

**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  
May 23, 2014

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STUDENT, <sup>1</sup>	)	
through her Parent,	)	
Petitioner,	)	Hearing Officer: Keith L. Seat, Esq.
	)	
v.	)	
	)	
SCHOOL,	)	
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, mother of Student, filed a due process complaint on 4/4/14, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). Specifically, Petitioner alleged that School failed to comply with its affirmative obligation to identify, locate, and evaluate Student over several years to determine her need for special education based on Student’s problem behaviors in school, test scores and grades. In addition, Petitioner alleged that School failed to conduct a Manifestation Determination Review (“MDR”), failed to find that Student’s behaviors were a manifestation of a disability, and failed to conduct a Functional Behavioral Assessment (“FBA”) and develop a Behavioral Intervention Plan (“BIP”).

School responded that Student was not denied a FAPE, as it did not have reason to suspect that Student had a disability prior to Student’s 3/5/14 incident, discussed below, on which date Parent gave School a written request seeking evaluation of Student. School further argued that it had no obligation to conduct an MDR or an FBA.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30,

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

## Hearing Officer Determination

of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

### Procedural History

Following the filing of the due process complaint on 4/4/14, this Hearing Officer was assigned to the case on 4/7/14. School timely filed a response to the complaint on 4/11/14 and made no challenge to jurisdiction.

The complaint contained disciplinary allegations that mandated an expedited hearing pursuant to 34 C.F.R. 300.532(c). Neither Petitioner nor School waived the resolution meeting, which took place on 4/8/14, at which time the parties agreed not to end the resolution period. The 15-day expedited resolution period ended on 4/19/14. Pursuant to 34 C.F.R. 300.532(c)(2), an expedited hearing was required no later than 20 school days following the filing of the complaint. According to the School calendar, as adjusted by a make-up day for inclement weather, the 20<sup>th</sup> school day was 5/12/14. A final decision in this matter must be reached no later than 10 school days following the hearing, *id.*, which based on the hearing dates of 5/9/14 and 5/12/14 requires an HOD by 5/27/14.

A prehearing conference was held on 4/17/14 and a Prehearing Order was issued on 4/18/14.

On 5/8/14, Petitioner filed Petitioner’s Motion to Testify via Phone and or in the Alternative to Continue. On 5/8/14, Respondent filed Respondent Objects to Petitioner’s Motion to Allow Petitioner to Testify by Phone and/or Motion to Continue. Later, on 5/8/14, after obtaining permission from her employer to take off work on 5/9/14, Petitioner withdrew her motion in a pleading styled Petitioner’s Motion to Testify via Phone and or in the Alternative to Continue Withdrawn. On 5/5/14, Petitioner had included in her Disclosures a document styled Petitioner’s Motion to Permit Telephone Testimony which was dated 5/5/14 but never filed or served. The facts in this paragraph were put on the record in the hearing on 5/9/14 and Petitioner confirmed on the record that she withdrew both motions dated 5/8/14 and 5/5/14.

The due process hearing was a closed hearing that took place as scheduled, on 5/9/14 and 5/12/14. Petitioner was represented by Joy Freeman-Coulbary, Esq. School was represented by Ellen Dalton, Esq. Neither party objected to the testimony of witnesses by telephone, but all witnesses in the hearing appeared in person. Petitioner participated in the hearing in person until Petitioner’s case in chief was concluded. Petitioner was then excused due to work reasons.

## Hearing Officer Determination

Petitioner's Disclosure statement, dated 5/5/14, consisted of a witness list of four witnesses and documents P-1 through P-19. Petitioner's documents were admitted into evidence without objection.<sup>2</sup>

The Five Day Disclosure statement of Respondent, dated 5/5/14, consisted of a witness list of eleven witnesses and documents R-1 through R-23. Respondent's documents were admitted into evidence without objection.<sup>3</sup>

Parties declined to discuss settlement at the beginning of the due process hearing.

Petitioner presented three witnesses in her case in chief: (1) Educational advocate ("Advocate"), who was qualified (over Respondent's objections) as an expert in individualized education program ("IEP") development, eligibility determination, and special education programming; (2) Petitioner; and (3) Student. No rebuttal witnesses were called.

Respondent presented nine witnesses, all from School: (1) Principal; (2) Special Education Coordinator ("SEC"); (3) Director of Student Support Team ("SST Director"); (4) Dean of Students ("Dean"); (5) Student's Math Teacher; (6) Student's English Teacher; (7) Special Education Teacher; (8) Psychologist; and (9) Director of Student Support Services ("SSS Director"), who was qualified (over Petitioner's objections) as an expert in special education policies and procedures relating to Child Find.

Parties stipulated to the following facts:

1. School is its own Local Educational Agency (LEA).
2. Student is \_\_\_\_\_ enrolled in School since the 2007/08 school year (SY).
3. Petitioner met with School's SEC and provided him with a written note dated 3/5/14, requesting that Student be evaluated for special education.
4. School is in the process of evaluating Student with Petitioner's consent which was given in writing on 4/8/14. No completed evaluations were included in School's Five Day Disclosures.
5. A manifestation determination meeting has never been held. No invitation to an MDR meeting was ever made to Petitioner.
6. School began its Student and Staff Support Team ("SSST") process for Student on 12/11/13.

The issues to be determined in this Hearing Officer Determination are as follows:

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<sup>2</sup> Pursuant to the Prehearing Order issued on 4/18/14, failure to note objections to the opposing party's disclosures results in the disclosures being admitted without objection.

<sup>3</sup> *Id.*

## Hearing Officer Determination

Issue 1 – Whether School denied Student a FAPE by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine initial eligibility for special education services:

(A) during the 2012/13 SY when (1) Student incurred behavioral infractions and was suspended for about 20 days due to behaviors, and (2) Student had declining test scores, but above average grades; and

(B) during the 2013/14 SY when (1) Student was suspended for more than 22 days, and (2) had declining and failing grades.

Issue 2 – Whether School denied Student a FAPE by failing to conduct a Manifestation Determination Review (“MDR”) for Student who was suspected of having a disability during the 2012/13 SY and 2013/14 SY, when Student was suspended from school for more than 10 school days during each school year.

Issue 3 – Whether School denied Student a FAPE not only by failing to conduct an MDR but also failing to determine that Student’s behavior in March 2014 was a manifestation of her suspected disability, when Student was suspended from school for more than 10 school days.

Issue 4 – Whether School denied Student a FAPE by failing to conduct an FBA and develop a BIP during the 2012/13 SY and 2013/14 SY, when Student was suspected of having a disability that had an adverse impact on education:

(A) in response to Student’s problem behaviors that impeded learning;

(B) as a result of the MDR that should have been convened and would have resulted in a determination that Student’s behaviors were a manifestation of her suspected disabilities; or

(C) during the time that Student was removed from her educational placement following her 10<sup>th</sup> day of suspension in each school year.

Petitioner requested the following relief:

(1) School to fund a comprehensive psychological, social history, Connors, and an FBA, as well as any other assessments warranted;

(2) School to convene a multidisciplinary team (“MDT”) meeting within 10 days of receiving the last of the completed evaluations/assessments to review those assessments, determine eligibility, fashion an IEP as warranted, determine any compensatory education<sup>4</sup> that may be due, and determine placement within 10 days;

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<sup>4</sup> If Petitioner prevailed, her request for compensatory education would be reserved pending the completion of Student’s evaluation and a determination of eligibility for special education services. Although Petitioner seeks as a remedy that the MDT determine any compensatory education that may be due, under controlling case law such

## Hearing Officer Determination

- (3) School to develop and implement an appropriate BIP;
- (4) School to convene an MDR and make an appropriate manifestation determination for 2012/13 SY and 2013/14 SY;
- (5) An Order determining that Student's suspension in March 2014 was due to behavior that was a manifestation of her suspected disability; and
- (6) Any other appropriate relief.

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>5</sup> are as follows:

1. Student is a resident of the District of Columbia. Petitioner is Student's mother.<sup>6</sup>
2. Student has been at School since Kindergarten
3. To date, Student has never been found to be a child with a disability requiring special education.<sup>9</sup> At no point did School ever conduct an MDR or a formal FBA for Student.<sup>10</sup>
4. Petitioner has other children who attend School and/or have graduated from School, some of whom have been in the special education program at School, so Petitioner had at least some familiarity with the program.<sup>11</sup>
5. Student's suspensions<sup>12</sup> began in 4<sup>th</sup> Grade; she has received the following suspensions:<sup>13</sup>

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a remedy cannot be given to an MDT or any body containing representatives of Respondent.

<sup>5</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>6</sup> Petitioner.

<sup>7</sup> *Id.*

<sup>8</sup> Special Education Teacher.

<sup>9</sup> Petitioner.

<sup>10</sup> Stipulation; SST Director.

<sup>11</sup> Petitioner.

<sup>12</sup> Unless otherwise indicated, all suspension discussed in this HOD are out-of-school suspensions.

## Hearing Officer Determination

- a. 2011/12 SY<sup>14</sup> – 3 suspensions totaling 17 days.<sup>15</sup>
- b. 2012/13 SY – 2 suspensions totaling 6 days.<sup>16</sup> Advocate noted an error in her computation of 4 suspensions totaling 20 days in P-4-1.
- c. 2013/14 SY – 4 suspensions totaling 21 days (9 days prior to 3/5/14 incident).<sup>17</sup>

6. Petitioner and Petitioner's sister often were called by School about Student's disciplinary issues and Student often needed to be picked up from School. These calls were in addition to the problems noted on School's Log Entries and Notices of Out of School Suspensions.<sup>18</sup>

7. Student's grades declined from the 2012/13 SY to the 2013/14 SY. In 2013/14, Student received 2 Fs in English, an F in Music, a decline from D to F in Earth Science and from C to D in World Geography.<sup>19</sup> Her poor grades do not reflect her capabilities, which are good.<sup>20</sup>

8. Student's behavior and grades varied among classes and teachers; she has little or no problem if she likes the teacher.<sup>21</sup> She had no problems with behavior or academic work in Math, where she liked the teacher and earned Cs.<sup>22</sup> She did have problems with English Teacher, who was new this year, and was getting Fs.<sup>23</sup> Student had good relationships with School Counselor, Dean, and SST Director, and no behavior problems with staff she liked.<sup>24</sup>

9. Student's NWEA/MAP<sup>25</sup> test scores over the last 18 months were low compared to national averages,<sup>26</sup> but close to – and sometimes above – DC averages.<sup>27</sup> Her test scores were not enough to trigger special educational concerns.<sup>28</sup>

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<sup>13</sup> Advocate; P-9; P-15.

<sup>14</sup> Petitioner is not alleging a violation of Child Find or failure to conduct an MDR for the 2011/12 SY, as it is outside the two-year statute of limitations, but asserts that these suspensions began a pattern that should have put School on notice when Student was later suspended in the 2012/13 SY and 2013/14 SY.

<sup>15</sup> Advocate; Principal; P-15-1, -2, -3.

<sup>16</sup> Dean; Principal; P-15-4.

<sup>17</sup> Dean; R-12-1; P-9-1, P-15-5, -6, -7.

<sup>18</sup> Petitioner; P-9-1, P-15.

<sup>19</sup> Advocate; Petitioner; P-12-1; P-6-1.

<sup>20</sup> English Teacher.

<sup>21</sup> Student.

<sup>22</sup> Math Teacher; Advocate; P-12-1.

<sup>23</sup> Student; English Teacher; P-12-1.

<sup>24</sup> Student; Dean.

<sup>25</sup> NWEA stand for Northwest Evaluation Association; MAP stands for Measure of Academic Progress.

<sup>26</sup> Student's Reading was in the 7-8 percentile, while her Math was in the 13-16 percentile, compared to national averages, R-10-1.

<sup>27</sup> Advocate; Special Education Teacher; Principal; R-10-1.

## Hearing Officer Determination

10. Student's DC-CAS scores showed that she was in the basic or below basic ranges, which the Special Education Teacher viewed as about average.<sup>29</sup> Student was within a few points of being Proficient, so within Bubble group at School.<sup>30</sup>

11. By October 2013, it became clear to School that Student needed both behavioral and academic support and she began getting support from School.<sup>31</sup> School began making interventions with Student in October 2013, beginning with Daily Behavior Tracker logs from 10/28/13 to 11/25/13.<sup>32</sup> Prior to that, the relatively few incidents that occurred in the 2012/13 SY did not rise to the level of School putting special interventions in place.<sup>33</sup>

12. Special Education Teacher was assigned to work with Student regularly during School's "intervention block," but not because Student needed special education; he viewed Student as being smart, capable and witty.<sup>34</sup> He tried to contact Petitioner before December 2013 to discuss concerns about Student. Student has a lot of potential and is charismatic; Student's peers pay attention to her and she has leadership ability.<sup>35</sup>

13. School referred Student to SSST, beginning with the 12/11/13 meeting, after she "smacked" a classmate on 12/11/13 and was suspended for two days, which was her first suspension of the 2013/14 SY.<sup>36</sup> Student was referred to SSST because of both academic and behavioral concerns.<sup>37</sup> Some 30 of the 70 6<sup>th</sup> Graders at School are in SSST.<sup>38</sup>

14. When the SSST began, Petitioner was invited and encouraged by School to attend, but did not respond.<sup>39</sup> School repeatedly, but unsuccessfully, sought to meet with Petitioner to discuss Student, offering to meet after hours or on the weekend to accommodate Petitioner's schedule.<sup>40</sup>

15. Principal had conversations with Student at various times and learned that outside family-based factors were impacting Student.<sup>41</sup> Dean made a point of checking in daily with Student.<sup>42</sup>

16. Other interventions used or tried by School included Afterschool tutoring, Saturday Learning Academy, Champion Prep with small groups, counseling with Counselor concerning her behavior, and working with SST Director on leadership and

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<sup>28</sup> Special Education Teacher.

<sup>29</sup> P-4-1; R-17-2, -3.

<sup>30</sup> Principal.

<sup>31</sup> SST Director.

<sup>32</sup> R-7.

<sup>33</sup> *Id.*

<sup>34</sup> Special Education Teacher.

<sup>35</sup> *Id.*

<sup>36</sup> Advocate; Stipulation; Dean; SST Director; R-12-1.

<sup>37</sup> R-2-3.

<sup>38</sup> Special Education Teacher.

<sup>39</sup> R-3-1; R-1-1.

<sup>40</sup> Dean; SST Director.

<sup>41</sup> Principal.

<sup>42</sup> Dean.

## Hearing Officer Determination

social skills.<sup>43</sup> Positive behavior intervention incentives were also implemented, which resulted in Student having lunches with a teacher and earning treats from the treat basket.<sup>44</sup>

17. Student did not go to Afterschool tutoring,<sup>45</sup> but sometimes attended Saturday Learning Camp.<sup>46</sup>

18. School put a Crisis/Emergency Plan in place for Student on 1/6/14 due to inappropriate behavior by Student, in order to de-escalate problems that might arise.<sup>47</sup>

19. School personnel met with Student to get “buy-in” and created a BIP for Student in January 2014.<sup>48</sup> Other students at School have BIPs even though they may not have disabilities.<sup>49</sup> In developing the BIP, School went through much of the analysis of an FBA, but prepared no written summary.<sup>50</sup>

20. School sometimes identifies students through SSST as needing special education evaluation, but School pursues its SSST process first and refers to special education evaluation only if SSST is not successful.<sup>51</sup> School’s SSST forms contain an option to be checked when disability is suspected, but it was not checked for Student.<sup>52</sup>

21. In January, February and the beginning of March 2014, Student made progress in SSST and was staying on task and seeing some success.<sup>53</sup> Due to interruptions caused by the holidays, snow days and Student’s suspensions, School had not had a sufficient period to determine whether the interventions it had put in place would be sufficient when the 3/5/14 incident occurred.<sup>54</sup>

22. Student was involved in a serious incident on 3/5/14 in which she became violent and struck both a security guard and the vice principal and had to be restrained. School immediately proposed expulsion of Student, but Petitioner appealed to the School Board and School reduced the penalty from expulsion to 12 days of suspension.<sup>55</sup> Student had not previously assaulted a staff member, although she had previously hit students, was disrespectful and verbally abused peers and adults alike.<sup>56</sup>

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<sup>43</sup> SST Director; R-4-1.

<sup>44</sup> R-19-2; English Teacher.

<sup>45</sup> Student; Special Education Teacher; SST Director.

<sup>46</sup> SST Director.

<sup>47</sup> R-9-1.

<sup>48</sup> Dean; R-8.

<sup>49</sup> Dean.

<sup>50</sup> SST Director.

<sup>51</sup> Dean; SEC; Principal.

<sup>52</sup> Dean; R-5-1, R-6-1.

<sup>53</sup> SST Director.

<sup>54</sup> *Id.*

<sup>55</sup> Petitioner; SST Director; Principal; P-15-7.

<sup>56</sup> Advocate.

## Hearing Officer Determination

23. After<sup>57</sup> Student's incident on 3/5/14, Petitioner for the first time in writing requested that Student be evaluated for special education, in a note given to SEC on 3/5/14.<sup>58</sup>

24. Upon receiving the 3/5/14 request from Petitioner, School began an evaluation of Student, beginning with a Review of Existing Data.<sup>59</sup> A student evaluation plan meeting was held on 4/8/14, where assessments were discussed with Petitioner and agreed upon.<sup>60</sup> The assessments include an FBA.<sup>61</sup> Petitioner signed the consent form giving her permission for evaluation of Student on 4/8/14.<sup>62</sup> All assessments have been completed; written reports are expected to be prepared by the week of 5/12/14.<sup>63</sup> Having expedited the evaluation, School proposed an eligibility meeting with Petitioner for various dates in late May 2014.<sup>64</sup>

25. Students at School are sometimes referred for special education evaluations without going through SSST.<sup>65</sup> Parental support is important to School in referring a student for a special education evaluation, but if the parent is overwhelmed the evaluation can move forward as long as there is parental consent.<sup>66</sup> Teachers with concerns can speak with SEC, but none ever did with respect to Student.<sup>67</sup>

26. Special Education Teacher, who worked with Student throughout the 2013/14 SY, is trained to look for warning signs from testing data and progress reports, but did not perceive a need to begin the special education process for Student.<sup>68</sup> Nor did School's other teachers and staff view Student as needing to be evaluated to see if she has a disability.<sup>69</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. To that end,

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<sup>57</sup> Dean; SEC.

<sup>58</sup> Stipulation; R-15-1.

<sup>59</sup> R-17.

<sup>60</sup> R-19-1.

<sup>61</sup> Psychologist.

<sup>62</sup> R-18-1.

<sup>63</sup> Psychologist.

<sup>64</sup> R-23-1; SEC.

<sup>65</sup> SST Director; SEC.

<sup>66</sup> Principal.

<sup>67</sup> SST Director; SEC.

<sup>68</sup> Special Education Teacher.

<sup>69</sup> English Teacher; SST Director; Math Teacher; SSS Director.

## Hearing Officer Determination

School must have procedures in place to ensure that all children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated. This obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111, 5 D.C.M.R. E-3002.1(d).

Child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300(a). Disability includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other Health Impairment. Regardless of the existence of a disability, it is only a qualifying disability under the IDEA if the disability adversely affects a child's educational performance. 34 C.F.R. 300.8.

In addition, School must ensure that (1) to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled, and (2) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114.

However, a child who meets one of the disability classifications under the IDEA who solely is in need of behavioral intervention or a related service and does not require special education services, does not qualify as a child with a disability under the IDEA. 34 C.F.R. 300.8(a)(2)(i).

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof is on the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

**Issue 1** – *Whether School denied Student a FAPE by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine initial eligibility for special education services:*

## Hearing Officer Determination

*(A) during the 2012/13 SY when (1) Student incurred behavioral infractions and was suspended for about 20 days due to behaviors, and (2) Student had declining test scores, but above average grades; and*

*(B) during the 2013/14 SY when (1) Student was suspended for more than 22 days, and (2) had declining and failing grades.*

Petitioner failed to meet her burden of proof by a preponderance of the evidence that School failed in its affirmative Child Find obligation to identify, locate and evaluate Student during either the 2012/13 or 2013/14 SY. School's Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). However, prior to 3/5/14 there were insufficient objective indicators that Student might be a child with a disability who, as a result, required special education services in order to access the curriculum.

In the 2012/13 SY, Student was suspended only twice for a total of 6 days and her test scores were not far below her peers, while her grades were generally satisfactory. This was not sufficient to put School on notice that action was needed under Child Find.

In the 2013/14 SY, School began making interventions with Student as her behavior deteriorated over the course of the school year. However, prior to the 3/5/14 incident, Student had been suspended only 3 times for a total of 9 school days. While her grades had declined, generally in classes with teachers Student didn't like, she was still performing in other classes where she like the teacher. By December 2013, School was paying close attention to Student and her behavioral and academic issues through SSST, with individual attention by both Dean and Principal, as well as her teachers. Following School protocol, if the interventions in SSST were not sufficient, Student might have been referred for a special education evaluation, but the 3/5/14 incident when Student struck the security guard and vice principal occurred before that point was reached.

On 3/5/14, after the incident that day, Petitioner for the first time in writing sought evaluation of Student.<sup>70</sup> This was the first sufficient objective indicator to School that Student was a child with a suspected disability who might be in need of special education to access the curriculum. At that point, School was required to comply with the initial evaluation procedures outlined in the IDEA and to expedite the evaluation. 34 C.F.R. 300.534(d)(2)(i).

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<sup>70</sup> School must conduct a full and individual initial evaluation upon the request of a parent to determine if the child is a child with a disability. 34 C.F.R. 300.301. This initial evaluation must be conducted by School within 120 days from the date that the student was referred for an evaluation or assessment. 34 C.F.R. 300.301(c), D.C. Code 38-2561.02(a). The referral must be made in writing by the parent. 5 D.C.M.R. E-3004.1(a)-(c). Petitioner's informed consent must be obtained in writing prior to the initial evaluation. 34 C.F.R. 300.300.

## Hearing Officer Determination

Following receipt of Petitioner's request for evaluation on 3/5/14, School began a Review of Existing Data, convened a student evaluation plan meeting on 4/8/14, conducted agreed upon assessments, and has proposed dates in late May 2014 to meet with Petitioner to review the assessments and determine eligibility. There is no violation of the IDEA as of 4/4/14 when this complaint was filed.

**Issue 2** – *Whether School denied Student a FAPE by failing to conduct a Manifestation Determination Review for Student who was suspected of having a disability during the 2012/13 SY and 2013/14 SY, when Student was suspended from school for more than 10 school days during each school year.*

Within 10 school days of any decision to change the placement of a child *with a disability* for a violation of a code of student conduct, an MDR must be conducted. 34 C.F.R. 300.530(e)(1). To conduct the MDR, School, the parent, and relevant members of the child's IEP team 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 parent to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of School's failure to implement the IEP. 34 C.F.R. 300.530(e)(1).

For Student to be entitled to the disciplinary protections of the IDEA, including the requirements that School conduct an MDR within 10 days of a change in placement for disciplinary reasons and conduct an FBA (Issue 4, below) after Student has been suspended for 10 days, Petitioner must prove that School knew that she was a student with a suspected disability before the behavior that precipitated her suspension occurred. 34 C.F.R. 300.534(a). However, Petitioner failed to present any documentary evidence or testimony to show that School had knowledge of a suspected disability under 34 C.F.R. 300.354(b) to rely on the protections of 34 C.F.R. 300.530, prior to 3/5/14.

Petitioner presented no evidence to show that she had expressed concern in writing to any School personnel or any of Student's teachers that Student was in need of special education and related services. Petitioner presented no evidence to show that she had requested an evaluation of Student prior to 3/5/14. Petitioner also presented no evidence to show that any of Student's teachers, or other School personnel, expressed specific concerns about a pattern of behavior demonstrated by Student to the School director of special education or to other School supervisory personnel. Thus, Petitioner failed to prove that Student was entitled to the disciplinary protections of the IDEA that apply to students with disabilities and an MDR was not required.

**Issue 3** – *Whether School denied Student a FAPE not only by failing to conduct an MDR but also failing to determine that Student's behavior in March 2014 was a manifestation of her suspected disability, when Student was suspended from school for more than 10 school days.*

## Hearing Officer Determination

Since School had no obligation to conduct an MDR, as concluded in Issue 2 above, there could be no failure to determine that Student's behavior was a manifestation of a disability.

**Issue 4** – *Whether School denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan during the 2012/13 SY and 2013/14 SY, when Student was suspected of having a disability that had an adverse impact on education:*

*(A) in response to Student's problem behaviors that impeded learning;*

*(B) as a result of the MDR that should have been convened and would have resulted in a determination that Student's behaviors were a manifestation of her suspected disabilities;*  
*or*

*(C) during the time that Student was removed from her educational placement following her 10<sup>th</sup> day of suspension in each school year.*

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 strategies to address that behavior. 34 C.F.R. 300.324. An FBA is essential to addressing a child's behavioral difficulties. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). Here, School was increasing its interventions based on Student's behavior and prepared a BIP in January 2014. But School did not have sufficient objective indicia necessary to trigger a formal FBA until 3/5/14, at which point an evaluation including an FBA was begun.

An FBA and development of a BIP are also triggered by an MDR which concludes that that Student's behaviors were a manifestation of her suspected disabilities. But as set forth above, an MDR was not required, so an FBA is not required on that basis.

Finally, after a child with a disability has been removed from her current placement for 10 school days in the same school year, School must conduct an FBA and develop behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not recur. 34 C.F.R. 300.530(d)(1)(ii). Here, Petitioner proved only that Student was removed from school for 6 days in the 2012/13 SY; during the 2013/14 SY, the 10<sup>th</sup> day did not occur until 3/5/14, at which point School began an expedited evaluation which included an FBA. Thus, School did not deny Student a FAPE by failing to conduct an FBA.

### **ORDER**

Petitioner failed to meet her burden of proof on all issues presented. All requested relief is denied.

This complaint is **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED.**

## Hearing Officer Determination

### NOTICE OF RIGHT TO APPEAL

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

Dated: May 22, 2014

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

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