

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

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

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

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

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Date Issued: September 12, 2011

Hearing Officer: Jim Mortenson

(Expedited Discipline)<sup>2</sup>

SEP 12 AM 11:04

STUDENT HEARING OFFICE  
OSSE

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on July 8, 2011. The Petitioner is represented by Darnell Henderson, Esq., and the Respondent is represented by Linda Smalls, Esq. Resolution meetings were to be held by July 15, 2011, on the manifestation determination appeal and by July 23, 2011, on the non-expedited issue(s).<sup>3</sup> No resolution meeting was held until August 10, 2011. A response was filed on July 18, 2011. A prehearing conference was held on July 28, 2011, and a prehearing order issued on that date.

The hearing was held on September 1, 2011, in room 2004 at 810 First Street NE, Washington, D.C. Following the presentation of the Petitioner's case, the Respondent moved for a directed finding based on its argument that evidence presented by the Petitioner was

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

<sup>2</sup> This matter involves an appeal of a manifestation determination pursuant to 34 C.F.R. § 300.532.

<sup>3</sup> Pursuant to 34 C.F.R. §§ 300.510(a) and 300.532(c)(3)(i).

insufficient to permit her to prevail on either of the issues in the complaint. Following discussion at the hearing, including prompts by the IHO for the Petitioner to show him which evidence would demonstrate she had met her burden on either claim, the IHO granted the motion and dismissed the case on the record. In order to comply with 34 C.F.R. § 300.512, and ensure a proper record for any appeal, findings of fact and the reasons for the granting of the motion are contained herein.

The due date for the hearing officer's determination (HOD) on the manifestation determination appeal is September 16, 2011, pursuant to 34 C.F.R. § 300.532(c)(2). The due date for the HOD on the non-expedited issue is September 21, 2011. The hearing and this HOD cover both issues and is issued on September 12, 2011.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chaps. 30 and 2510.

## **III. ISSUES, RELIEF SOUGHT, AND DETERMINATION**

The issues to be determined by the IHO are:

- (1) Whether the Respondent erred when it determined on June 2, 2011, that the Student's slapping of a staff member was not a manifestation of her disability?<sup>4</sup>
- (2) Whether the Respondent failed to conduct a functional behavioral assessment (FBA), or provide written notice of a refusal to conduct a FBA, requested by the Petitioner on March 9, 2011, and develop a subsequent behavior intervention plan (BIP)?

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<sup>4</sup> This issue is an appeal of a manifestation determination and is an expedited matter pursuant to 34 C.F.R. § 300.532.

The substantive requested relief includes:

- (1) Compensatory education (unspecified).
- (2) An independently provided FBA and a subsequent BIP.

The Respondent's motion for a directed finding was granted because the Petitioner failed to present sufficient evidence to show that the manifestation determination was in error or that the procedural violation of not conducting an FBA requested by the Petitioner on March 9, 2011: impeded the Student's right to a free appropriate public education (FAPE); significantly impeded the Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or caused a deprivation of educational benefit.

#### IV. EVIDENCE

Two witnesses testified at the hearing, both for the Petitioner.<sup>5</sup> The witnesses for the Petitioner were:

- 1) Petitioner, Student's Mother (P)
- 2) Yojinde Paxton, Educational Advocate (Y.P.)

12 documents were disclosed by the Petitioner and one was admitted into evidence, P 5 (Advocate's Notes, March 9, 2011).

Six documents were disclosed by the Respondent and five were admitted into evidence. The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 2	October 25, 2010	IEP
R 3	October 5, 2010	Disability Worksheet
R 4	June 2, 2011	Meeting Notes
R 5	June 19, 2011	IEP Progress Report – Annual Goals

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<sup>5</sup> The granting of the Respondent's motion for directed finding resulted in no need for the Respondent to present witnesses.

**V. FINDINGS OF FACT**

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

1. The Student is a child with a disability (other health impaired) who completed grade at School during the 2010-2011 school year and is attending grade at School for the 2011-2012 school year.<sup>6</sup>
2. An initial evaluation of the Student in the summer of 2010 resulted in the Student's eligibility for special education and related services under the definition of other health impairment due to her attention deficit hyperactivity disorder (ADHD).<sup>7</sup>
3. The Student has an IEP developed October 25, 2010, that requires: five hours per week of specialized instruction in reading in the general education setting; five hours per week of specialized instruction in written expression in the general education setting; 30 minutes per week of behavioral support services; classroom accommodations; state wide assessment accommodations; and transportation services.<sup>8</sup>
4. An IEP team meeting was held March 9, 2011, and the Petitioner inquired about an FBA for the Student.<sup>9</sup> The social worker and other team members said they could develop a BIP based on the information they already had.<sup>10</sup>
5. The Student was suspended in May 2011 for hitting a teacher.<sup>11</sup> The teacher was by the Student while he and the Student were playing games with their hands.<sup>12</sup>

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<sup>6</sup> Undisputed Fact (UF).

<sup>7</sup> UF, R 3.

<sup>8</sup> UF, R 2.

<sup>9</sup> UF, P 5, Testimony (T) of Y.P.

<sup>10</sup> UF.

6. It was determined at a team meeting on June 2, 2011, that the Student's behavior for which she was suspended was not a manifestation of her disability, despite the Petitioner's disagreement with the rest of the team.<sup>13</sup> Petitioner believed the Student's behavior was impulsive because it was not normal behavior for her.<sup>14</sup> The Student engages in repeated impulsive behaviors which include: defiance, non-compliance, and attendance issues.<sup>15</sup>
7. The Student admitted her actions and advised the team that she was wrong to have done it.<sup>16</sup>

## VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008);

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<sup>11</sup> R 4.

<sup>12</sup> R 4, T of P.

<sup>13</sup> UF. (Because of the disagreement, the purported "decision" was not a team decision pursuant to 34 C.F.R. § 300.530(e) because there was not a determination by "the LEA, the parent, and relevant members of the child's IEP Team[.]" However, there is no evidence that the Student was removed for a total of ten school days, thus it is questionable whether a manifestation determination was even required.)

<sup>14</sup> T of P, T of Y.P., R 4

<sup>15</sup> T of P, R 2. (The Petitioner testified that the only "new" impulsive behavior she could think of the Student doing is hitting the teacher. The Student had also once pulled the fire alarm, according to the IEP. The evidence is not convincing that the hitting of the teacher while playing was impulsive given the types of behaviors the Student is generally associated with engaging impulsively.)

<sup>16</sup> R 4.

Holdzelaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. Based on the evidence in the record at the conclusion of the Petitioner's case, the IHO is not persuaded that the Respondent made an incorrect manifestation determination and, as a result, that any alleged failure to conduct a FBA or develop a subsequent BIP denied the Student a FAPE.
3. A manifestation determination is an examination of whether a student's conduct was caused by or had a direct and substantial relationship to her disability, or was the result of a failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(1). Such a determination must be made within ten school days of any decision to change the placement of a child with a disability because of the conduct. Id.
4. The Petitioner failed to show, by a preponderance of the evidence, that the Student's conduct was caused by or had a direct and substantial relationship to her disability, or that it was the result of a failure to implement her IEP. Petitioner's argument rested primarily on her belief that the Student's act of hitting the teacher while playing hand games with him was impulsive. No objective evidence supporting this belief was presented. Furthermore, the evidence in the record of the types of impulsive behaviors the Student was known to engage in did not include hitting. No evidence was presented and no argument made that the IEP was not implemented. Thus, the Respondent's determination that the behavior was not a manifestation of her disability was not in error.
5. A determination that a child was denied a FAPE must be on substantive grounds. 34 C.F.R. § 300.513(a). A procedural violation may result in a determination that a child was denied 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).

6. Because the Student's behavior was not a manifestation of her disability, the Petitioner's argument that the failure to conduct a requested FBA and subsequent BIP which resulted in the behavior in question is also unpersuasive. Any failure to conduct the FBA was a procedural error as no evidence other than the discipline for the hitting of the teacher was presented.

#### **VII. DECISION**

The Respondent prevails because the Petitioner failed to show by a preponderance of evidence that the manifestation determination was in error or that any failure to conduct an FBA resulted in a substantive denial of FAPE.

#### **VIII. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that this matter is hereby dismissed with prejudice.

**IT IS SO ORDERED.**

Date: September 12, 2011



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Independent Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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