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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,¹
through the Legal Guardian,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: September 6, 2010

Hearing Officer: Virginia A. Dietrich

Case No:

Case No.

(Consolidated for hearing)

Hearing Dates: 08/17/10 Room: 5b

08/31/10 Room: 5b

HEARING OFFICER DETERMINATION

BACKGROUND

Petitioner, the grandfather and legal guardian of Student, filed an expedited discipline due process complaint notice on 06/03/10, i.e., case number _____ alleging that Student was denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEIA") when the District of Columbia Public Schools ("DCPS") failed to afford Student the disciplinary protections of a child with a suspected disability and when DCPS failed to convene a Manifestation Determination Review ("MDR") meeting after Student had been suspended from school for more than 10 days despite DCPS being on notice that Student was being evaluated for special education services. In the complaint, Petitioner also alleged that Student was entitled to compensatory education for missed services while Student was suspended from school during the 2009-2010 school year. Pursuant to 34 C.F.R. 300.532(c)(2), a complaint where the parent has disagreed with discipline procedures flowing from a violation of a code of student conduct must proceed to a hearing within 20 school days of the filing of the complaint, and the hearing officer must make a determination within 10 school days after the hearing. In this case, the 20th school day following the filing of the complaint was 08/31/10, and the 10th school day following the due process hearing that concluded on 08/31/10, is 09/15/10.

¹ Personal identification information is provided in Appendix A.

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On 06/15/10, Petitioner filed a second complaint, i.e., case number [redacted] which was a non-discipline expedited due process complaint, in which Petitioner alleged that Student had been denied a FAPE in violation of the IDEIA when DCPS failed to identify Student as a child with a disability despite recent independent evaluations that indicated a need for special education services, when DCPS failed to provide Student with an appropriate placement when it failed to determine Student eligible for special education services, and when DCPS failed to convene a proper Individualized Education Program ("IEP") Team on 06/04/10 by failing to include a general education teacher from the interim alternative program that Student was attending as a result of disciplinary actions taken by the school Student regularly attended. Petitioner also claimed that Student was entitled to compensatory education for missed special education services beginning on 06/04/10 when Student was denied eligibility for specialized instruction in all academic areas and in the area of speech and language pathology, and for Student being denied an appropriate placement where the special education services could be implemented. On 06/21/10, Petitioner withdrew his request for an expedited hearing in case number 2010-0722 and the case was removed from the non-discipline expedited hearing calendar. The IDEIA timeline then reflected a 30-day resolution period that began on 06/16/10 and ended on 07/15/10, followed by 45-day period in which to render a decision, with a hearing officer determination due no later than 08/29/10. See 34 C.F.R. 300.515. When Petitioner failed to appear on 08/16/10 for the first scheduled day of the hearing, Petitioner was allowed to begin his case on 08/17/10, which was the second day scheduled for the hearing. The hearing could not be concluded on 08/17/10, and Petitioner sought and was granted a continuance until 08/31/10, with a Hearing Officer determination due no later than 09/10/10.

On 07/01/10, as a result of a motion to consolidate the two cases filed by Petitioner on 06/23/10 in case number [redacted] the cases were consolidated for one hearing for the sake of judicial economy. All documents admitted into evidence and all witness testimony presented at the due process hearing was applicable to both cases.

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEIA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapters 25 and 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

This Hearing Officer was assigned to case number [redacted] on 06/04/10. The prehearing conference occurred on 06/15/10 and a Prehearing Order which memorialized the substance of the prehearing conference, was issued on 06/15/10. A resolution meeting took place on 07/27/10 and resolution could not be reached.

This Hearing Officer was assigned to case number [redacted] on 06/16/10. A resolution meeting took place on 07/27/10 and resolution could not be reached. The prehearing conference occurred on 07/27/10 and a Prehearing Order which memorialized the substance of the prehearing conference, was issued on 07/29/10.

The due process hearing was a closed hearing that was scheduled to be heard on 08/16/10 and 08/17/10; however, Petitioner failed to appear for the hearing on 08/16/10 and Petitioner's

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Attorney was unable to reach him by telephone. Petitioner's Attorney requested and was granted the opportunity to begin the hearing on 08/17/10. Petitioner did appear for the hearing on 08/17/10 and it began at 9:00 a.m.; however, the hearing could not be concluded on 08/17/10 despite a full day of testimony. Petitioner sought and was granted a continuance because it was the non-appearance of Petitioner on 08/16/10 that accounted for the failure to complete the hearing in the scheduled 2-day time frame. The hearing date was continued to 08/31/10, which was the first mutually agreeable date for all parties. The consolidated hearing concluded on 08/31/10.

Petitioner was represented by Darnell Henderson, Esq. from James E. Brown & Associates and DCPS was represented by Tanya Chor, Esq.. Petitioner presented the following four witnesses: Petitioner; educational advocate; Psy.D., clinical and school psychologist; and speech and language pathologist. DCPS presented the following two witnesses: Assistant Principal at School; and DCPS compliance case manager.

Petitioner's Disclosure Statement, dated 08/06/10 and labeled case number contained a witness list of 6 witnesses and disclosure documents numbered PE-1 through PE-40. The witness list and Exhibits PE-1 through PE-40 were admitted into evidence without objection. Due to the cases being consolidated, the witness list and disclosure documents were applicable to case number as well.

DCPS' Disclosure Statement, dated 08/09/10 and labeled case number contained a witness list of 5 witnesses and disclosure documents numbered DCPS 1 through DCPS 24. DCPS withdrew Exhibit DCPS 24. The witness list and Exhibits DCPS 1 through DCPS 23 were admitted into evidence without objection. Due to the cases being consolidated, the witness list and disclosure documents were applicable to case number as well.

The issues and relief requested were read into the record for both cases. Petitioner withdrew his request for compensatory education in case number Petitioner's request for compensatory education as relief in case number as outlined in the Prehearing Order issued on 07/29/10, took the form of 4 hours/week of independent tutoring in all academic areas for the school year, 50 hours of independent speech-language services to address receptive speech-language deficits, and 100 hours of independent individual counseling with emphasis on grief and loss, problem solving skills and substance abuse, and was proposed for missed services as a result of the ineligibility determination for special education services beginning on 06/04/10 and continuing until the time the hearing began on 08/17/10. DCPS objected to Petitioner's request for relief for compensatory education in case number because Petitioner's disclosures did not include a compensatory education plan and Petitioner's witness list contained no reference to testimony about compensatory education. DCPS' objection was noted, and the Hearing Officer ruled that DCPS was unfairly prejudiced by Petitioner's noncompliance with statutory disclosure requirements, and that the issue would be addressed in this Hearing Officer Determination. Pursuant to 34 C.F.R. 300.512(a)(3), any party to a hearing has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. For this reason, Petitioner was precluded from and did not present any evidence regarding compensatory

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education in case number This Hearing Officer notes that even if Petitioner had been allowed to present evidence on compensatory education, it would have been extremely difficult if not impossible for Petitioner to offer and prove the nature and extent of harm as a result of missed services for Student when only 13 school days had elapsed from the time that Student allegedly should have been determined eligible for special education services until the time of the due process hearing.

At the time the complaints were filed, Student was a year old girl who resided in the District of Columbia and was attending grade at School, a public school located in the District of Columbia. From the beginning of the 2009-2010 school, Student had been suspended from school on numerous occasions and for lengthy periods of time. Petitioner, concerned about Student's poor grades and unacceptable behaviors in school that led to suspensions, had filed a previous complaint against DCPS, alleging that Student was in need of special education services, and by way of a settlement agreement dated 03/16/10, Petitioner was authorized funding for various independent evaluations. The completed evaluations were reviewed at a Multidisciplinary Team ("MDT") meeting on 06/04/10, and at that time, Student was determined to be ineligible for special education services. Petitioner disagreed with the determination of ineligibility and filed a due process complaint notice, i.e., case number

Case number the first filed complaint, was filed as a result of Petitioner's contention that as of 03/16/10, the date that DCPS settled a case with Petitioner regarding Student's need for evaluations and determination of eligibility for special education services, DCPS was on notice that Student was a child with a suspected disability, and as such, when Student was suspended for more than 10 days beginning on 03/24/10, DCPS should have complied with the disciplinary protections of IDEIA applicable to Student and conducted an MDR meeting within 10 days of the suspension to determine if Student's behavior that led to the suspension was a manifestation of her suspected disability.

With respect to case number the issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS failed to afford Student the disciplinary protections of a child with a suspected disability when it suspended Student from school on 03/24/10 for more than 10 days after having received notice of Student's suspected disability by signing a settlement agreement on 03/16/10 where DCPS agreed to fund independent evaluations and then reconvene to review the evaluations and determine Student's eligibility for special education services; and

Whether DCPS failed to convene a MDR meeting within 10 days of Student's suspension on 03/24/10 after being on notice that Student had a suspected disability?

In case number Petitioner withdrew the issue of Student's entitlement to compensatory education as a result of missed academic programming while on suspension during the 2009-2010 school year because Student had been promoted to the grade for the 2010-2011 school year despite the alleged missed services. Due to the withdrawal of this issue, Petitioner also withdrew the relief requested in the form of Student being provided with all missed class assignments while on suspension and having a tutor available to assist Student with the completion of the missed assignments.

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The relief requested by Petitioner at the due process hearing in case number was as follows: A determination that Student had been denied a FAPE as a result of DCPS' failure to follow proper disciplinary procedures by failing to convene a MDR meeting; and that DCPS be ordered to follow proper procedures in convening a MDR meeting with all appropriate personnel, including Petitioner.

With respect to case number the issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS failed to identify Student as a child with a disability despite a current independent comprehensive psychological evaluation that identified Student with academic deficiencies in core curriculum classes and recommended a disability classification of Learning Disabled ("LD") and Emotional Disturbance ("ED"), and a current independent speech-language evaluation that recommended speech-language services due to receptive language deficits; and

Whether DCPS failed to provide Student with an appropriate placement when it failed to determine that Student was eligible for special education services on 06/04/10; and

Whether DCPS failed to convene a proper IEP Team at the eligibility determination meeting at School on 06/04/10 when it failed to include a general education teacher from the interim alternative program that Student had been placed in since April 2010 due to disciplinary action by School?

The relief requested by Petitioner at the due process hearing in was as follows: A finding that Student was denied a FAPE with respect to all issues in the complaint; a hearing officer determination that Student is eligible for special education services with a disability classification of Multiply Disabled ("MD"), inclusive of Learning Disabled ("LD") and Emotional Disturbance ("ED"); DCPS to place and fund Student in a full-time, therapeutic day placement, with transportation, for students with LD and ED classifications or other appropriate placement located by Petitioner; and DCPS to convene an IEP Team meeting with all appropriate personnel to develop an appropriate IEP for Student.

Stipulations of fact by the parties:

#1. On 06/04/10, the Multidisciplinary Team ("MDT") reviewed the following independent evaluations: Comprehensive Psychological Evaluation dated 04/04/10; Functional Behavior Assessment dated 04/20/10; Speech and Language Evaluation dated 03/31/10; Occupational Therapy Evaluation dated 03/30/10; and Social History Evaluation dated 04/26/10.

#2. Exhibit PE-31 refers to the 2007-2008 school year when Student was attending the grade.

#3. Exhibit DCPS 1 is dated 07/27/10.

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. During the 2009-2010 school year, Student, age was an grade student at School, located in the District of Columbia. (Testimony of Petitioner; PE-21).

#2. On 03/16/10, Petitioner and DCPS executed a Settlement Agreement whereby Petitioner was authorized to obtain an independent comprehensive psychological evaluation, speech and language evaluation, occupational evaluation, social history and behavior assessment at the expense of DCPS, and within 15 calendar days of receipt of the final independent evaluation, DCPS was to convene an eligibility meeting to review the evaluations, determine eligibility and if warranted, develop an IEP, discuss location of services and compensatory education. (PE-16).

#3. During the 2009-2010 school year, Student was first suspended from school for more than 10 days beginning on or about 08/31/09. (PE-25; PE-26). On 11/16/09, Student was suspended from School for 3 days for causing disruption on school property. (PE-29). On 01/28/10, Student was again suspended from School for 10 days for engaging in reckless behavior that could cause harm to self or others. (PE-29). And on 03/24/10, Student engaged in behavior that warranted suspension or expulsion when Student caused a security breach at School by opening the exit door for outsiders and engaging in reckless behavior that could cause harm to others. (DCPS 11). As a result of this conduct on 03/24/10, Student was suspended for 45 days, beginning on 03/24/10 and ending on 06/07/10, and sent to for educational instruction during that period of suspension. (DCPS 13).

#4. A MDR meeting did not occur within 10 days of the suspension on 03/24/10, but occurred on 06/04/10 with only DCPS personnel present. (Testimony of Testimony of DCPS 16). Petitioner, although present at School on 06/04/10 when the MDR meeting occurred, did not participate in it due to lack of prior and proper notice of the meeting from DCPS. (Testimony of Petitioner; Testimony of ; Testimony of)

#5. On 06/04/10, the MDT met and reviewed the following independent evaluations: Comprehensive Psychological Evaluation dated 04/04/10; Functional Behavior Assessment dated 04/20/10; Speech and Language Evaluation dated 03/31/10; Occupational Therapy Evaluation dated 03/30/10; and Social History Evaluation dated 04/26/10, and the IEP Team, over the objection of Petitioner, determined that Student was not eligible for special education services. (Stipulation #1; PE-17; P-35).

#6. The MDT participants at the 06/04/10 eligibility determination meeting included the following: Petitioner, Petitioner's advocate, DCPS compliance case manager, DCPS social worker, DCPS psychologist, two School special education teachers, School Special Education Coordinator, Student's grade English teacher at

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School, Student's grade history teacher at School, Student's grade mathematics teacher at School, School Assistant Principal, DCPS speech and language pathologist, and DCPS occupational therapist. (PE-17).

#7. The independent comprehensive psychological evaluation dated 04/04/10 was conducted in Student's home environment where Student was observed to be oriented to person, place, and time and with no evidence of a thought disorder. Although Student expressed frustration and was upset about the length of the evaluation, she offered sustained and focused attention on all items presented, and the evaluation was thought to be an accurate assessment of Student's current cognitive, academic and personality functioning. (PE-21). This independent comprehensive psychological evaluation was reviewed by the MDT on 06/04/10 and was considered to be a valid assessment by DCPS. (PE-17; Testimony of

#8. The results of cognitive testing as indicated in the independent comprehensive psychological evaluation dated 04/04/10 was that Student's general intellectual ability is in the Average range when compared to others in her age range. Student's overall Average cognitive score suggests that she should be able to keep up with her peers on a wide variety of verbal and non-verbal cognitive reasoning tasks. (PE-21).

#9. The results of achievement testing as reflected in the independent comprehensive psychological evaluation dated 04/04/10 are as follows: Student received a Broad Mathematics grade equivalent score of 5.0 (5th grade), suggesting that math tasks involving problem solving and number sense above the 10 year, 4 month age level would be quite difficult for her. Student received a Broad Reading grade level equivalent score of 5.2 (5th grade), suggesting that reading tasks such as decoding skills, reading comprehension and reading speed above the 10 year 7 month age level would be quite difficult for her. Student received a Broad Written Language grade level equivalent score of 3.6 (3rd grade), suggesting that tasks that require her to write cohesive sentences, spell, write with quality and fluency above the 8 year 11 month level would be quite difficult for her. Student received an Oral Language grade level equivalent score of 2.8 (2nd grade), suggesting that tasks that require her to listen and respond to oral directions above the 8 year 2 month age level would be quite difficult for her. Student's achievement testing scores suggested deficiencies in math, reading, written language and oral language, which reflect a diagnosis of Learning Disorder Not Otherwise Specified as evidenced by difficulties in all academic areas assessed. (PE-21; Testimony of

#10. Student's social-emotional functioning, as reflected in the 04/04/10 independent comprehensive psychological evaluation, was assessed by using three rating scales completed by Student's teachers and one rating scale completed by Student, and can be summarized as follows:

(A) The Behavior Assessment Scale for Children that was completed by one of Student's teachers indicates that Student's score in Externalizing problems is in the Clinically Significant range, her score on Hyperactivity is in the At-Risk range, her score on Aggression is in the Clinically Significant range, and her score on Conduct Problems is in the Clinically Significant range. Her behaviors that warranted those scores included acting without thinking, often calling out in class, acting out of control, threatening to hurt others, losing her temper too quickly,

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arguing when denied her own way, bullying others, seeking revenge on others and hitting others. With respect to Internalizing Problems, Student earned a Clinically Significant score on Depression. Her behavior was described as often sad, negative about things, and often pessimistic. In the area of School Problems, Student's score in Attention Problems was in the At-Risk range. Behavior wise, Student sometimes listens to directions, but is easily distracted from her schoolwork. An At-Risk score signifies potential or developing problems that need to be monitored carefully but which may not be severe enough to warrant a formal diagnosis and a Clinically Significant score denotes a high level of maladaptive behavior.

(B) On the Conner's Teacher Rating Scale, Student's scores suggested that she presents with behavioral difficulties in the classroom that consist of attention problems, hyperactivity, and distractibility.

(C) On the Graphic Projective Technique: House, Tree, Person, which is a projective personality test, Student's responses indicated emotional turmoil, tendencies towards behavioral acting out, feelings of inadequacy and poor self-esteem.

(D) Based on the assessment, Student meets the criteria for Conduct Disorder and Depressive Disorder Not Otherwise Specified because she feels poorly about herself, is grieving over the loss of her mother, her inner turmoil and sadness is seen by her tendency to lash out at others with minimal provocation, and she has not achieved a stable self-concept. Student also meets the criteria for Conduct Disorder, Adolescent Onset Type, Moderate because she exhibits symptoms of aggression towards people, she deliberately started a fire with the intention of causing significant damage, and she does not attend school regularly; and this disturbance in behavior causes clinically significant impairment in Student's social and educational functioning. (PE-21).

#11. An independent Speech and Language Evaluation dated 03/31/10 revealed that with respect to Student's vocabulary skills, Student's receptive language skills fell in the Average range and her expressive language skills fell in the Below Average range; however, Student's standard score of 84 for expressive language was only one point below the average score range of 85-115. In 6 of the 8 subtests that measured Student's language skills, Student achieved average scores. Student's scaled score for Formulated Sentences was one point below the average range and her scaled score for Understanding Spoken Paragraphs was 2 points below the average range. Although Student did demonstrate a mild weakness in her ability to formulate grammatically correct complex sentences and a moderate weakness in her ability to understand spoken paragraphs and answer questions about what was heard, this composite moderate weakness presented deficits that might impact her ability to access the general education curriculum. (P-20). The evaluator concluded that based on Student's speech and language impairment, Student had weaknesses that needed to be addressed through the provision of speech and language services; therefore, Student qualified as a student with a speech and language impairment under IDEIA. The evaluator recommended 30 minutes/week of either individual or group speech and language services in the classroom setting to assist Student with her demonstrated weaknesses and opined that although implementation of remedial speech and language services could be accomplished by any teacher within the classroom setting, the provision of the necessary services can best be achieved by a speech and language pathologist

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who would be more directed towards achieving specific speech and language goals. (P-20; Testimony of

#12. On 06/04/10, the MDT reviewed the independent Speech and Language Evaluation dated 03/31/10, and gave no indication that the assessment was an invalid assessment although DCPS disagreed with the measurement instrument used and the results based on that instrument. DCPS did not believe that Student qualified for speech and language special education services because the measurement instrument used was not geared towards urban children and because all areas in which Student did not perform well on could be addressed in her academic courses. (PE-17; Testimony of DCPS felt that the weaknesses that Student demonstrated were no different from weaknesses demonstrated by other students, and did not rise to the level of a disability. And, DCPS felt that if Student had a disability, it would be demonstrated across the board in terms of her scores. (Testimony of If DCPS were to conduct another speech and language evaluation using a different measurement instrument within one year of 03/31/10, the test results would be invalid. (Testimony of

#13. Student's grades for the first three advisories consisted of F, D, and F respectively in English 8 with 42 absences; F, C, and A in Pre-Algebra with 43 absences; B, B-, and F in Science with 25 absences; D, F and F in U.S. History and Geography with 27 absences; a final grade of D in Health and Physical Education 8 with 22 absences; and a C in Art for the 3rd Advisory with 16 absences. (DCPS 10). Student received failing grades as a result of tardiness and absences. At the end of the 2009-2010 school year, Student was promoted to the grade. (Testimony of

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:

"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. 3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A free appropriate public education or FAPE means special education and related services that are provided at public expense; meet the standards of the State Education Agency; include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with an IEP that meets the requirements of IDEIA. 34 C.F.R. 300.17. Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational

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standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

The first issue to be addressed, as alleged in case number _____ is whether DCPS failed to afford Student the disciplinary protections of a child with a suspected disability when it suspended Student from school on 03/24/10 for more than 10 days after having received notice of Student's suspected disability by signing a settlement agreement on 03/16/10 wherein DCPS agreed to fund independent evaluations and then reconvene to review the evaluations and determine Student's eligibility for special education services?

Pursuant to 34 C.F.R. 300.534(a), a child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in IDEIA if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency...that the child is in need of special education and related services. 34 C.F.R. 300.534(b).

The Hearing Officer concludes that on 03/16/10, DCPS was on notice that Student was a child with a suspected disability because on that date, DCPS signed a settlement agreement with Petitioner authorizing Petitioner to obtain five different evaluations at DCPS' expense, and DCPS agreed that when it received the last of these independently obtained evaluations, DCPS would convene a meeting to review the evaluations and determine Student's eligibility for special education services. (Finding #2).

On 03/24/10, when Student was suspended for 45 days for opening an exit door at school, she had already been suspended for more than 10 days during the 2009-2010 school year. (Finding #3). Therefore, Student was entitled to the disciplinary protections provided by IDEIA.

The disciplinary protections that would have been afforded to Student as a child with a suspected disability are that she would have received a functional behavioral assessment and behavioral intervention services and modifications that would have been designed to address the behavior violation so that it did not reoccur. 34 C.F.R. 300.530(d). There is no evidence in the record that a behavior intervention plan was developed; however there is evidence in the record that a Functional Behavior Assessment was conducted on 04/20/10. (Finding #5). Rather, Student was sent to an interim alternative placement at Choice Academy for 45 days. (Finding #3).

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).

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DCPS' failure to develop a behavior intervention plan impeded Student's right to a FAPE in that she did not have a behavior intervention plan that would help her to curtail the behaviors that resulted in a violation of the code of student conduct, and her parent was denied the opportunity to help construct a behavior intervention plan that might address the behaviors that resulted in Student's multiple suspensions during the 2009-2010 school year, (Finding #3). As a result, Student was denied a FAPE. Petitioner met his burden of proof on this issue.

The second issue, as alleged in case number _____ is whether DCPS violated IDEIA when it failed to convene a MDR meeting within 10 days of Student's suspension on 03/24/10?

Pursuant to 34 C.F.R. 300.530(e), within 10 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 Local Education Agency, 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. In this case, DCPS was obligated to convene a MDR within 10 days of Student's suspension on 03/24/10 because of the protections afforded to Student via 34 C.F.R. 300.534(a) and the fact that Student's placement was changed when she was transferred from School to _____ on 03/24/10 for a 45-day suspension period. (Finding #3). DCPS did not convene a MDR meeting within 10 days as required by statute, but attempted to do so on 06/04/10 in conjunction with an eligibility determination meeting, without giving Petitioner proper and prior notice of the MDR meeting. (Finding #4).

The impact of DCPS' failure to conduct the MDR meeting within 10 days is that it is entirely possible that the MDR team could have found that Student's behavior was a manifestation of her suspected disability and returned her to _____ School with services to address her behaviors. And, because the MDR team found Student ineligible for special education services on 06/04/10 (Finding #5), DCPS is not absolved of the responsibility of conducting the MDR meeting within 10 days because the decision making process cannot be applied retrospectively. Student was denied a FAPE because DCPS' failure to conduct the MDR meeting within 10 days deprived Petitioner of his right to participate in educational decisions regarding his child's placement. The harm to Petitioner was that he was precluded from the opportunity to participate in the decision-making process that led to Student's removal from School to _____ for an extended period of time.

The Hearing Officer determines that Petitioner met his burden of proof by a preponderance of the evidence, and that Student was denied a FAPE as a result of DCPS failing to convene a MDR meeting within 10 days of the 03/24/10 suspension. The MDR, conducted on 06/04/10 without Petitioner because Petitioner failed to receive proper and prior notice of the convening of the MDR meeting until it was about to take place (Testimony of _____ and Petitioner), was improper under IDEIA because Petitioner had a right to have notice, the opportunity to participate in the MDR meeting, and the right to determine who the relevant members of the MDR team would be. 34 C.F.R. 300.530(e).

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The first issue to be addressed with respect to case number _____ is whether DCPS failed to identify Student as a child with a disability despite a current independent psychological evaluation that identified Student with academic deficiencies in core academic areas and recommended a disability classification of Learning Disabled ("LD") and Emotional Disturbance ("ED"), and a current independent speech-language evaluation that recommended speech-language services due to receptive language deficits?

Petitioner alleges that the results of an independent comprehensive psychological evaluation and an independent speech and language evaluation contained sufficient empirical data for Student to be determined eligible for special education services as a child with a disability classification of Multiple Disability ("MD"), ED, LD and Speech and Language Impairment ("SLI") and that DCPS' failure to determine Student eligible for special education services on 06/04/10 resulted in the denial of a FAPE.

Under IDEIA, a child with a disability means a child who has been evaluated as having...a speech or language impairment...a serious emotional disturbance...a specific learning disability...or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8. "Evaluation" means procedures used in accordance with IDEIA to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15; 5 D.C.M.R. 3001.1.

Under IDEIA, Emotional Disturbance ("ED") 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. The term Emotional Disturbance does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance. 34 C.F.R. 300.8(c)(4); 5 D.C.M.R. 3001.1.

According to the results of an independent comprehensive psychological evaluation dated 04/04/10, Student qualified for a disability classification of ED on the basis of a diagnosis of Conduct Disorder and Depressive Disorder Not Otherwise Specified. These results were based on a Behavior Assessment Scale completed by one of Student's teachers during the 2009-2010 school year, on the Conners' Teacher Rating Scale completed by one of Student's classroom teachers during the 2009-2010 school year, on a Teacher/Counselor Questionnaire on Student's Progress in the Classroom and on a Graphic Projective Technique assessment completed by Student. Three out of the four measurement instruments used by the evaluator to obtain data to determine whether or not Student had a diagnosis that would qualify her for a disability classification of ED came from classroom and school observations of Student by her teachers.

Teachers' reports of Student's behavior in school, as reported in these assessments, included Student sometimes acting without thinking, often calling out in class, often acting out of control, threatening to hurt others, losing her temper too quickly, often teasing others, arguing when denied her own way, bullying others, seeking revenge on others, and hitting others. These

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behaviors contributed to scores in the At-Risk range for hyperactivity and scores in the Clinically Significant classification range for Externalizing Problems, Aggression and Conduct Problems; with an At-Risk score signifying potential or developing problems that need to be monitored carefully but which may not be severe enough to warrant a formal diagnosis and a Clinically Significant score denoting a high level of maladaptive behavior. Student's score on the Depression index was in the Clinically Significant range where data indicated that Student was often sad, almost always negative about things, and often pessimistic. (Finding #10). This comported with Student's behavior that was observed for the Functional Behavioral Assessment where Student was observed to be non-participatory, withdrawn, and with her head down on the desk most of the time in class. (PE-22). However, [redacted] credible testimony about Student's self report of use of drugs and alcohol and staying out late at night that began after her return from her initial suspension to [redacted] during the 2009-2010 school year, may very well have explained Student's behavior of sleeping in class and putting forth very little effort into her school work. (Testimony of [redacted] Essentially, Student's behavior could be explained by sensory or health factors.

The Hearing Officer concludes that Petitioner did not meet his burden of proof by a preponderance of the evidence that Student qualifies as a student with a disability classification of ED. Although there was credible evidence in the record by way of the independent psychological evaluation that Student qualifies as a Student with ED based on a diagnosis of depression or Conduct Disorder, there is also contrasting credible evidence in the record that Student's use of drugs and alcohol and staying out late at night were the prime culprits of Student's inability to effectively participate in class.

In making the determination that Student does not have an Emotional Disturbance under IDEIA, the Hearing Officer relies on 34 C.F.R.306(c) which states that, "In interpreting evaluation data for the purpose of determining if a child is a child with a disability...each public agency must draw upon information from a variety of sources, including aptitude and achievements, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and ensure that information obtained from all of these sources is documented and carefully considered." In balance, the results of the overall "evaluation" of Student by the MDT on 06/04/10 pursuant to 5 D.C.M.R. 3001.1, was that there were too many competing factors in order for the MDT to conclude that Student's depression or aggression or conduct problems interfered with her ability to learn in school. The Hearing Officer concludes that in totality, the evidence was insufficient to conclude by a preponderance of the evidence that Student met the definition of Emotional Disturbance under IDEIA; especially when in the beginning of the 2009-2010 school year, Student was "on point" (PE-22; Testimony of [redacted] and the maladaptive behaviors that were observed had only surfaced after the first quarter of the 2009-2010 school year.

Under IDEIA, a Specific Learning Disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations... 34 C.F.R. 300.8(c)(10); 5 D.C.M.R. 3001.1.

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The evidence presented with respect to whether or not Student had a Learning Disability was the strongest. Typically, a learning disability is present when a discrepancy exists between a student's cognitive and academic achievement. (Testimony of _____ Testimony of _____ Student's cognitive testing indicated that Student was solidly in the Average range and should be able to keep up academically with her peers; however, Student's achievement scores indicated performance on the 5th grade level in mathematics and reading, on the 3rd grade in written language, and on the 2nd grade in oral language; and this performance was significantly behind Student's same age 8th grade peers during the 2009-2010 school year. (Finding #9). The evaluation, and thus the evidence was clear that Student had significant performance deficits in all areas of academic performance.

Pursuant to 34 C.F.R. 300.10, core academic subjects means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history and geography.

There was speculation by the DCPS members of the MDT on 06/04/10 that perhaps Student's achievement testing scores were low because she was under the influence of narcotics; however, there was no concrete evidence of this in the record. The observation of the evaluator who conducted the independent comprehensive psychological evaluation was that Student was oriented to person, place, and time; there was no evidence of a thought disorder; although Student expressed frustration and was upset about the length of the evaluation, she offered sustained and focused attention on all items presented; and the evaluation was thought to be an accurate assessment of Student's current cognitive, academic and personality functioning. (Finding #7). There was no evidence in the record to refute the evaluator's observations of Student at the time of testing or the overall validity of the evaluation. In fact, the testimony of DCPS' witness was that the independent comprehensive psychological evaluation was determined to be a valid instrument of measurement by the MDT on 06/04/10. (Finding #7).

Pursuant to 34 C.F.R. 300.309, the IEP Team may determine that a child has a specific learning disability, if the child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. This was certainly the case with Student who was achieving at the 2nd grade level in Oral Language, the 3rd grade level in Written Language, and the 5th grade level in Reading and Mathematics, as she was nearing completion of the 8th grade. While DCPS' witness credibly testified that the DCPS members of the MDT didn't believe that the results of independent comprehensive psychological evaluation accurately reflected the Student that they had all known fairly well over the past two years, the Hearing Officer gave greater weight to the achievement testing scores on the independent comprehensive psychological evaluation because it was a standardized test with results that had been determined to be valid by DCPS and there was no evidence that at the time of the testing, Student was under the influence of narcotics or alcohol.

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Student's grades were poor during the 2009-2010 school year, but she was also absent from class a great deal. (Finding #13). Although there was credible testimony by a DCPS witness that there was a self report by Student that Student was coming to school under the influence of narcotics and perhaps this accounted for her poor school performance, the fact remains that Student was very much behind her peers in terms of her ability to perform academically in all core academic subjects. And, because she was so much farther behind her same age peers; i.e., at the 2nd grade level in oral language skills and at the 3rd grade level in written language skills, it is inconceivable that Student could catch up without special education support services in the areas of reading, mathematics and language.

Therefore, Petitioner met his burden of proof by a preponderance of the evidence that under IDEIA, Student qualified as a student with a disability classification of SLD and that the IEP Team's determination of ineligibility for special education services on 06/04/10 resulted in the denial of a FAPE.

Under IDEIA, Speech or Language Impairment ("SLI") means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 C.F.R. 300.8(c)(11); 5 D.C.M.R. 3001.1.

The evidence was clear and uncontroverted that Student had a demonstrated mild weakness in the receptive speech and language skill areas of formulating sentences and understanding spoken paragraphs which translated into an everyday inability to formulate grammatically correct complex sentences and answers questions from verbally presented information. Student's vocabulary also was slightly below the Average range when compared to her same age peers. Testimony presented on behalf of DCPS, specifically who as well as being the assistant principal at School was also a certified speech and language pathologist, revealed that DCPS believed that these weaknesses did not warrant a disability classification of SLI because they were just below the average range of functioning and could be easily addressed in the general education classroom with proper supports and accommodations. DCPS' position was sound, credible and intuitively made sense. Even the speech and language pathologist who conducted the Speech and Language Evaluation dated 03/31/10, admitted that Student's weaknesses could be addressed by any teacher within the general education curriculum. (Finding #11). That being said, Petitioner failed to meet his burden of proof that Student required special education services to address her weaknesses in speech and language.

Under IDEIA, Multiple Disabilities ("MD") means concomitant impairments, the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. 34 C.F.R. 300.8(c)(7).

Petitioner did not meet his burden of proof that Student should be classified with MD because Petitioner only met his burden of proof that Student should receive one disability classification under IDEIA; i.e., Specific Learning Disability.

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The second issue to be addressed in case number _____ is whether DCPS failed to provide Student with an appropriate placement when it failed to determine that Student was eligible for special education services?

In determining the educational placement of a child with a disability...each public agency must ensure that the child's placement...is based on the child's IEP...34 C.F.R.300.116(b)(2). The Hearing Officer has already determined that Student was denied a FAPE by DCPS' failure to determine Student eligible for special education services as a child with a disability on 06/04/10. DCPS' failure to develop an IEP within 30 days of the determination of eligibility pursuant to 34 C.F.R. 300.323(c), which should have happened no later than 07/04/10 based on an initial determination of eligibility date of 06/04/10, resulted in DCPS not having an IEP in place at the beginning of the 2010-2011 school year, which is required by 34 C.F.R. 300.323(a). The Hearing Officer takes judicial notice that the 2010-2011 school year in the District of Columbia began on 08/23/10.

IDEIA defines a FAPE as special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate preschool elementary school or secondary school education and are provided in conformity with an IEP...34 C.F.R. 300.17. In this case, the absence of an IEP when one should have been developed is necessarily a denial of a FAPE because Student is not receiving the services that she would have been receiving if an IEP had been in existence. Student has been deprived of the educational benefit of having special education services in place to address deficiencies in all areas of academic performance.

Petitioner met his burden of proof by a preponderance of the evidence that Student was denied a FAPE when DCPS failed to provide Student with an appropriate placement by failing to determine Student eligible for special education and developing an IEP.

The third issue to be addressed in case number 2010-0722 is whether DCPS failed to convene a proper IEP Team on 06/04/10 when it failed to include a general education teacher from the interim alternative program that Student had been placed in since April 2010 due to disciplinary action taken by her home school?

Pursuant to 34 C.F.R. 300.306(a)(1), the determination of whether a child is a child with a disability is to be made by a group of qualified professionals and the parent of the child. The statutory regulations do not specify any particular composition of the deciding group. In this case, Petitioner is challenging the composition of the group of individuals that met on 06/04/10 and who determined Student ineligible for special education services, on the basis that the IEP Team did not contain a teacher from _____ the school that Student attended from 03/24/10 through 06/07/10, while on suspension from _____ School.

IDEIA defines the IEP Team as a group of individuals that is responsible for developing, reviewing, or revising an IEP for a child with a disability. 34 C.F.R. 300.23. On 06/04/10, a Multidisciplinary Team met to determine eligibility for special education services, but not to develop an IEP. Therefore, the statute that Petitioner cites in support of his position that the IEP Team should have contained a regular education teacher from _____ i.e., 34 C.F.R.

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300.321(a), is inapplicable. Even if the statutory provision were applicable, Petitioner would not have prevailed because DCPS is only required to have one regular education teacher of the child present at the IEP Team meeting, and DCPS more than complied with this requirement by having Student's English teacher, history teacher, and math teacher in attendance at the eligibility determination meeting. (Finding #6).

Petitioner failed to meet his burden of proof on this issue.

Petitioner failed to provide sufficient evidence to convince the Hearing Officer by a preponderance of the evidence that the least restrictive environment in which Student may receive special education services and derive educational benefit is in a full-time placement in a special education school. Although the independent comprehensive psychological evaluation recommended a full-time special education placement, the recommendation was not supported by the data in the evaluation or any evidence in the record that Student could not be educated in a school with her nondisabled peers. Pursuant to 34 C.F.R. 300.114, DCPS must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and 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 aides and services cannot be achieved satisfactorily. As such, DCPS' first attempt to provide services to Student should be in the neighborhood school with nondisabled peers, if possible.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, this Hearing Officer orders:

(1) DCPS shall convene a MDR meeting, with proper notice to Petitioner, and with Petitioner as a participant, within 15 school days of the date of this Order to determine whether or not Student's conduct that resulted in her suspension on 03/24/10 was a manifestation of her suspected disability at that time, and if so, school records should be corrected to reflect as such; and

(2) DCPS shall convene an appropriate IEP Team to develop an IEP within 30 calendar days of the date of this Order consistent with the findings in this Hearing Officer Determination, i.e., that Student is a disabled child with a disability classification of Specific Learning Disability, and at that meeting the IEP Team shall discuss and determine placement.

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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 6, 2010

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (via U.S. mail)
Petitioner's Attorney: Darnell Henderson, Esq. (electronically)
DCPS' Attorney: Tanya Chor, Esq. (electronically)
DCPS (electronically)
SHO (electronically)