DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

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| Parent[1], on behalf of Student,<br><br>Petitioner,<br><br>v.<br><br>DISTRICT OF COLUMBIA PUBLIC SCHOOLS<br><br>Respondent. | )<br>)<br>)<br>)<br>)Hearing Officer: James McKeever<br>)<br>)<br>)<br>)Hearing Date: January 4, 2012<br>)<br>) |

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a year-old boy with a disability who resides in the District of Columbia and currently attends a middle school in the District of Columbia. The Student is eligible for special education and related services as a student with a disability under the IDEA (Exhibit P-4).

On November 22, 2011, Petitioner filed an expedited Due Process Complaint (DPC) against DCPS alleging that DCPS failed to offer the Student a free and appropriate public education (FAPE) during the 2011-2012 school year by failing to conduct a Manifestation Determination Review (MDR) and by failing to provide educational services to the Student while the Student was removed from his placement as required under 34 CFR §300.530(d). Petitioner also alleged a denial of FAPE based on DCPS' failure

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

to conduct a comprehensive psychological evaluation and based on DCPS' failure to develop a Functional Behavioral Assessment (FBA) and a Behavior Intervention Plan (BIP) as required under 34 CFR § 300.530(f). Additionally, Petitioner alleged a denial of FAPE based on DCPS' failure to develop an appropriate IEP on November 14, 2011 including the failure to recommend Extended School Year (ESY) services, develop appropriate present levels of performance and provide speech and language therapy services. Finally, Petitioner alleged that the Student was denied a FAPE because DCPS failed to determine a proper placement as required by the IDEA (Exhibit P-2).

On December 5, 2011, DCPS filed its response. DCPS asserted a general denial to the allegations contained in the DPC and advised that this was the 10th DPC complaint filed for the Student in the last two years. DCPS also asserted that the Student had not been suspended for more than 10 consecutive and/or cumulative days during the current school year and that Petitioner's claims regarding a denial of FAPE based on a flawed IEP and the failure of DCPS to conduct a comprehensive psychological evaluation upon Petitioner's request were adjudicated by Hearing officer Determination (HOD), dated April 30, 2011 and HOD, dated November 1, 2011, respectively. As such, DCPS asserts that Petitioner's claims are barred by the doctrine of res judicata and collateral estoppel (Exhibit D-1).

A resolution session was held on December 8, 2011. The parties were unable to resolve the complaint and agreed to proceed to a due process hearing[2].

A Prehearing Conference (PHC) was held on December 13, 2011. Counsel for the Petitioner and counsel for Respondent participated. During the PHC the parties discussed the issues raised in the DPC and Petitioner's requested relief (set forth below). It was agreed that the Due Process Hearing (DPH) would be held on January 4, 2012 and that the disclosures would be filed by December 29, 2011.

The disclosures were filed as agreed on December 29, 2011 and the DPH was held on January 4, 2011. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-42 were admitted into evidence. Respondent's Exhibits 1-11 were also admitted into evidence[3].

[2] The resolution period expired on December 7, 2011. The expedited due process timeline began on December 8, 2011.

[3] A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

The following witnesses testified on behalf of the Petitioner: Parent, Student, Advocate, Consulting Psychologist, Behavior Support Technician, Special Education Teacher and Director of proposed Private School

The following witnesses testified on behalf of the Respondent: Social Worker at DCPS school.

## II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("DEA), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f); 34 C.F.R. §300.513.

## III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

a. Whether DCPS denied the Student a FAPE by failing to provide educational services while removed from his placement as required under 34 CFR §300.530(d);

b. Whether DCPS denied the Student a free and appropriate public education by failing to convene a MDR;

c. Whether DCPS denied the Student a FAPE by failing to develop an FBA and a BIP as required under 34 CFR § 300.530(f);

d. Whether DCPS denied the Student a FAPE by failing to develop an appropriate IEP on November 14, 2011 by failing to determine the Student's need for ESY services and by failing to included specific and/or accurate present levels of performance on the Student's IEP;

e. Whether DCPS denied the Student a FAPE by failing to provide the Student with all of his speech and language services as per his IEP;

f. Whether DCPS denied the Student a FAPE by failing to provide the student with an independent comprehensive psychological evaluation as per the parent's request on September 21, 2011; and

g. Whether DCPS denied the Student a FAPE by failing to determine

a proper placement as required by the IDEA.

Petitioner requests funding for an independent psychological evaluation and compensatory education services. Petitioner also requests funding for placement at the proposed Private School for the 2011-2012 school year with transportation.

## IV. FINDINGS OF FACT

Based upon the evidence adduced at the Due Process Hearing, I make the following findings of fact:

The Student is a -year-old boy who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child classified with Multiple Disabilities. The Student presently attends the 5th grade at a middle school in the District of Columbia (Exhibit P-4).

During the 2010-2011 school year, the Student attended the 4th grade at a different DCPS school. On January 20, 20110, DCPS generated an IEP that provided for 30 hours of specialized instruction outside the general education setting, 90 minutes per week of behavior support outside the general education setting and related services of speech and language therapy for 60 minutes per week. The IEP also provided for bus transportation and ESY services (Exhibit R-3).

On January 11, 2011, DCPS conducted an FBA (Exhibit R-3).

On January 20, 2011, DCPS developed a BIP based on the FBA that was conducted on January 11, 2011 (Exhibit R-3).

On or about February 12, 2011, Petitioner filed a DPC under case number 2011-0148 challenging the Student's IEP developed on January 20, 2011 and the Student's placement. The issues raised in that complaint were (1) whether the FBA and the BIP developed by DCPS were appropriate and (2) whether DCPS failed to timely provide an occupational therapy evaluation and a Woodcock Johnson III assessment (Exhibit R-2, R-3). For relief, Petitioner requested that DCPS be directed to fund a private school placement (Exhibit R-3).

The impartial hearing for Petitioner's DPC 2011-0148 was held on April 13, 2011 (Exhibit R-3).

Three days after the impartial hearing was held and before the HOD was issued for that case, Petitioner requested that DCPS conduct another comprehensive psychological evaluation of the Student. The request was made by Petitioner's counsel, via facsimile, to the Principal at the Student's school during 2010-2011 school year (Exhibit R-2).

On April 29, 2011, DCPS develop an Individual Crisis Management Plan (ICMP) for the Student. The ICMP outlined the Student's behavior baselines, safety concerns and potential triggers, among other things (Exhibit R-7).

On April 30, 2011, an HOD for DPC 2011-0148 was issued. In his decision, the Hearing Officer (HO) determined that the January 20, 2011 IEP and the Student's placement were appropriate because that the Student had made significant progress with his social/emotional issues, among other reasons (Exhibit R-3). The HO also found that the FBA[4] and the BIP[5] developed by DCPS were appropriate (Exhibit R-3).

On June 6, 2001, Petitioner filed a DPC against DCPS under case number 2011-0854 alleging a denial of FAPE based on DCPS' by failure to timely conduct a comprehensive psychological evaluation of the Student, that the Petitioner had requested on April 18, 2011 (Exhibit R-2).

On June 17th and June 29th 2011, DCPS conducted a comprehensive psychological evaluation and generated a written report dated on July 7, 2011 (Exhibit P-7)[6].

On August 19, 2011 Petitioner filed a DPC under case number 2011-0897 against DCPS alleging that DCPS denied the Student a FAPE during the 2010-2011 school year by failing to timely conduct the comprehensive psychological evaluation of the Student, which Petitioner had requested on April 18, 2011 (Exhibit R-2).

The 2011-2012 school year began on or about August 28, 2011 (Advocate's testimony).

On August 30, 2011, the Student was observed destroying school property in the hallway of the school. On the same dated, the Student was also aggressive towards an aide and a behavior technician and as a result

[4] Conducted on January 11, 2011.
[5] Developed on January 20, 2011.
[6] Petitioner withdrew DPC 2011-0854 on July 18, 2011.

had to be restrained and then escorted to the "time-out" room (Exhibit 35 and 36).

On September 6, 2011, the Student left his gym class with another student and entered another classroom and initiated a "fight" with a third student. As a result of this altercation, the Student was assigned to an alternative classroom (Exhibit 16). Although a "Suspension Notice" was issued, the Student was not suspended for this incident (Exhibit P-15 and P-2, paragraph number 26).

On September 12, 2011, the parent was advised that the Student was disciplined for "being in the hallway without a pass, using profane language, exhibiting disruptive behavior and failing to obey directions" (Exhibit P-14). Although the discipline notice indicates that that the Student would be re-admitted back to school when a "parent conference" was completed (Exhibit P-14), The Student was not suspended for this infraction as no evidence was presented to support such a finding. In fact, no such suspension was even alleged in Petitioner's DPC (Exhibit P-2, paragraph 27).

On September 20, 2011 a "Discipline Referral Form" was generated by DCPS because the Student pushed a peer while he was "checking in the with his behavior support staff member" and then he pushed another peer in his drama class (Exhibit 32 and 33). The Student was not suspended for either of these infractions.

On September 21, 2011, the Student's Multidisciplinary Team (MDT) met to review the comprehensive psychological evaluation dated July 7, 2011. During the meeting, Petitioner's Advocate requested that DCPS fund an independent psychological evaluation (Exhibit P-3), which was the subject of Petitioner's then pending DPC under case number 2011-0897, though the impartial hearing had not yet been held. DCPS denied the Advocates' request and advised that DCPS would generate an addendum to the report upon receipt of Petitioner's response to the Behavior Assessment for Children (BASC) questionnaire (Exhibit P-5 and P-6).

On September 23, 2011, the Student was disciplined for "destroying school property, using profane language and failing to obey directions" (Exhibit P13). The Student was initially suspended for three days, but was allowed to come back to school after one day of suspension (Exhibit P-13 and P-2, paragraph 50).

On September 27, 2011, Petitioner filed a DPC under case number 2011-0969 alleging a denial of FAPE based on DCPS' failure to conduct an appropriate psychological evaluation. This DPC further alleged several

additional issues, including, but not limited to, DCPS' failure to develop an appropriate IEP, its failure to implement an IEP, its failure to provide speech and language services, and its failure to determine a proper placement. Petitioner requested funding for a private school placement (Exhibit R-2)[7].

During September 2011 the Student's ICMP was revised to identify the Student's behavior triggers and areas of progress, if any (Testimony of Social Worker).

On October 3, 2011, a Discipline Referral Form was generated for the Student because the Student punched another student in his class (Exhibit P-30). The Student was not suspended for this incident (Exhibit P-30, P-2, paragraph number 51).

Although Petitioner alleged that the Student was suspended for two days on October 4, 2011 for attacking his teacher (P-2, paragraph number 52), I make no such finding as no evidence was presented at the impartial hearing to demonstrate that anything actually happened on October 4, 2011[8].

On October 12, 2011, the Student broke the glass frame to the fire extinguisher box located in the hallway of the school. The Student was not suspended for this infraction (Exhibits P-27, P-28 and P-29).

On October 24, 2011, this HO conducted the impartial hearing for DPC under case number 2011-0897.

On October 25, 2011, the Student was suspended for 3 days for breaking a window near the school's cafeteria as he attempted to steal an Ipod (Exhibit P-26 and R-4). Petitioners' assertion that the Student was suspended for four days for this infraction is not supported by any evidence offered into the record. Additionally, Petitioners' Advocates' testimony was again unreliable on this issue as she initially stated that the Student was

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[7] On the same date, Petitioner filed a motion to consolidate DPC 2011-0897 and DPC 2011-0969. The motion was denied by Order dated October 11, 2011. On November 5, 2011, Petitioner withdrew the DPC 2011-0969.

[8] Petitioner's Advocates' testimony was unclear as she appeared to be confused about the dates of the Students' suspensions. As such, I find her testimony about the dates of the Student's suspension to be unreliable and do not credit her testimony on this issue. I also note that at this point during the impartial hearing counsel for Petitioner appeared to be very frustrated with the Advocates' testimony and audibly stated "god damn" under his breath, which was noted by the HO and recorded at the hearing.

suspended for three days, then stated that the Student was suspended for five days and then changed her testimony again and stated that the Student was suspended for three days (Advocates' testimony).

Petitioner alleged that the Student was suspended for one day on October 31, 2011 "due to his behavior" at school (Exhibit P-2, paragraph number 55). Petitioners' Advocate testified that she believed that the Student was suspended on October 31, 2011 and November 1, 2011. However, I make no such finding because there is no documentary evidence contained in the record to support such a finding and because Petitioners' Advocates' testimony was unreliable and not corroborated by any other evidence.

On November 1, 2011, this HO issued an HOD for case number 2011-0897 that addressed the issue as to whether or not DCPS denied the Student a FAPE by failing to timely conduct a comprehensive psychological evaluation based on Petitioner's request made on April 18, 2011. This HO found that the alleged deficiencies with respect to the psychological evaluation dated July 7, 2011, did not rise to the level of a denial of FAPE. Specifically, this HO found that the BASC-2 was not completed because the Petitioner failed to provide the parent questionnaire form to the school psychologist for this assessment. I also found that the teacher questionnaire was not completed because at the time of the evaluation the Student was not in school (Exhibit R-2). Additionally, this HO found that the Student has been evaluated multiple times, in all domains, during the last few years and that a BASC-2 was completed by a psychologist in April 2009 and then again in May, 2009 (Exhibit P-9 and P-10), among other reasons (Exhibit R-2).

On November 3, 2011 the Student pushed over a metal detector at school (Petitioner's testimony). A "Notice of Proposed Disciplinary Action" recommended an 11 day suspension (Exhibit P-12). However, Petitioners' Advocate testified that she "thinks" that the Student was suspended for only two days for this infraction (Advocates testimony)[9]. In his closing remarks, counsel for Petitioner stated that the Student was suspended for only one day for this infraction (Petitioners' Counsels' closing). Accordingly, I find that the Student was suspended for only one day for this infraction.

On November 8, 2011, the Student assaulted another student on the school bus (Exhibit P-11). The "Bus Incident/Behavior Form" does not indicate what action, if any, was taken against the Student (Exhibit P-11). Petitioners' Advocate testified that the Student initially received a 10 day

[9] Petitioners' counsel was visibly frustrated with the testimony of his witness at this time and asked for a break from his direct examination. Counsel then left the hearing room, and returned five minutes later.

school bus suspension, but that the Student was only removed from the school bus on November 9th, 10th and 14th of 2011 (Exhibit P-3). As such, I find that the Student was given a three day bus suspension for the infraction that occurred on the school bus on November 8, 2011.

On November 14, 2011, an IEP was developed for the Student that provided for 30 hours per week of specialized instruction outside the general education setting, 90 minutes per week of behavioral support outside the general education setting and 240 minutes per month of speech and language therapy outside the general education setting (Exhibit P-4).

During the IEP meeting, which lasted approximately 2 hours, the Student's BIP was reviewed and revised to address the Student's recent behaviors. It was acknowledged that the Student regressed during his transition to the new school, in part, because it was a "new environment" (Testimony of Social Worker). However, the Student's Social Worker, who new him from the previous school year, did not believe that the functions of the Student's behaviors had changed (Exhibit P-3, Testimony of Social Worker) and that despite his recent conduct, the Student was demonstrating some insight into his behavior (Exhibit P-3, Testimony of Social Worker).

The Student's behavior support therapy was revised to include "recreation therapy" in the form of running laps around the school and taking walks with his Behavior Technician (Testimony of Behavior Technician).

The Student's ICMP was also discussed and the Social Worker recommended keeping data on the Student's behaviors in order to add more information to the Student's BIP (Exhibit P-3). A behavior tracing book was developed and the Student was now required to "check in" with his Behavior Technician 3 times per day (Testimony of Social Worker, Exhibit P-3).

The Student is placed in a self-contained classroom with 6 students and one teacher, although there is often an additional adult in the classroom (Exhibit P-3). The classroom is located on the third floor of the school building where there are behavior monitors positioned to make sure that the students do not have access to the other parts of the school building (Testimony of Social Worker). Nevertheless, at times, the Student was able to get past the hall monitors and access the other parts of the school building (Testimony of Social Worker).

During the IEP meeting, Petitioner and Petitioner's Advocate believed that the baseline information contained on the Student's IEP with respect to the Student's present levels of performance in reading, math and written expression was too high (Advocate's testimony, Exhibit P-3). As a result of

their concern, DCPS reviewed the Student's informal academic assessments and changed the Student's present level of performance baselines in reading and math and written expression from 80% to 50% on the Student's IEP (Exhibit P-3, P-4).

ESY services were discussed during the IEP meeting, however, DCPS advised that they could not recommend ESY services at that time because DCPS policy required them to wait until December 15, 2011 in order to make an assessment as to whether the Student regressed before determining whether the Student was eligible for ESY services (Exhibit P-4, P-3). It is significant to note however that the Student was offered ESY services during the previous school year and that Petitioner chose to permit the student to play football instead of attending the ESY program (Petitioner's testimony).

The IEP dated November 14, 2011 provided the Student with 240 minutes per month of speech and language services outside the general education setting (Exhibit 4). The Student has expressive and receptive language delays and has poor vocabulary and communication skills, which impact on his behavior in the classroom (Exhibit P-4, page 4). Although the Student testified that he was not getting his speech and language services (Student's testimony), the Student's speech and language "service trackers" show that the Student was receiving speech and language services in the self contained classroom (Exhibit 22), and that the Student's speech and language therapist sits next to him during their weekly session (Exhibit P-4, page 6). Accordingly, I find that the evidence shows that the Student is receiving his speech and language therapy services.

Petitioner's counsel obtained the services of a Consulting Psychologist, who was deemed an expert at the impartial hearing in special education programming, to review the comprehensive psychological evaluation performed by DCPS on July 7, 2011 (Exhibit P-9) and the Student's evaluations conducted on April 9, 2009, May 29, 2009 and June 1, 2009 (Exhibits 8, 9 and 10). Although the Consulting Psychologist opined that the Student's current placement was insufficient to meet his needs, the evidence shows that Consulting Psychologist was not familiar with the Student's current IEP and had not met and/or performed an assessment of the Student. Additionally, the Consulting Psychologist agreed that the Student's behaviors could not be eliminated (Testimony of Consulting Psychologist). As such, I do not credit the Consulting Psychologist' testimony with respect to the Student's placement. Additionally, the Consulting Psychologist confirmed that the cognitive testing performed by DCPS as referenced in evaluation dated July 7, 2011, was a "legitimate instrument to assess the Student's intelligence," although he would have used the Wechsler Intelligence Scale For Children Fourth Edition (WISC-IV) because this was the instrument that

was what was used during the Student's testing in 2009 (Testimony of Consulting Psychologist). Accordingly, I find that cognitive testing performed by DCPS on July 7, 2011 was appropriate.

It is undisputed that during the early fall of 2011, the Student was violent and aggressive. The evidence shows that he was not making progress with his behaviors (Exhibit P-17-21, and P-23-25, Behavior Service Trackers). However, beginning in mid November 2011, the Student's behaviors began to improve. Specifically, the intensity and frequency of the Student's violent behaviors decreased (Testimony of Behavior Support Technician). It was also noted that the Student now seeks out help independently and that his relationships with his peers and adults had improved (Testimony of Behavior Support Technician and Special Education Teacher).

In December 2011, the Student was name the "most improved" student of the month (Testimony of Social Worker and Behavior Technician).

Although, the Student's Special Education Teacher testified that he initially thought the Student's placement inappropriate, since mid November 2011, the Special Education Teacher observed that Student's behaviors improved and that the Student developed some insight into his actions (Testimony of Special Education Teacher). The Special Education teacher also testified that the Student is receiving an educational benefit and that the current placement is appropriate for the Student (Testimony of Special Education Teacher).

There have been no adverse behavior incidents reported from mid November until the time of the impartial hearing (Petitioner's testimony)

The Student was accepted to the proposed Private School, which is a small, self contained, state approved school, which provides a school wide behavior management plan. Tuition is per day (Testimony of Assistant Director of Private School).

## V. SUMMARY

The Hearing Officer concludes that Petitioner has not met her burden of proof with respect to any of the claims raised in her DPC.

## VI. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

## VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony with the exception of Petitioner's Advocate whose testimony concerning when and how often the Student was suspended was inconsistent and uncorroborated and therefore unreliable.

## VI. ANALYSIS AND CONCLUSIONS OF LAW

**(1) Whether DCPS denied the Student a FAPE by failing to provide educational services while removed from his placement as required under 34 CFR §300.530(d).**

34 CFR §300.530(d) provides that: (1) A child with a disability who is removed from his current placement pursuant to paragraphs (c), or (g) of this section must—(i) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, albeit 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.

34 CFR §300.530(c) states: For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

34 CFR §300.530(g) states: (g) School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

Here, the evidence demonstrates that on September 23, 2011 the Student was initially suspended for 3 days for "destroying school property, using profane language and failing to obey directions" (Exhibit P13). However, the evidence shows that the Student was allowed to come back to school after only 1 day of suspension (Exhibit P-13 and P-2, paragraph 50). The evidence also shows that the Student was suspended for 3 days on October 25, 2011, for breaking a window near the school's cafeteria as he attempted to steal an Ipod (Exhibit P-26 and R-4). The evidence further shows that on November 3, 2011, the Student was suspended for 1 day because the Student pushed over a metal detector in front of school (Petitioner's testimony, Exhibit P-12 and Petitioners' Counsels' closing). Thus, the evidence shows that the Student was suspended for a total of 5 days from September 23, 2011 to November 3, 2011.

Additionally, the evidence shows that on November 8, 2011, the Student received a 3 day suspension from the school bus for fighting with another student.[10] Since it is undisputed that the Student was provided bus transportation as a related services on his IEP (See Exhibit P-4, page 11), the 3 day suspension from the school bus will be treated as a suspension under 34 CFR § 300.530.[11] Accordingly, the evidence demonstrates that the Student was suspended for a total of 8 days during the 2011-2012 school year, which is insufficient to constitute ad removal under 34 CFR §300.530(d)(1). As such, under these facts, DCPS was not required to provide the Student with educational services during his suspensions from school.

Finally, 34 CFR §300.530(d)(3) provides that: A public agency is required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly remove, at Id. In this case, no evidence was presented at the impartial hearing to demonstrate what, if any, services are provided to children without disabilities who are similarly removed. Accordingly, I find that Petitioner has failed to meet her burden of proof with respect to this issue.

**(2) Whether DCPS denied the Student a free and appropriate public education by failing to convene an MDR.**

Section 300.530(b) provides that school personnel may "remove" a child with a disability who violates a code of student conduct for not more than 10 consecutive school days, as long as those removals do not

[10] The initial 10 day school bus suspension was reduced to a 3 day school bus suspension.
[11] Federal Register, Vol. 71, No. 156 at 46715.

constitute a "change of placement" under Section 300.536. 34 C.F.R. § 300.530(b). Section 300.536, in turn, provides that a "change of placement" occurs if either (1) the removal is for more than 10 consecutive school days, or (2) the child is subject to a "series of removals that constitute a pattern," determined on a case-by-case basis consistent with the factors spelled out in the rule.

34 C.F.R. § 300.536 provides that within 10 school days of any decision to change the placement due to violations of a code of student conduct, the LEA must then convene a meeting of the IEP team to make a "manifestation determination" as provided in Section 300.530 (e). The IEP team is then to determine whether the conduct in question either (1) was "caused by, or had a direct and substantial relationship to, the child's disability," or (2) was the "direct result of the LEA's failure to implement the IEP," 34 C.F.R. § 300.530(e); see, 20 U.S.C. § 1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child's disability, then the IEP team generally must (1) conduct a functional behavior assessment ("FBA") and implement a behavioral intervention plan ("BIP") for the child, and (2) return the child to the placement from which the child was removed, 34 C.F.R. § 300.530(f); see, 20 U.S.C. § 1415(k)(1)(F).

Here, the evidence shows that the Student was suspended for 8 days, which included a 3 day suspension from the school bus, during the 2011-2012 school year. As s such, DCPS was not required to convene MDR pursuant to 34 C.F.R. § 300.536. Additionally, the evidence does not support a finding that the Student was subject to a "series of removals that constituted a pattern" as the record shows that the Student was suspended on four occasions, which again included the school bus suspension, for unrelated behaviors. Accordingly, I find that Petitioner has failed to meet her burden of proof with respect to this issue as well.

**(3) Whether DCPS denied the Student a FAPE by failing to develop an FBA and a BIP as required under 34 CFR § 300.530(f).**

34 CFR § 300.530(f) addresses situations in which there is Determination that behavior was a manifestation of the Student's disability. If the LEA, the parent and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must— (1) Either—(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and (2) Except as provided in paragraph (g) of this section, return

the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

Again, here the evidence shows that the Student was suspended for a total of 8 school days. As such, DCPS was not required to the hold an MDR and determine whether the Student's behaviors that led to his suspension was a manifestation of his disability. Additionally, DCPS was not required to conduct a new FBA and a BIP. Nevertheless, the evidence demonstrates that the Student's BIP was appropriately revised during the IEP meeting on November 14, 2011, as demonstrated by his improved behavior. Moreover, the FBA conducted on January 11, 2011, was still appropriate because the "functions of the Student's behaviors" had not changed from the time when the FBA was developed (Testimony of Social Worker). As such, I find that DCPS was not required to conduct a new FBA or a new BIP and that Petitioner has failed to meet her burden of proof with respect to this issue.

**(4) Whether DCPS denied the Student a FAPE by failing to determine the Student's need for ESY services and by failing to include specific and/or accurate present levels of performance on the Student's IEP.**

ESY:

Pursuant to 34 C.F.R. Section 300.106

> "(1) Each public agency must ensure that extended school year services are available as necessary to provide a FAPE consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child."

ESY services are considered to be necessary when there is evidence of regression without such services and the student lacks the ability for recoupment in a reasonable period of time. See, Independent School District No. 709 v. Duluth Bonney, 44 IDELR 191 (Minn. Ct. App. 2005 ).

In this case, the evidence shows that ESY services were discussed during the IEP meeting held on November 14, 2011, however, DCPS advised that they could not recommend ESY services at that time. DCPS policy required them to wait until December 15, 2011 in order to make an assessment as to whether the Student regressed before determining whether the Student was eligible for ESY services (Exhibit P-4, P-3). Although it is

undisputed that the Student was offered ESY services during the last school year (Exhibit P-4, Petitioner's testimony) and that Petitioner did not make the Student available for the ESY services during that time, the Local Educational Agency (LEA) is still obligated to assess the Student's need for ESY services each school year and offer services as needed. Nevertheless, I do not find that these facts support a finding of a denial of FAPE because the time in which the Student would receive ESY services has not yet arrived. I also find that waiting until December 15th of the school year in order to determine whether a Student has regressed, is not unreasonable. However, to the extent DCPS has not yet reconvened an IEP meeting to determine whether the Student is in need of ESY services for this school year, DCPS is directed to reconvene an IEP meeting within 45 days from the date of this HOD to consider the Student's need for ESY services, and to amend the Student's IEP as necessary.

Present Levels of Performance:

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

The local educational agency is required to ensure that each student with a disability in need of services within its jurisdiction is provided with an IEP that contains: (a). a statement of the child's present levels of academic achievement and functional performance, measurable annual goals and a description of how the child's progress toward meeting the annual goals will be measured, (b). a statement of special education needs and related services and supplementary aids or a student to advance properly toward attaining annual goals;, and, (c). a statement of transition service needs for all students who have attained the age of 16. (See 20 U.S.C. 1412(a)(12)(A)(i), and 1414(d)(3),(4)(B))

As indicated above, During the IEP meeting held on November 14, 2011, Petitioner and Petitioner's Advocate believed that the baseline information contained on the Student's IEP with respect to the Student's present levels of performance in reading, math and written expression was too high (Advocate's testimony, Exhibit P-3). As a result of Petitioner and her Advocates' concern, DCPS reviewed the Student's informal academic

assessments and changed the Student's present level of performance baselines in reading and math and written expression from 80% to 50% on the Student's IEP (Exhibit P-3, P-4). Significantly, no evidence was presented at the impartial hearing to demonstrate that the 50% baseline was inappropriate for this Student. To the contrary, it appeared that Petitioner and her Advocate agreed that the 50% baselines were appropriate (Advocate's testimony, Exhibit P-4). Accordingly, I find that Petitioner has failed to meet her burden of proof with respect to this issue.

**(5) Whether DCPS denied the Student a FAPE by failing to provide the Student with all of his speech and language services aa per his IEP.**

As set forth above, the IEP dated November 14, 2011 provided the Student with 240 minutes per month of speech and language services outside the general education setting (Exhibit 4). The Student has expressive and receptive language delays and has poor vocabulary and communication skills, which impact on his behavior in the classroom (Exhibit P-4, page 4). Although the Student testified that he was not getting his speech and language services (Student's testimony), the evidence shows that the Student's was receiving speech and language services in the self contained classroom (Exhibit 22) and that the Student's speech and language therapist sits next to him during their weekly session (Exhibit P-4, page 6). Accordingly, I find that Petitioner has failed to meet her burden of proving a denial of FAPE with respect to this issue.

**(6) Whether DCPS denied the Student a FAPE by failing to provide the student with an independent comprehensive psychological evaluation as per Petitioner's request made on September 21, 2011.**

Federal regulations provide that a parent has a right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (see 34 C.F.R. § 300.502[b]. However, the right to an independent evaluation at public expense is subject to the right of a school district to initiate a hearing to demonstrate the appropriateness of its evaluation or that the evaluation does not meet the school district's criteria (see 34 C.F.R. § 300.502[b][2]. If an impartial hearing officer finds that a school district's evaluation is appropriate, a parent may obtain an independent evaluation, but not at public expense (see 34 C.F.R. § 300.502[b][3]).

The Applicable federal regulation provides in material part as follows:
(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either-
(i) Initiate a hearing under Sec. 300.507 to show that its evaluation is appropriate; or
(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under Sec. 300.507 that the evaluation obtained by the parent did not meet agency criteria.
(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent education evaluation, but not at public expense.
(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation. 34 C.F.R. § 300.502[b].

As indicated above, on August 19, 2011, Petitioner filed a DPC under case number 2011-0897 alleging that DCPS denied the Student a FAPE during the 2010-2011 school year by failing to timely conduct a comprehensive psychological evaluation of the Student as per Petitioner request made on April 18, 2011 (Exhibit R-2). The impartial hearing for this DPC was held on October 4, 2011. Significantly, on September 21, 2011, and while DPC 2011-0897 was pending, Petitioner and her Advocate again requested that DCPS fund a comprehensive psychological evaluation of the Student. DCPS refused. On November 1, 2011, this HO issued an HOD for DPC 2011-0897 and found that DCPS conducted the requested evaluation in a timely manner and that the alleged deficiencies with respect to the psychological evaluation (dated July 7, 2011) did not rise to the level of a denial of FAPE (Exhibit R-2). As such, it should have been very clear to Petitioner that a final judgment with respect to the merits of this claim had been reached previously. In fact, the final judgment on this claim was issued just three weeks before Petitioner reasserted the same claim in this case (the DPC complaint for this case was filed on November 22, 2011 for). Although it is acknowledged that in DPC 2011-0897 Petitioner relied upon DCPS' failure to timely conduct a "Reevaluation," and not on 34 C.F.R. § 300.502, it is abundantly clear that the parties were the same in DPC 2011-0897 and that this claim arose for the same set of facts that were in DPC 2011-0897. Accordingly, DCPS was not required to initiate a DPC to defend their evaluation and Petitioner is not entitled to an evaluation at public expense based on the doctrine of claim preclusion IDEA Public Charter School v. Belton, 48 IDELR 90 (D.D.C. 2007).

**(7) Whether DCPS denied the Student a FAPE by failing to determine a**

**proper placement as required by the IDEA.**

Pursuant to 34 C.F.R. § 300.17. A FAPE means special education and related services that—(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324. (Authority: 20 U.S.C. 1401(9)).

Here, Petitioner contends that the Student placement is inappropriate because the Student's current middle school cannot control the Student's behaviors and because the Student is not able to "obtain an educational benefit' form his current placement (Exhibit P-2).

The evidence shows that the Student's IEP currently provides for 30 hours per week of specialized instruction outside the general education setting, 90 minutes per week of behavioral support outside the general education setting and 240 minutes per month of speech and language therapy outside the general education setting (Exhibit P-4). The Student is placed in a self-contained classroom with 6 students and one teacher, although there is often an additional adult in the classroom (Exhibit P-3). The classroom is located on the third floor of the school building where there are behavior monitors positioned to make sure that the students do not have access to the other parts of the school building (Testimony of Social Worker) although, at times, the Student was able to get past the hall monitors and access the other parts of the school building (Testimony of Social Worker). Nevertheless, the Student has an FBA, which was deemed appropriate by HOD dated April 2011 (Exhibit R-3) and is still considered relevant to the function of the Student's current behaviors (Testimony of Social Worker). The Student also a BIP that was revised on November 14, 2011. Additionally, the Student has an ICMP, which was discussed at the most recent IEP meeting as wells as a new "behavior tracking book" that was developed during the fall of 2011. Finally, the Student is now required to "check in" s with his with Behavior Technician 3 times a day (Testimony of Social Worker, Exhibit P-3).

Although it is acknowledge that the Student regressed behaviorally during his transition to the school in the fall of 2011, the evidence shows that this was due, in part, because the Student has entered a "new environment" (Testimony of Social Worker). However, the evidence also shows that beginning in mid November 2011, the Student's behaviors began to improve. Specifically, the intensity and frequency of the Student's violent behaviors decreased (Testimony of Behavior Support Technician) and it was noted that

the Student now seeks out help independently and that his relationships with his peers and with adults had improved (Testimony of Behavior Support Technician and Special Education Teacher).

Moreover, in December 2011, the Student was name the "most improved" student of the month (Testimony of Social Worker and Behavior Technician). Additionally, the Student's Special Education Teacher confirmed that the Student's behaviors improved and that the Student had developed some insight into his actions (Testimony of Special Education Teacher). The Special Education teacher also testified that the Student is receiving an educational benefit and that the current placement is appropriate for the Student (Testimony of Special Education Teacher).

Finally, there have been no adverse behavior incidents reported from mid November until the time of the impartial hearing (Petitioner's testimony). Accordingly, I find that the Student's current placement is appropriate and that the Student is receiving an educational benefit. As such, Petitioner has not met her burden of proving a denial of FAPE based on DCPS' failure to determine a proper placement under IDEA.

Compensatory Education:

As I have not found a denial of FAPE, Petitioner is not entitled to compensatory educational services Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005).

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 19th day of January, 2012, it is hereby

ORDERED that, to the extent DCPS has not yet reconvened an IEP meeting to determine whether the Student is in need of ESY services for this school year, DCPS is directed to reconvene an IEP meeting within 45 days from the date of this HOD to consider the Student's need for ESY services and amend the Student's IEP as necessary.

ORDERED that, Petitioner's Due Process Complaint dated November 22, 2011, is dismissed in its entirety, with prejudice.

Dated January 19, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).