategies." While these terms were not defined by the evaluator, the Psychologist testified that the student would benefit from access to a psychologist to assist the student with de-escalation and a token economy with point sheets for the student to earn rewards. As discussed above, the School A program had four behavioral specialists/counselors available on-site every day. Additionally, School A had a de-escalation room. When the student went to the de-escalation room, [REDACTED] was accompanied by a teacher or a social worker. The School A program also included a point/level system, "Rocket Academy." The student had daily point sheets where target behaviors were tracked every 30 minutes and was able to earn rewards based on points accrued. The student also had individual BIPs developed on March 27, 2012 and January 15, 2013 which provided intervention strategies/positive behavior supports, rewards/reinforcements for appropriate behaviors and notice of consequences for inappropriate behavior.

The December 3, 2012 Comprehensive Psychological Evaluation also recommended that a reward system be developed for the student, that in exchange for academic and behavioral success, the student would be allowed to participate in sports. While the Hearing Officer does not agree with the philosophy of withholding team activities and physical exercise if a student

has not performed in other areas, School A nonetheless provided the opportunity for the student to participate in softball.

The Petitioner also alleged that the student did not receive an educational benefit or make educational progress because the student's Reading Comprehension score was only slightly improved from August 2009 to December 2012. The Hearing Officer is not persuaded by this argument. First, while the student's Reading Comprehension grade equivalency score only increased slightly from August 2009 to December 2012, the student's scores in Word Reading, Numerical Operations, Spelling, Pseudoword Decoding, Listening Comprehension and Oral Expression significantly increased. Next, the Petitioner's expert witness testified that the instrument used to measure the student's individual achievement changed between August 2009 and December 2012. Specifically, the Psychologist testified that there were changes in the "descriptive classifications" from the WIAT II to the WIAT III and there could not be a one-to-one comparison between the two assessments.

Further, while the student's present levels of performance for math on [REDACTED] April 11, 2012 and January 16, 2013 IEP cannot be compared because of the difference in content, the present levels of performance for reading indicates some progress. The student's April 11, 2012 IEP states that the student can "identify the author's purpose." The student's January 16, 2013 IEP states that the student "is able to make valid predictions" "can summarize in [REDACTED] own language, including important characters' names, some details, and many of the important events in sequence from beginning, middle and end." "[REDACTED] understands important text implications with supporting details as well as the significant message or event from the story, with relevant reason for [REDACTED] opinion." During an interview for the student's September 2012 psychological evaluation, the parent stated that the student's academic skills are good, the student's behavior had been "good overall" and that the student was willing to do [REDACTED] work/homework. During an interview for the student's September 2012 psychological evaluation, the student's teacher indicated that the student initiated and participated in classroom discussions without difficulty, completed [REDACTED] homework and did "well" with [REDACTED] ability to write in the classroom and complete assigned projects. The teacher did note the student's outbursts were triggered by the behavior of [REDACTED] classroom peers. During the interview for the student's September 2012 psychological evaluation, the school social worker indicated that the student had made "a lot" of progress with regard to [REDACTED] behavior specifically progress with demonstrating fewer aggressive behaviors and showing empathy toward peers. The student continued to have difficulty with identifying social cues.

Finally, for the first three quarters of the 2012-2013 school year in English, the student earned the grade letters "A," "C" and "C" respectively. In math, the student received the grade letters "B," "A" and "B." In science, the student received the grade letter "A" for the first quarter and "C" for the second quarter. In Health and Physical Education, the student received the grade letters "A," "B" and "B" for the first three quarters. For the third quarter the student received a "C" in World History and Geography. Although the Petitioner argued that grade letter "Cs" are not academic progress, the common and accepted definition of a grade letter "C" is average progress or achievement.

Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. A student may derive educational benefit under *Rowley* if some of █ goals and objectives are not fully met, or if █ makes no progress toward some of them, as long as █ makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with █ abilities. *Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist.*, No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450. Here, although the student is not on grade level, there was no evidence presented which suggested that the student did not make progress toward █ goals during the 2012-2013 school year. The student received average to above average grades for the first three quarters of the 2012-2013 school year and the student's present levels of performance from █ April 11, 2012 IEP to █ January 16, 2013 IEP indicated progress in reading. The student also progressed toward behavior goals which made him more available to benefit from instruction.

The Petitioner argued that the student's program during the 2012-2013 school year was inappropriate because the classroom was "absolute chaos" and the student continued to display the same weaknesses during █ FBAs. The Hearing Officer is not persuaded by these arguments. Both the Mother and the Psychologist described an environment lacking in classroom management during their school visits. The Mother acknowledged that her observation of the classroom occurred for only moments on two separate occasions. The Psychologist testified that her observation was conducted on one day for one hour. During the student's September 2012 FBA, the evaluator conducted six observations of the student. Two of the six observations were in the student's classroom. During the first observation the student was engaged in the activity and was able to remain focused during minor distractions such as foot tapping and bag moving in the classroom and stated that █ would ignore the one more significant distraction when another student made excessive noise. During the second observation, the student was not attentive to the lesson and the evaluator noted that a few students were talking among themselves and the student made multiple inappropriate comments. During the observation for the student's September 2012 psychological evaluation, the student was seated and focused on the math instruction. The evaluator described a class where all students participated in the math lesson. The student was also observed during reading and language arts lessons. For both the reading and language arts lessons the student completed █ work and requested and received assistance as needed. The Special Education Coordinator, who was able to observe the student on a daily basis, testified that for the majority of school days, the student was "happy and on-task" and that typically when the student demonstrated inappropriate behaviors, School A staff were able to deescalate and redirect the student.

While the student's May 2010 and September 2012 FBAs describe similar problems behaviors, the student has been diagnosed with Mood Disorder, Oppositional Defiant Disorder and ADHD and meets the criteria for ED. Emotional disturbance means "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.” An 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 CFR §300.8(c)(4). The definition of ED describes behaviors that exist over a period of time and to a marked degree. The student’s disability is based on conditions that, by definition, cannot be “cured” by the school. “Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child’s disability.” *Klein Ind. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. August 6, 2012).

The Special Education Coordinator and the record explain that the student’s emotional state is greatly affected by ■ relationship with ■ father. During the 2012-2013 school year, the student’s behavior improved during the time period when ■ had visitation with ■ father. When visitation with ■ father ceased, the student became “agitated.” The student’s behavior also declined during times the student’s mother was present at school and when the mother involved the police for incidents occurring in the home.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. The Hearing Officer concludes that the student’s January 16, 2013 IEP accurately reflected the results of evaluations, identified the student’s needs, established annual goals related to those needs, and provided appropriate specialized instruction, related services, positive behavioral interventions and supports, and other behavioral strategies, to address the student’s behavior and academic needs. Additionally, the Hearing Officer concludes that the student’s program during the 2012-2013 school year provided the supports necessary to address the student’s academic and behavioral needs. The program provided met the student’s unique needs, included crisis management, a low student-teacher ratio, an on-site therapist, individual therapy sessions, crisis prevention strategies and provided the student with educational benefit.

The Petitioner failed to meet its burden with respect to Issue #3.

### **ORDER**

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

**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).

Date: September 4, 2013

  
Hearing Officer