DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20003

Guardian, on behalf of
STUDENT,[1]

Petitioner,

v
Public Charter School

Respondent.

Date Issued: October 23, 2010
(AMENDED[2])

Wanda I. Resto Torres, Hearing Officer

Case No: 2010-1228
Hearing Date: October 12, 2010 Rm. 2005[3]
October 13, 2010 Rm. 2006

STUDENT HEARING OFFICE
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OSSE

HEARING OFFICER DECISION

BACKGROUND

On September 22, 2010,[4] Petitioner filed a Due Process Complaint ("Complaint") identifying a Public Charter School ("PCS"), and the Office of the State Superintendent of Education for the District of Columbia ("OSSE") as the Respondents ("Respondents") and invoking rights under the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 5 District of Columbia Municipal Regulations ("D.C.M.R.").

The Complaint alleged the student a 15 year-old girl classified as a student with an Emotional Disturbance entitled to receive special education services. The student's Individualized Education Program ("IEP") prescribes a combination of 10 hours per week of specialized instruction in the general education and 8 hours a week outside the general education setting, in co-taught classes, a resource room and 1.5 hours weekly of counseling.[5] The student attended a Public Charter School in the District of Columbia, until May, 2010. The Petitioner alleged PCS convened a manifestation determination meeting without notice to the

[1] Personal identification information is provided in Appendix A.
[2] The HOD issued October 23, 2010 was amended to clarify there were five total witnesses at the hearing and Respondent's document 13 was excluded.
[3] The Hearing commenced in Room 2006. Because an employee protest outside the building could be heard in the hearing room, we moved to Room 2005 after approximately 2 hours of hearing.
[4] The Petitioner filed this Complaint and an expedited request electronically. Although the electronic system was not supposed to be ready for filing, the Student Hearing Office accepted the filing. The case was erroneously assigned No. 2010-0033, and then a week later assigned to the Hearing Officer with case No. 2010-1228.
[5] R 15, May 20, 2010 IEP.

Petitioner and that at that meeting; a decision was made to expel the student from school. The Petitioner claimed that a unilateral change of placement decision was made by the head of the school without including the parent or the team in the decision-making process. The Petitioner argued that at the time of the expulsion, there was not an interim placement determination made by the MDT, leaving the student with no placement at all, and that the Petitioner had no say in the process.

The Petitioner alleges that the PCS failed to develop and implement an appropriate IEP, failed to set appropriate social-emotional goals, failed to change the student's counseling from group to individual session counseling beginning February 2010, and did not include an appropriate behavior intervention plan ("BIP") in the student's IEP. The Petitioner also claimed there was a failure to conduct triennial evaluations in May 2009.

As relief, the Petitioner invoked the "stay put" protections, and asked that the student, who had no other placement, be returned to the PCS in the educational setting she had prior to the expulsion. The Respondent argued it was willing to allow the student back into the PCS, but in the day program, and not in the boarding program which she was attending prior to May 26, 2010 when she was expelled.

The Petitioner requested a ruling that the Respondent denied the student a FAPE by failing to implement an appropriate IEP, failing to provide appropriate social-emotional goals, failing to change the student's counseling from group to individual session counseling beginning February 2010, and by failing to include an appropriate BIP in the student's IEP. The Petitioner is requesting the Respondent fund an independent comprehensive psychological evaluation and an occupational therapy evaluation. Petitioner also requests a ruling that the Respondent be compelled to convene an IEP meeting that includes the Petitioner; that the IEP team review evaluations and that it review and revise the IEP and the behavior intervention program. Additionally, the Petitioner claims the student is entitled to a compensatory education award for denial of FAPE since September 2009.

On September 30, 2010, the undersigned Hearing Officer was assigned the Complaint.[6]

On October 1, 2010, the Respondent OSSE filed a Sufficiency Challenge and Motion to Dismiss Petitioner's Complaint (Motion to Dismiss). [7]

On October 4, 2010, an Order was issued granting OSSE's Motion to Dismiss because the Complaint did not allege either that the OSSE was directly involved or responsible for the denial of FAPE or that it was contacted by the LEA prior to the change in placement, did not allege that OSSE failed to act, and did not state a clear claim against OSSE.

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[6] The case was assigned one week after the hearing was requested to be expedited.

[7] Because of the shortened timelines for conducting expedited due process hearings under 300.532(c), the sufficiency provisions in 300.508(d) do not apply. See: Comment to 34 C.F.R. § 300.532, Federal Register Vol. 71, No 156, August 2006).

On October 4, 2010, Respondent filed an Answer to the Complaint. The Respondent admitted the student was suspended in May 2010.[8] It asserted that a letter of confirmation for the Manifestation Determination Review ("MDR") meeting was sent. The Guardian and all relevant members of the MDT were present for the MDR meeting held on May 26, 2010. The MDR team concluded that the behavior that led to the student's suspension was not substantially related to her disability. PCS argued that the parent voluntarily left the meeting before the team could complete the manifestation review and told the team to proceed without her. PCS asserted there was no request for the meeting to be reconvened. PCS argued that the MDR team's decision to expel the student on June 22, 2010, was appropriate and supported by the clinical psychologist who conducted evaluations of the student and reviewed all relevant information with the MDR team.

PCS admitted that the student was not provided services following her suspension and expulsion. PCS argued that the Petitioner left the MDR meeting prior to the MDT having an opportunity to discuss an interim alternative setting for the student after her suspension. PCS argued that because the Petitioner stated she was removing the student from the school, Petitioner waived the right to challenge any action or inaction on the part of PCS. PCS argued that it is not required to allow the student to return the following school year once the student had been expelled. PCS contends that the expulsion of the student was appropriate, that its obligation was at most to provide an interim alternative educational setting for the remainder of the 2009-2010 school year following the student's expulsion from PCS, and that its failure to do so can be remedied by the compensatory education plan being discussed in this case. PCS asserted that in the event that the plan is agreed to, the only issue is whether PCS had a duty to provide a placement for the student for the 2010-2011 school year.PCS further argued it is the Petitioner who has a duty under the District of Columbia compulsory attendance law to enroll the student in another school for the remainder of the school year, and that the responsibility of providing a FAPE to the student is upon the new LEA.

PCS claimed that the MDT discussed the need for an occupational therapy evaluation and everyone, including the Petitioner, agreed that an evaluation was not necessary.

PCS argued that the parent signed the IEP dated May 19, 2009 indicating her agreement with its contents. PCS takes the position that the IEP is reasonably calculated to provide the student with educational benefit, that it implemented the student's IEP, that the student was receiving the counseling prescribed on her IEP, and that her behavior intervention plan was being implemented.

On October 4, 2010, the PCS was ordered to, by October 7, 2010, allow the student to reenroll at the school in the setting she had prior to the expulsion and to provide the services according to her May 2009 IEP, pending the decision of the hearing officer.[9]

[8] The Answer was not filed with the Hearing Officer.
[9] 20 USC § 1415 (k)(4)(A) and 34 C.F.R. § 300.533.

At an October 6, 2010 prehearing conference, the parties agreed that because there was no bed available at the PCS Boarding school, the student would attend a day program at the school and the transportation cost would be funded by PCS. No other significant agreements were reached.

On October 7, 2010, Petitioner filed a Motion for Extension of Time to file a Response to Respondent OSSE's Sufficiency Challenge and Motion to Dismiss Petitioner's Complaint. The IDEIA does not contemplate extension of time to file a response or insufficiency matters when the hearing is under expedited timelines.

On October 12th and 13th of 2010, closed hearings were held. Lauren Baum represented the Respondent; the Petitioner was represented by Laura Rinaldi and Kelly Hoecherl. Petitioner filed documents labeled P-1 through 19; documents P-20 and P-21 were presented by the Petitioner at the hearing and admitted over the objection of the Respondent; a witness would be available to testify on the content. Two witnesses testified: the Guardian, and the Petitioner's Psychologist. The Respondent presented twenty-four documents, labeled LEA-1 through 24, Respondent's document R-13 was excluded; it was deemed not the best evidence. Three witnesses testified for the Respondent -- the Special Education Coordinator, Respondent's Psychologist and the Student's Counselor. The hearings were conducted in accordance with the rights established under federal and local laws and the implementing regulations, and the SOP.[10] No written closing arguments or briefs were submitted.

ISSUES

The issues to be determined are as follows:

1. Was the Petitioner provided notice of the manifestation determination review meeting and an opportunity to participate?

2. Was there a change of placement without all relevant MDT members included in the decision making process?

3. Are the social-emotional goals on the student's IEP and the behavior intervention plan appropriate, and did the student receive individualized counseling in the amount prescribed in her IEP?

4. Is the student entitled to evaluations?

5. Was the student denied a FAPE?

6. Is the student entitled to a compensatory education award, and if so, in what amount?

[10] 20 U.S.C. §§1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

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's May 2009 Psychoeducational evaluation diagnosed her with Axis I: mathematics disorder, and recommended that the MDT discuss eligibility under a specific learning disability category. The evaluator also recommended an occupational therapy evaluation to address the student's visual motor integration concerns. The evaluation mentions that the student's Broad Reading, Math and Academics Skills in 2005 and 2006 were in the Average range. [11]

2. On May 19, 2009 a MDT/IEP met and prescribed a combination of 10 hours per week of specialized instruction in the general education and 8 hours a week outside the general education setting, in co-taught classes, a resource room and 1.5 hours weekly of behavioral support services for the student.[12] It was determined that the student continued to be eligible under the category of emotional disturbance.[13] The team discussed the student's weaknesses in math and considered a specific learning disability. However it was determined that the student in her testing had shown average scores, some progress, she had many absences and was not emotionally available. The MDT decided to provide extended school year services in math and the student progress to the next level. The MDT also discussed whether an occupational therapy evaluation was necessary and it was determined that there may be a vision problem and that the Petitioner should follow up with a medical visit. The Petitioner participated in the meeting where the IEP was developed and signed the IEP. The BIP is developed by the social worker with the MDT after approximately three classroom observations, conversation with the teachers and an interview with the student. All the teachers are trained on the BIP daily and updated through an E-mail, which includes a behavior chart rating the student from zero through 10. The charts are collected at the end of the day and a report is printed. If something in the report shows a problem; it is sent to the social worker to address.[14] The student met 48% of the behavior goals from September 2008 through May 2009. [15] In February, the BIP was reviewed for the period of September 10, 2009 through January 24, 2010 and there was an improvement to 64%. However, for the period September 10, 2009 through May 10, 2010, there was an increase in behavioral problems.

3. The manifestation determination review (MDR) meeting occurred on May 26, 2010; instead of May 20, 2010 as written on the meeting notes. The letter of confirmation for the MDR

[11] P 7, May 5, 2009, Psychoeducational evaluation.
[12] R 5, May 15, 20109, IEP.
[13] Emotional disturbance is defined under the IDEIA as an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R.§ 300.7(c)(4)(i).
[14] R 14, May 19, 2009. IEP, and testimony of the Special Education Coordinator.
[15] R 3, May 2009 BIP, Review, R 7, February 3, 2010, BIP Review, and R 17 BIP Review September 10, 2009 through May 10, 2010.

meeting was given to the Petitioner on May 20, 2010. The Petitioner attended the MDR meeting, became upset, indicated that she was leaving the meeting and said to continue without her, and that she was going to withdraw the student from the PCS. The MDR meeting notes have the Petitioner's signature, signifying her attendance. At the MDR meeting, the Assistant Principal reported that the incident that resulted in the student's suspension occurred in the art class. There was disagreement about a book between the student and X; the teacher gave the book to X and the student went into X's backpack pulled out a perfume bottle. The student went to the bathroom, poked a hole in the bottle, returned to the classroom, and threw the bottle at X. The characteristics of dysthymic disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition, ("DSM-IV") The DSM-IV indicates that in order to diagnose the patient with dysthymic disorder, there must be a "depressed mood for most of the day, for more days than not, as indicated either by subjective account or observation by others, for at least two years."[16] were reviewed and the MDT addressed whether the student's conduct was substantially related to dysthymic disorder and whether the conduct at issue was a result of a failure to implement the IEP. Both questions were answered in the negative. The team discussed the fact that the student left the room, came back, and then acted, and concluded that the conduct was not impulsive. There was no interim alternative placement discussed because the Petitioner said she would take the student out of the school and did not wait for the decision. On May 27, 2010, the Petitioner went to the school to withdraw the student. The IEP, IEP Meeting notes, FBA, BIP and BIP Review, and May 26, 2010-MDR meeting notes were again provided to the Petitioner. [17]

4. The April 2009 clinical psychological evaluation provided a diagnostic on *Axis I with a note to "rule* out" dysthymic disorders, and an impulse control disorder Not Otherwise Specified. The evaluator did not have enough information to make a diagnosis of impulse control disorder. In Axis III there is a notation of a history of seizure included because she knew the student was on medication for seizures. The summary of the evaluation indicates the student has difficulties managing her reactions appropriately, and has been suspended for throwing a rock at someone, has a hard time controlling her impulses that could be associated to difficulties in school. The Psychologist who evaluated the student was a member of the MDR meeting in May 2010. The findings of the clinical evaluation were discussed; emotional disturbance and dysthymic disorders as defined in the DSM-IV were discussed. The Psychologist testified that it was determined that the student acted in a deliberate way when she stepped out of the class went to the bathroom, returned and threw the object.[18] Although the team discussed impulsive disorder, it did not discuss the student's behavior problems; that she can explode because the conduct that led to the suspension was not considered impulsive. Furthermore, there were no recent seizures episodes to consider as a factor that could have impacted the student's behavior on the day of the incident. The MDR Team

[16] American Psychiatric Association "Diagnostic criteria for 300.4 Dysthymic Disorder", Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (2000) and testimony of the Clinical Psychologist.
[17] R 19, May 20, 2010, (the correct date is May 26, 2020) Manifestation determination review notes–signed by Petitioner, R 12 May 20, 2010 Letter of confirmation of MDR, and R20, May 27, 2010, Receipt of Documents Letter.
[18] P17, October 10, 2010, E-mail.

without the Petitioner decided that the student's conduct was not related her disability.[19] The student has a delayed response style; social emotionally, the student often chose to react impulsively and without considering impact of her actions. [20]

5. The Petitioner testified that the student was retained in the ninth grade, and this year she did not attend summer school. The student has an IEP, is not doing well in school, her grades have dropped, she has had altercations at school, and has been suspended or in detention a few times. The Petitioner attended the MDR meeting and signed the MDR notes. At the meeting, the Petitioner was told the student was to be suspended from school. She attempted to tell the MDR about the student's emotional circumstances but was not given the opportunity. The Petitioner received a letter of expulsion through the mail in July 2010. The PCS did not indicate where the Petitioner should go to enroll the student in another school.[21]

6. The mental health counselor was to meet with the student approximately once each week, however, there were times when the student would not attend the sessions. The Counselor was not concerned that the student was missing sessions because she saw progress in her social emotional goals and there was a better rapport with the student. The student's self-awareness increased, and she became more responsive. She started taking care of herself and her image. The mental health counselor testified that at the MDR meeting, the Petitioner wanted to talk about an incident that happened two years prior, and the Special Education Coordinator stated the MDT was there to talk about the incident that caused the suspension. The Petitioner became upset and left the meeting and said she was going to take the student out of school. The MDR team determined that the student's conduct was not a manifestation of the student's disability and that it was not an impulsive act. In school year 2009-2010, the student was struggling in school and counseling services were changed from group counseling to individual counseling 1.5 hours weekly, because the student's behavior interfered with her school work. The student was absent from some of the 2009-2010 counseling sessions. To address the student the absences, the student was reminded of her obligation to attend the sessions and calls were made to the Petitioner. However, there was no change in the counseling strategies; some of the counseling was provided through games or going to the movies.[22] The student was showing mild progress even though she did not receive all her counseling. [23] The progress notes have a scale from 1 to 4 (mastery) and the student did not master any of her social emotional goals. The notes show she was sad and unresponsive to treatment and passive. At the MDR, the team agreed that the IEP was being implemented.[24] There was nothing in the notes to show that the lack of counseling services was mentioned.

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[19] P 8, and R1, April 27, 2009, Clinical Psychological Evaluation. Testimony of the Respondent's clinical psychologist- stipulated expert.
[20] Testimony of the Special Education Coordinator, and P 16, 2008-2009 Report Card.
[21] Testimony of the petitioner. R 12 May 20, 2010, Letter of invitation for the manifestation review meeting.
[22] P-20, 12/2/09, Individual Session Progress Note and testimony of the Counselor.
[23] R23, IEP Progress Report.
[24] Testimony of the mental health counselor.

7. On October 4, 2010, a psychological educational evaluation was conducted on the student. The evaluation included results of cognitive functioning and the student was assessed in a Wechsler Intelligence Scale for Children 4th Edition (WISC-IV)[25], and Woodcock Johnson Test of Achievement 3rd Edition (WJ-III) to assess her academic strengths and weaknesses in reading, math and written language. A Bender Visual Motor Gestalt Test was used to measure her visual motor integration. The scores are consistent with her performance on the cognitive tests: they are below her age and grade.[26] The student in reading word recognition is average, but in reading comprehension she is only at the fifth grade level. In math her ability is very limited and she is in the Borderline range. She has trouble with two digits calculations. The student's discrepancies in scores are because of her deficiencies in understanding math. The Bender Test provides a picture of visual planning and understanding of the hand eye coordination. Here the student's situation is more complex and she struggles to figure out situations and her recall is poor. She shows a visual-spatial processing deficit, consistent with the previously diagnosed learning disorder. She has low self-esteem and suffers from depression and anxiety. The student's overall scores are low to average. The student's perceptual reasoning is in the average low range. She has a standard deviation of three, which suggests that she could do better. Her processing speed and fluency are low, her ability to work at a fast pace is poor. The student is functioning at fourth - fifth grade level in Math as compared to her previous evaluation. In school year 2008-2009 the student failed math. According to the report card, her grade was 56, and there were no remarks of absences on her report card. The student has a 5.5 math grade equivalent; her math reasoning is in the 4.1 level. She is reading at a seventh grade and her reading comprehension is at a fifth grade level; these deficiencies affect her ability to complete school work. The evaluator offered the following diagnoses:

    - Axis I: disruptive behavior disorder, dysthymic disorder, impulse control disorder NOS, attention deficit hyperactivity disorder, mathematics disorder
    - Axis II Diagnosis Deferred
    - Axis III Seizure disorder, by history
    - Axis IV: Moderate at present but history of school problems, current suspension.
    - Axis V GAF Current =41, Highest Past Year =45

Each of these disorders has a specific set of characteristics used as criteria for diagnosis in the DSM-IV.[27] The student's triennial evaluation showed some type of impulsive conduct, and dysthymic disorder all consistent with this doctor's analysis. *The* student's personality test showed disruptive behavior that limits her ability to stay on task. The student has a conduct disorder, and a lack of concern for others. She has had fights and problems with impulsivity -- mostly behavior decisions. The student is manifesting sufficient symptoms of oppositional

[25] Wechsler Intelligence Scale for Children - Fourth Edition -identifies key cognitive strengths and weaknesses related to learning disabilities, executive function, attention disorders, intellectual disability, and giftedness in children.
[26] Testimony of the Clinical Psychologist, during testimony the doctor corrected an error in the written report page 7-where it says WASC should read WISC. The reading comprehension section and the passage comprehensive— grade equivalent of 7.7 is not correct it should be 5.4 (90 the standard score).
[27] P 21 October 2010, Psychoeducational/Clinical Psychological Evaluation and testimony of the Clinical Psychologist.

defiance. The Psychologist testified that the student's conduct was related to her disability because her diagnosis got triggered since her self-esteem is low, she was challenged, and she felt undermined by the teacher when the book was given to X. At that moment, the disruptive behavior and impulse control of her disability explained her conduct. She does not look at the big picture, she cannot stop and think, and her thought process is impacted; she can only view one part at a time. [28] According to the Psychologist the student has an Impulse-Control Disorder -- a mental disorder that causes recurrent failure to resist impulsive behaviors that may be harmful to the student or others. The determination by the Psychologist at the MDR meeting-- that the conduct triggering expulsion was not a split second reaction -- failed to consider dysthymics who also have impulse control disorder when there is the confluence of both conditions. The seizure disorder was also not discussed and that could have contributed to the behavior in question. The student has a math disorder; she does not learn the same as others and requires help to understand simple problems. The student's disability category should be multiple to include learning disorder in math, ADHD or a neurological condition under the category "other health impaired." The test administered in 2009 were appropriate however they failed to indicate how to follow up on the math disorder and did not contain a recommendation for the IEP to include a learning disability classification.[29]

The IEP is not appropriate; the student requires a learning disable and other health impairment disability category. There is a need to address the manifestations of her low self esteem and disobedience. The student requires more hours than the 10 hours of specialized instruction, the student requires at least 4 additional hours even if provided in a pullout setting with focus on math and reading comprehension. The student should be provided with art therapy to supplement counseling and to assist her to learn how to express her feelings in different ways because she is guarded. The social emotional goals should be more concrete with a description on how to achieve the goal. The goals should address the student's insecurities through an hour and half of therapy divided between individual and group sessions because of her problems with social interactions. The student's BIP requires more specific interventions for those behaviors that have already been exhibited and how to defuse that behavior. The behavior intervention plan does not provide from verbal cues to address the student's acting out and fails to address the antecedent behavior. When she has staring episodes there's nothing to address how to redirect her and it does not provide concrete steps to target the goal. The plan should describe what interventions will be put in place how the redirection can be done with specific guidance. The evaluator's opinion is that the student requires a more consistent, intensive treatment than she has been able to receive. In the evaluator's view the student's reported history of staring and falling asleep may be linked to seizure activity albeit milder that displayed in the past. A recommendation for a neurological assessment was made. According to the evaluator the medical condition must be determined first -if no determination of seizures; then attention deficit hyperactivity disorder should be ruled out because of her lack of attention and sustaining information. The witness credibly testified that the rule out of a diagnosis must be

[28] P 13May 20, 2010, E-mail describing incident that led to suspension of the student.
[29] P5 and R 19 May 20, 2010, Manifestation determination review notes (the evidence was that the correct date is May 26, 2010), P17 summary of Psychologist determination that the conduct was not a manifestation of the disability. P 7, May 5, 2009, Psychoeducational evaluation, P 8, April 27, 2009, Clinical Psychological Evaluation, and testimony of the Clinical Psychologist.

carried out by a mental health professional. The witness' opinion is that the student should be returned to the PCS-where she had some friends otherwise her self-confidence will be impacted adding to the feeling of inadequacy. Her educational performance and inability to learn will be hampered.[30]

The Psychologist offered his views of a compensatory education plan. He explained that the student is still behind her peers in grade, and indicated that had the student received the services she was entitled to receive, she would have shown at least one year of progress and maybe two. Her reading comprehension would have improved, she would not have failed in the ninth grade, and she would have shown some progress in math, he testified. Behaviorally, the student's self-esteem would have improved and would not be an ongoing problem, and she would have better impulse control skills, he testified. Had the student received four more hours of specialized instruction, she could have made some progress. He recommended an additional 4 hours a week of specialized instruction, including art therapy and counseling, along with 3 to 5 hours weekly of tutoring in math and reading comprehension to be supplemented with extended school year services. He calculated the hours based on his experience with other students.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof is the responsibility of the party seeking relief, in this case the Guardian. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.[31]

FAPE Determination

The IDEIA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means special education and related services that are provided at public expense, under public supervision, and without charge; meets the standards of the State Education Agency, include an appropriate school; and are provided in conformity with an individualized education program ("IEP") that meets the requirements of §§300.320 through 300.324.[32]

Special education and related services

[30] Testimony of the Petitioner's Psychologist.
[31] 5 D.C.M.R. § 3030.3
32 20 U.S.C. §1401(9), 34 C.F.R. §300.17, and 30 DCMR §3001.1.

The LEA must make a free appropriate public education available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. When a student with a disability is removed from his or her current placement for more than ten (10) school days for disciplinary reasons, the LEA must continue to provide the specialized instruction and related services that are specified on the student's IEP.[33] To meet the obligation to provide a FAPE, the LEA may be required to provide special education services and "related services" -- supportive services, such as counseling, that are necessary for a student to benefit from special education services.

Moreover, after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, the child must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.[34] The services required may be provided in an interim alternative educational setting

In this case, the student's IEP required that the student receive social emotional counseling as a related service. The uncontroverted evidence was that the student in school year 2009-2010 received less than half of the hours of social emotional counseling services prescribed in her IEP. Furthermore, the LEA failed to provide any educational or related services after the May 20, 2010 suspension.

Manifestation determination meeting

According to the applicable provisions of the IDEIA, the LEA must conduct a MDR when a special education student is going to be suspended for a period of time that will result in that student being out of school for more than ten days for that school year.

The LEA must take steps to ensure the parents of a child with a disability are present or are afforded an opportunity to participate in each IEP Team meeting.[35] The team that conducts the MDR should include the parent and individuals that are knowledgeable about the student, the student's behavior, and the student's needs. The MDR team must review all relevant information in the student's file and any relevant information provided by the parent. [36]

Where a disciplinary change in placement would exceed 10 consecutive school days and the conduct that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school "may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures

[33] DCMR B2510.6- District Of Columbia Register Vol. 56 - No. 33 August 14 , 2009, and 34 C.F.R. § 300.530 (2).
[34] 20 U.S.C. § 1415 (k) (1) (E); and 34 C.F.R. § 300.530 (d)(i).
[35] 20 U.S.C. § 1414(e) and 34 C.F.R. § 300. 322.
[36] 20 U.S.C. § 1415 (k) (1) (E); and 34 C.F.R. § 300.530 (e).

would be applied to children without disabilities, except as provided in paragraph (d) of § 300.530."[37]

In this case the evidence was the Petitioner was invited to the MDR meeting and the notes for that meeting have her signature. Mid-way through the MDR meeting, the Petitioner felt the decision to be made at the meeting was predetermined, and she abandoned the meeting. The Petitioner could have requested that the notes include a statement of her views about what the team should consider, or she could have sent a written statement to the MDT after the meeting, but she did not. It is now disingenuous for the Petitioner to claim that she did not have an opportunity to meaningfully participate in the meeting.

A child with a disability who is removed from the child's current placement must (i) Continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (ii) receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.[38]

The MDR team had to consider whether the student's conduct was a manifestation of the student's disability, and whether the requirements of the IEP that is in place for the student have been met. The MDR team discussed whether the student's conduct was substantially related to the student's dysthymic disorder.

However, the MDR team did not consider whether the student's inability to maintain satisfactory interpersonal relationships with peers an element of her emotional disturbance disability influenced the offending behavior. The MDR team also failed to assess properly the second prong of the MDR analysis – whether the student's IEP had been implemented – because it failed to point out the failure of the LEA to provide the full 1.5 hours of weekly of social emotional individualized counseling as required by her IEP and to assess how that may have contributed to the behavior that led to expulsion. The evidence demonstrated that the MDR discussion was superficial in that it did not address the student's unique circumstances, including how the student's emotional disturbance, the *dysthymic* disorder and seizure history could converge. There was no discussion of previous behaviors as reflected in her report card and progress notes, and how these behaviors related to her disability and the conduct that led to expulsion. There is nothing in the MDR notes to reflect that all relevant information that could be impacting the student's educational benefit was adequately discussed.

Evaluations

The LEA shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...the evaluation [must be] sufficiently

[37]20 U.S.C. § 1415 (k) (1) (7); and 34 C.F.R. §300.530 (c).
[38] 20 U.S.C. § 1415 (k) (1) (7); and 34 C.F.R. §300.530 (d).(i)

comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." *See* 34 C.F.R. § 300.304(c)(4) and (6). Further, pursuant to 34 C.F.R. § 300.303(a)(2), the LEA shall ensure "a reevaluation of each child with a disability is conducted...if the child's *parent* or teacher requests a reevaluation.[39]

The Petitioner claimed the evaluations in 2009 were insufficient. However, the testimony by her Expert was that the evaluations done by the LEA in April and May 2009 were appropriate, but that the MDT failed to put in place adequate strategies to address the student's multiple disabilities and to follow through on other recommended evaluations.

A May 2009 Psychoeducational Evaluation diagnosed the student with a mathematics disorder, and the evaluator also recommended an occupational therapy evaluation to address the student's visual motor integration concerns. The Petitioner requested that the PCS complete the occupational therapy evaluation but it was not been completed.[40] However a recent Bender Visual Motor Gestalt Test was used to measure her visual motor integration. The student's of visual planning and understanding of the hand eye coordination is more complex and she struggles to figure out situations and her recall is poor. She shows a visual-spatial processing deficit, consistent with the previously diagnosed learning disorder.[41] Therefore, it is not necessary for further testing on the visual motor integration. Now an October 2010 Psychoeducational/Clinical Psychological evaluation recommends a neurological evaluation based on the history of seizures.

The plain language of the statute and regulations clearly set forth the LEA's obligations. The United States District Court for the District of Columbia recognizes these obligations. In Cartwright v. District of Columbia, 267 F.Supp.2d 83 (D.D.C. 2003), the court reversed the Hearing Officer's Determination that DCPS is not obligated to complete new evaluations upon request because there must be some showing that conditions warrant new evaluations. The court found that the plain language of the regulations state that the clearly warranted standard employed by the hearing officer only applies when the request for the evaluation is made by a person other than a parent or a teacher. *See also* Herbin vs. District of Columbia, 362 F. Supp.2d 254 (D. D.C. 2005) (Court overturned hearing officer's determination affirming reasoning Cartwright) and Kingsberry v. District of Columbia, CA No.: 03-2378 (2005) (Court overturned another hearing officer and again affirmed reasoning in Cartwright).

Here the LEA failed to provide the requested evaluation or to present a due process complaint to challenge the parental request.

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[39] 20 U.S.C. § 1414 (a) (2) and D.C. M. R. 5 § 3005

[40] The Petitioner is requesting an independent comprehensive psychological evaluation, but because the student recently received a psychological evaluation, the Petitioner's request is denied.

[41] Testimony of the Clinical Psychologist.

Individualized education program

The Petitioner claimed the Respondent did not provide appropriate social-emotional goals, or the appropriate amount and type of counseling. The Petitioner also claimed the BIP was not addressing the student's behavior *and* lacked specificity.

The IDEIA requires that eligible students are provided special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.[42]

In considering the substantive validity of an IEP, a number of circuits have held that a court must judge prospectively. *S.S. v. Howard Road Academy,* 585 F. Supp. 2d 56; (D.D.C. 2008)

The Hearing Officer finds that the IEP when originally drafted was calculated to provide the student with educational benefit. The evidence showed the counseling social-emotional goals and the behavior intervention plan were at the time drafted, discussed and the student had shown some progress in Math and in social emotional goals and the Petitioner participate and consented to services.

The evidence now suggests the student requires more hours than the 10 hours of specialized instruction The IEP must address the fact that the student math reasoning is in the 4.1 level. The social emotional goals should address the student's insecurities. The student's BIP requires more specific interventions for those behaviors that have already been exhibited and how to defuse that behavior. The BIP should describe what interventions will be put in place how the redirection can be done with specific guidance.

The student requires an IEP that is updated with information obtained from the October psychological educational evaluation and the pending occupational and neurological evaluations, after which a determination must be made on whether the student needs additional specialized instruction or services and in which setting.

Educational placement decision

Children with disabilities who attend public charter schools and their parents retain all rights under Part B of IDEIA.[43] A free appropriate public education must be available for all children residing in the District of Columbia, including children with disabilities who have been suspended or expelled.[44] Furthermore, a public charter school, as the "public agency," must

[42] 20 U.S.C. § 1400. and 5 D.C.M.R. § 3000.2 (2006)
[43] 34 CFR §300.209(a). and 34 CFR §300.115.
[44] 20 U.S.C. § 1412 (a) (1) (A); and 34 C.F.R. § 300.101 (a) .

ensure the availability of a continuum of alternative placements to meet the educational needs, provides related services and supplementary service. [45]

The IDEIA requires that, "for purposes of [disciplinary] removals of a child with a disability from the child's current educational placement" a "change in placement occurs if [inter alia] [t]he removal is for more than 10 consecutive school days ...." 34 C.F.R.§300.536(a)1.

A student who has been expelled shall be placed in an alternative educational setting that will allow the student the opportunity to continue to earn credits towards promotion or graduation requirements. [46]

The IDEIA does not specify the alternative setting in which educational services must be provided to a student who has been suspended for disciplinary reasons, however it is clear that an appropriate alternative educational setting must be selected and must be appropriate for that student. Further, Section 615(k)(2) of the IDEIA provides that the interim alternative educational setting must be determined by the IEP team. What constitutes an appropriate interim alternative educational setting will depend on the circumstances of each individual case. Comment to 34 C.F.R. § 300.530(g).[47]

Regardless of the placement alternative selected the LEA must provide or arrange for nonacademic and extracurricular services and activities to be addressed.[48]

Additionally, local rule provides that a principal or other school official may establish, or make a referral to, a special class or other supervised program for students who are suspended, subject to the approval of a person designated by the Chancellor. Analogous to the DCPS; PCS has the same obligation at a minimum to provide written notice to the parent indicating the name and address of the neighborhood school. [49]

The LEA may not use the disciplinary procedure to evade responsibility "discipline must not be used as a means of disconnecting a child with a disability from education. Section 300.530(d) clarifies, in general, that the child must continue to receive educational services so that the child can continue to participate in the general curriculum (although in another setting), and progress toward meeting the goals in the child's IEP.." Comment to 34 C.F.R. § 300.530(b).[50]

The LEA has an obligation to provide an interim placement decision, and in this case the evidence is that the Student was expelled without the PCS ensuring that she would receive

[45] 34 CFR §300.115.
[46] DCMR B2504.10.
[47] Federal Register Vol. 71, No 156, 46715.
[48] 48 34 C.F.R § 300 **.118.**
[49] DCMR B2504.9, 10 and (b) B2504 Policy For Suspensions And Expulsions -District Of Columbia Register Vol. 56 - No. 33 August 14 , 2009.
[50] Federal Register Vol. 71, No 156, 46715.

educational services or that she would be working toward meeting her IEP goals during the alternative setting. The PCS failed to provide any placement when the suspension occurred.

PCS failed to show that the decision regarding the student's educational setting after expulsion was made considering the student's need to receive educational and related services afforded in her IEP.

Free Appropriate Public Education

In assessing whether a FAPE has been provided, a decision maker must determine whether (1) the school complied with the IDEIA's procedures; and (2) whether the IEP developed through those procedures was reasonably calculated to enable the Student to receive educational benefits.[51] The Respondent failed its legal obligations to provide a FAPE under the IDEIA when it did not provide the student the individual counseling services as required in the modification to her May 2009 IEP, and when it failed to provide the student an interim alternative placement after the expulsion.

Compensatory Education

"Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education." Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 555 F. Supp. 2d 130 (D.D.C. 2008) (citing Walker v. District of Columbia, 157 F. Supp. 2d 11, 30 (D.D.C. 2001).)

"Under the theory of "compensatory education," courts and hearing officers may award educational services . . . to be provided prospectively to compensate for a past deficient program." See, G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003). More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." G. ex rel. RG, 343 F.3d at 309.

In Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005) the D.C. Circuit held, with respect to compensatory education, that, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."

The evidence in this case to support a request for compensatory education consisted of the testimony of the Psychologist. He stated had the student received the services to which she was entitled; she would have shown at least one year of progress and maybe two. He said the student's reading comprehension would have improved, she would not have failed in the ninth

[51] Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982); and Jalloh v. District of Columbia, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

grade, and she would have shown some progress in math. Behaviorally the student's self-esteem would have improved and not an ongoing problem and she would have better impulse control skills, he testified. He also testified that had the student received four more hours of specialized instruction each week, she could have made some progress. He recommended that the student be given an additional 4 hours a week of specialized instruction including art therapy and counseling, along with 3 to 5 hours weekly of tutoring in math and reading comprehension to be supplemented with extended school year services. He calculated the hours based on his experience with other students.

The Reid decision demands, a compensatory award fashioned by the Hearing Officer must be the result of a "fact-specific" inquiry that is "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid,* 401 F.3d at 524 The student "is not entitled, however, to an amount of such instruction predetermined by a cookie-cutter formula, but rather to an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures." This means that the plaintiff has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record." Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt *("Nesbitt II"),* 583 F. Supp. 2d 169, 172 (D.D.C. 2008)

The Hearing Officer's responsibility to determine the amount and type of compensatory education services must be based on receiving sufficient evidence which includes the appropriate assessments, records. The Petitioner did not offer a plan reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. It did indicate how the recommended hours of compensatory education were calculated beyond a statement that it was based on the witness experience. The plan did not explain how the additional services would allow the student to reach a level of proficiency with her chronological age and peers. The Petitioner failed to meet the Reid standard or to provide the evidence that would allow the Hearing Officer to fashion a compensatory education plan.

ORDER

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

ORDERED, Petitioner's request for a "Stay Put" decree at the PCS is **GRANTED, it is further;**

ORDERED, PCS will by November 30, 2010, allow the student to attend classes at the school in the boarding school she had prior to the expulsion, and will provide the services according to her May 2010 IEP, **it is further;**

ORDERED, PCS will fund by November 15, 2010 a neurological evaluation of the student, and within 10 school days of receiving the reports of the evaluations, will convene an

IEP meeting including the Petitioner and invite a representative of OSSE, to review evaluations, revise the IEP and the behavior intervention program, **it is further;**

ORDERED, the MDT must discus a specific learning disability, address her math deficits, other identified symptoms in her current evaluations, a BIP with specific goals and strategies to address the dysthymic disorder. The student's IEP must include more than 1.5 hours weekly of individual session social emotional counseling, **it is further;**

ORDERED, the MDT will discuss whether an increase in specialized instruction hours is warranted and if the PCS continues to be the appropriate placement, **it is further;**

ORDERED, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives, **it is further;**

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1415(i)(2)(B).

Dated: November 8, 2010

Wanda I. Resto Torres- Hearing Officer