

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

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

[Parents], on behalf of
[Student],¹

Date Issued: February 10, 2012

Hearing Officer: Jim Mortenson

Petitioners,

v

District of Columbia Public Schools (DCPS),
On behalf of

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 FEB 10 PM 3:53

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on January 12, 2012.

The complaint was bifurcated into separate hearings based on issues arising under 34 C.F.R. § 300.532 which must be heard in an expedited hearing and other issues that fall under 34 C.F.R. § 300.507. This Hearing Officer Determination (HOD) is the result of the expedited hearing. The remaining issues will be heard in another hearing to be held on February 28, 2012.

A prior complaint, resulting in an expedited hearing, was filed on September 1, 2011, and resulted in an HOD on September 27, 2011 (Case No. 2011-0894, Independent Hearing Officer (IHO) Vaden). In that case the IHO determined the Respondent failed to make an accurate

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

manifestation determination and did not properly place the Student following his disciplinary removal. The Student was returned to the school from which the Respondent had attempted to remove him by the IHO.

A prehearing was convened in this case on January 23, 2012 and a prehearing order was issued on that date. The Respondent failed to provide a response to the complaint within 10 days as required by 34 C.F.R. § 300.508(f) and the undersigned IHO's Prehearing Notice and Order of January 16, 2012. Despite this, the IHO permitted the Respondent to have an additional two days from the date of the prehearing conference to submit the required response to the complaint. This second order was also ignored by the Respondent and no response to the complaint was ever filed.²

Telephone testimony was prohibited by the IHO as stated in the Prehearing Notice and Order of January 16, 2010, and the Prehearing Order of January 23, 2012. The parties were ordered to request permission for telephone testimony with support for good cause to permit such testimony. No such motions were made. Only the Respondent later sought to have witnesses testify via telephone, which was permitted for one witness following the Respondent's objection to the orders and inquiry by the IHO at the hearing. The one witness the IHO permitted to testify via telephone did not testify.

² With regard to both Counsel and their representation of their clients and adherence to orders of this tribunal, Rules of Professional Conduct 1.1, Competence, and 8.4, Misconduct, must be noted for the benefit of the parties. Rule 1.1 requires a lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The case background listed in this HOD may reflect a lack of knowledge, skill, thoroughness, and preparation reasonably necessary for the representation for either or both parties. If this rule was violated, it would be misconduct under Rule 8.4, as would be the "failure to obey court orders" (as noted by the Bar in the comments to 8.4(d)), some failures which are specifically listed in this HOD and equate to "conduct that seriously interferes with the administration of justice." This tribunal is not in a position to make a final determination about whether the conduct of the attorneys in this case violated the Rules of Professional Conduct. Rather, the IHO wishes to put the parties on notice so that they may work with their counsel and determine whether further action is necessary. The parties may wish to contact the Office of Bar Counsel for more information and further assistance at 202.638.1501. It is also noted that this IHO does not believe the outcome of this case has been impacted by any misconduct of counsel. Rather, the process was unnecessarily complicated by the failure of counsel to be prepared, more fully knowledgeable of the law, and follow the specific orders of the tribunal to ensure an efficient and fair process.

The parties were required to provide trial briefs in advance of the hearing outlining the party's legal arguments and describing the evidence they intend to present and how that evidence will support their case including what documents will show or prove and what witnesses will testify about. Neither party followed this order, resulting in a less efficient use of time at the hearing.

The Student's guardian was required to be present at the hearing and she attended. The Respondent was required to have a local education agency (LEA) representative at the hearing and failed to comply with this order.

A resolution meeting was held on January 26, 2012. No agreements were reached at the meeting.

The expedited due process hearing was required to be held within 20 school days of the complaint, and was convened and timely held on February 3, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is February 21, 2012. This HOD is issued on February 10, 2012.

II. JURISDICTION

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

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

- (1) Whether the Respondent accurately determined the Student's behavior resulting in a disciplinary removal in November 2011 was not a manifestation of his disability?

(2) Whether the Respondent, following the Student's disciplinary removal from _____ in November 2011, ensured the Student was provided an appropriate placement?

The substantive requested relief is return of the Student to

The Respondent demonstrated that the Student's behavior resulting in a disciplinary removal in November 2011 was not a manifestation of his disability. Following the Student's removal from _____ in November 2011 the Respondent did not provide the Student with services for over two months and sent him to another school but failed to maintain his educational placement by increasing his specialized instruction outside of the general education setting and did not provide behavioral support services without explanation and not in conformity with the IEP revised December 2, 2011.

IV. EVIDENCE

Four witnesses testified at the hearing, all for the Petitioners. The Petitioners' witnesses were:

- 1) Rebecca Stevenson, D. C. Child and Family Services Social Worker (R.S.)
- 2) The Student's Grandmother, Petitioner (P)
- 3) Chithalina Khanchalern, Educational Advocate (C.K.)
- 4) The Student, (S)

24 exhibits were admitted into evidence of 42 disclosures from the Petitioners. The

Petitioners' exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	Undated	2011-2012 Report Card
	Undated	Academy 2011-2012 Schedule
	Undated	Bell Schedule View
P 2	October 4, 2011	Notice of Disciplinary Action: Short Term Suspension with Manifestation Meeting
	October 6, 2011	Fax Cover Sheet [correspondence from P to her Attorney]
P 3	October 11, 2011	Advocate Notes

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	October 19, 2011	Letter from Khanchalern to Priest
P 5	October 20, 2011	Email from Khanchalern to Finley, et al.
	October 20, 2011	Letter from Khanchalern to Finley
P 6	October 27, 2011	MDT Mtg [Notes]
	October 28, 2011	[Behavior Intervention Plan]
P 7	October 27, 2011	[Classroom data tracking sheet]
	October 28, 2011	Individual Student Report [with cover letter]
P 8	November 7, 2011	Suspension Pending Disciplinary Hearing With Manifestation Hearing
P 9	November 8, 2011	Letter of Invitation to a Meeting
	November 8, 2011	Email from Khanchalern to Priehs, et al.
	November 7, 2011	Letter of Invitation
P 11	November 9, 2011	Advocate's Notes
P 14	November 15, 2011	Email chain ending from Khanchalern to Hecht
	November 10, 2011	Hearing Notification: Expulsion
	November 10, 2011	Letter of Invitation to a Meeting
P 15	November 18, 2011	Email from Stevenson to Khanchalern
P 16	November 18, 2011	Letter of Invitation to a Meeting
	December 2, 2011	Email chain ending from Lourie to Wendorf
	November 22, 2011	Email chain ending from Lourie to Khanchalern, et al.
P 16	November 17, 2011	Email chain ending from Khanchalern to Priehs, et al.
P 17	December 2, 2011	IEP, MDT Meeting Notes: MDT
P 18	November 16, 2011	Email chain ending from Petitioner to her Attorney, et al.
	December 2, 2011	Email from Stevenson to Khanchalern
	December 6, 2011	Email from Petitioner to her Attorney, et al.
	December 7, 2011	Email chain ending from Stevenson to Petitioner, et al.
	January 4, 2012	Email chain ending from Khanchalern to Hecht
P 19	December 2, 2011	Meeting Notes: MDT, Reciept
P 20	November 18, 2011	Email chain ending from Khanchalern to Petitioner
	December 16, 2011	Email chain ending from Khanchalern to Defoe, et al.
	December 19, 2011	Email chain ending from Murray to Defoe
	December 19, 2011	Email chain ending from Murray to Khanchalern, et al.
P 21	October 7, 2011	Prior Written Notice
P 22	September 27, 2011	Hearing Officer Determination (Case No: 2011- 0894)
P 29	Undated	Quick Lookup Standards Grades
P 30	December 15, 2010	IEP
P 31	December 16, 2009	IEP, MDT Meeting Notes: IEP

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 32	October 21, 2009	MDT Meeting Notes
P 33	July 7, 2009	IEP, Meeting Notes,
P 36	May 22, 2007	Clinical Update

Ten exhibits of 12 of the Respondent's disclosed documents were admitted into evidence.

The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	December 6, 2006	Functional Behavior Assessment (FBA)
R 2	June 27, 2007	Psychiatric Evaluation
R 3	November 9, 2011	School Expulsion Hearing Notes
R 4	November 9, 2011	MDT Meeting Notes: Manifestation
R 5	Undated	Unlabeled [FBA]
R 6	December 2, 2011	Unlabeled [Behavior Intervention Plan]
R 7	December 2, 2011	Prior Written Notice
R 10	Undated	[Photo copy of knife]
R 11	August 25, 2008	Confidential Comprehensive Psychological Evaluation
R 12	December 12, 2011	Confidential Psychological Re-evaluation

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a year old learner who was enrolled at Academy and is now enrolled at School.³
2. has a rigorous approach to the curriculum.⁴ The school days are from 8:00 a.m. to 5:00 p.m. and also occur about twice per month for several hours on Saturdays.⁵ There are about 86-90 students per grade and about 30 students in each class.⁶
3. The Student suffers from attention deficit hyper activity disorder (ADHD), oppositional defiance disorder (ODD), depressive disorder, disruptive behavior disorder, and a mood disorder.⁷ He is eligible for special education and related services under the definition of other health impairment.⁸ The Student is very intelligent and strong academically.⁹ He is articulate and self-aware.¹⁰ He is able to talk openly and honestly about his thoughts, feelings, and his behavior choices.¹¹ He has behavior problems when he becomes frustrated, angry, feels disrespected, or gets upset and struggles to manage his feelings.¹² He sometimes refuses to follow directions.¹³ On rare occasions he becomes aggressive when angry with peers and fights.¹⁴ He is learning skills to manage his anger and to develop positive problem-solving strategies to make good choices and maintain self-control when upset.¹⁵ He has no IEP goals concerning, and there are no references to developing, skills related to

³ Testimony (T) of S, T of C.K.

⁴ T of S, T of P.

⁵ T of P.

⁶ T of S.

⁷ R 2, R 11.

⁸ P 30.

⁹ T of S, P 1, P 30, R 2, R 11.

¹⁰ T of S, P 30.

¹¹ T of S, P 30.

¹² T of S, P 30.

¹³ T of P, P 30.

¹⁴ T of S, P 2, P 6, P 30,

¹⁵ P 30.

forgetfulness, and none of the assessment data indicates the Student has a problem with being forgetful.¹⁶

4. The Student's IEP provides three hours per week of specialized instruction outside of the general education setting and one hour per week of behavioral support services outside of the general education setting.¹⁷ This was not changed when the IEP was revised on December 2, 2011.¹⁸
5. On the first day of the 2011-2012 school year the Student got into a fight with another student and was expelled.¹⁹ The Petitioners appealed the manifestation determination that had occurred where the Respondent determined the Student's behavior was not a manifestation of his disability and were successful in overturning the manifestation determination and the Student was returned to school.²⁰ The Student was not returned to his educational placement, however, as he was segregated from his classroom for a period of time.²¹ The Student was provided compensatory education hour for hour he missed as a result of the IEP not being implemented.²²
6. On the Friday or Saturday before October 31, 2011, the Student stole a broken knife from his father and placed it in a pocket of his favorite cargo pants because he was afraid of people in the neighborhood and believed that if necessary he could show the knife to prevent trouble.²³ He left the knife in his pocket, along with various other items, such as mechanical pencils,

¹⁶ P 30, R 2, R 11. (P and R.S. testified that being forgetful is a part of the Student's disability. Assuming this is true generally for children with ADHD, there is no evaluation or other objective data concerning this child that he is unusually forgetful.)

¹⁷ P 30.

¹⁸ P 17.

¹⁹ P 22,

²⁰ P 22.

²¹ T of P, T of S, T of C.K.

²² T of C.K.

²³ T of P, T of S.

lead for the pencils, and his wallet.²⁴ He wore the pants regularly, and on November 7, 2011, he reached into his pocket during class and pulled out the broken knife which was noticed by his teacher.²⁵ The Student was confronted and turned over the knife, was taken to the office, and was removed from school for bringing a knife to school.²⁶ The Student had forgotten the knife was in his pocket when he wore his pants to school.²⁷

7. A manifestation determination was convened on November 9, 2011.²⁸ The meeting was facilitated by DCPS staff person, Evan Murray.²⁹ There were 12 people at the meeting, including: Mr. Murray, the DCPS representative; the Petitioners; the Student; two social workers, including R.S.; the Director of Special Education for a special education coordinator; the Student's special education teacher; the teacher who caught the Student with the knife; a school psychologist; and C.K.³⁰ They discussed the knife and its possession by the Student and noted it was a one-time incident.³¹ There was no anger or outburst concerning the knife and the Student had merely forgotten it was in his pocket and did not intend to bring it to school.³² The Student's disabilities, counseling services and IEP goals, whether the behavior was noted in the IEP, and the opinions of various meeting participants as to whether they felt bringing the knife to school was a manifestation of the Student's disability were all discussed.³³ Not everyone agreed, and Mr. Murray determined that the

²⁴ T of S.

²⁵ T of S, T of R.S., P 8, R 3, R 4.

²⁶ T of S, T of P, P 8, R 3, R 4.

²⁷ T of S, T of P, T of R.S., T of C.K., P 8, P 11, R 3, R 4.

²⁸ P 9, P 11, R 4.

²⁹ T of R.S., T of C.K., P 11.

³⁰ R 4.

³¹ R 4, P 11, T of P, T of S, T of R.S., T of C.K.

³² T of S, T of R.S., T of P, T of C.K., R 4, P 11.

³³ R 4, P 11.

behavior was not a manifestation of the Student's disability.³⁴ C.K. did not think the question of whether bringing the knife to school was the correct question to ask, despite the suspension notice indicating the Student was suspended for bringing a knife to school.³⁵

C.K., R.S., P and S all believe the staff at [redacted] wanted the Student out of the school and that the manifestation determination was a foregone conclusion of achieve that end, following the Student's prior expulsion for fighting that resulted in him being returned to school through HOD.³⁶

8. Following the manifestation determination meeting an expulsion hearing was held and the Student was expelled from [redacted]
9. During the manifestation determination meeting the Respondent advised that DCPS would provide the Student with an alternate setting if he were expelled.³⁸ The Petitioner was advised of a meeting to discuss "possible changes to the setting" for the Student, as well as to "determine alternative educational setting," but the meeting was really about conducting an annual review of the IEP and advising the Petitioner that the Student would be attending his [redacted]

³⁴ T of R.S., T of C.K., R 4, P 11 [redacted] stated at the meeting, and it was recorded in the meeting notes that there was consensus that the behavior was not a manifestation of the Student's disability. This was in error and the evidence shows there was not consensus.)

³⁵ T of R.S., T of C.K., P 11. (C.K.'s objections at the meeting, and repeated at the hearing, were an interesting academic exercise, but only obfuscated a fairly straight-forward matter. She believed the behavior to address was whether putting the knife in his pocket was a manifestation of his disability, which she then argued was because he does not consider the consequences of his actions. She also agreed, however, that putting his knife in his pocket at home would not be a violation of a school rule. Ultimately, he forgot the knife was in his pocket, and there is no dispute about that. The Petitioner and R.S. believe forgetting is part of his disability and so his possession of the knife at school was a manifestation of his disability. As noted in the findings herein, there is no evaluation data indicating the Student is disabled by forgetfulness or that his ADHD or other disorders affect him in that way even insignificantly. Likewise, his inability to think through consequences of having a knife at school when he found it is irrelevant because he was already in possession of the knife at school which was the violation, regardless of whether he removed it from his pocket or not.)

³⁶ T of P. T of S., T of C.K., T of R.S. (There was various testimony of the way the Student was treated after being returned to school, being placed in the office, allegedly treated disrespectfully by the Principal, and how the manifestation determination meeting felt intimidating and that staff allegedly were influenced in their opinions as to the determination. Assuming this is true, it has no bearing on the manifestation determination.)

³⁷ T of P, T of C.K., P 14, R 3.

³⁸ R 4, P 11.

neighborhood school, School.³⁹ The meeting was held on December 2, 2011.⁴⁰

10. The Petitioner was required to complete the enrollment process for the Student at the new school and was delayed in completing that until January.⁴¹ The Student began attending sometime in January 2012.⁴² The Student was not provided educational services from the time he was removed from school on November 7, 2011, until he returned to school the week of January 13, 2012.⁴³

11. The Student's classes at have no more than 30 students in them and his special education class has about 15 students.⁴⁴ The Student's special education and related services are not being provided in conformity with his IEP because he is receiving 3.75 hours of specialized instruction outside of the classroom as opposed to 3 hours and no behavior support services are provided.⁴⁵ The Student did not receive any special education and related services from November 8, 2012, until he began attending The Student is less challenged academically at than at The Student is not really distracted at as he is kept away from people he socializes with.⁴⁷ The Student would prefer to be at and is not having significant behavior problems at and is able to do the classwork.⁴⁸

³⁹ P 14, P 16, P 17, P 19, T of P, T of C.K., T of R.S.

⁴⁰ P 17, P 19.

⁴¹ T of P, T of R.S., T of C.K., T of S.

⁴² T of S.

⁴³ T of S, T of P.

⁴⁴ T of S.

⁴⁵ T of S, T of P.

⁴⁶ T of S.

⁴⁷ T of S.

⁴⁸ T of S.

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing, generally, is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3). An exception to the burden of proof occurs in manifestation determination reviews. "In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability." D.C. Mun. Regs. 5-B2510.16.
2. Federal Regulations at 34 C.F.R. § 300.530(e) prescribes how a manifestation determination is made:
 - (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine —
 - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
 - (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

See also, D.C. Mun. Regs. 5-B2510.3 and 5-B2510.9. District of Columbia law at. D.C. Mun.

Regs. 5-B2510.12 provides:

In carrying out a review, the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team:

- (a) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including:
 - (1) Evaluation and diagnostic and results, or other relevant information supplied by the parents of the child;
 - (2) Observations of the child;
 - (3) The child's IEP and placement; and
 - (4) Any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel; and
 - (b) Then determines that:
 - (1) In relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
 - (B2) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
 - (3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.
3. The Student violated the code of student conduct by bringing a knife to school. The Student had put the knife in his pocket for protection in the neighborhood, had forgotten the knife was in his pocket (it had been there for over a week) and discovered it during class. The IEP team discussed the incident and did not agree that the conduct was a manifestation of the Student's disability. Evaluation and diagnostic data were reviewed by team members, and the IEP and placement were discussed. Specifically, there was concern that the Student had not been permitted to return to class, as ordered by the prior IHO (rather, the Student was kept in the school office for a number of days before he was permitted to return to the class room). It was also discussed whether the IEP was implemented given he was not in class for a period of time. The Student's advocate and the Petitioner argued that the question the team should have been asking was whether putting the knife in or pulling the knife out of his pocket was a

manifestation of his disability, because then the team could say that his disability impaired his ability of understanding the impact and consequences of putting in or pulling the knife out of his pocket. The school staff correctly stated that the question was whether bringing the knife to school (as stated in the suspension notice) was a manifestation of his disability, regardless of his intention to bring it to school. (It has not been disputed that having a knife at school is a violation of the code of student conduct.) The Student's behavior for which he was disciplined, bringing the knife to school, was not in any way related to his disability. The evidence shows that the Student simply forgot the knife was in his pocket. The Petitioner argues that his forgetfulness is related to his disability. However, none of the objective evaluation data, the IEPs of the last few years, and student progress data demonstrates that the Student has a problem with "forgetting." Indeed, we all forget things from time to time, and that appears to be exactly what the Student did. The Petitioner also argues, a bit more convincingly, that the Student's disorganization in the morning, due to his medication not being fully in effect yet, led to his having the knife on him. However, the knife was not placed in his pocket the evening or even the day before he was caught with it at school. He had it in his pocket for over a week, and there is testimony that he often wore the same pair of pants during that time period, indicating he brought the knife to school on more than one occasion. The Petitioner also argues that the failure to implement the IEP while he was out of class, specifically the failure to provide counseling, means that the determination must be that the behavior was a manifestation of the Student's disability. The argument fails because the Student was to be provided counseling to deal with anger management and self-control. He was not disciplined for losing control, rather merely bringing a knife to school. Thus, the behavior in question, bringing a knife to school, was not the direct result of the Respondent's

failure to implement the IEP. Furthermore, the implementation issue was resolved with the provision of compensatory education services. Whether the discipline the Student suffered was fair, under the circumstances, is not a question for this forum. The question this IHO has the authority to address is whether the Respondent accurately determined the behavior was not a manifestation of the Student's disability. It is clear that this determination was accurate.

4. 34 C.F.R. § 300.530(c) provides:

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.

See also, D.C. Mun. Regs. 5-B2510.4.

5. There are vagaries of what is meant by "placement." When moving a child from one building to another where the programs are "substantially and materially similar" there is no change of placement. 71 Fed. Reg. 46588-89 (August 14, 2006). The programs need not be identical.

According to OSEP:

Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588. An educational placement, under the Individuals with Disabilities Education Improvement Act (IDEA), is the provision of special education and related services within a continuum of alternative placements. *See*, 34 C.F.R. § 300.115. This continuum includes: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b). "Unless the IEP of a child

with a disability requires some other arrangement, the child is educated in the school that he or she would attend in nondisabled.” 34 C.F.R. § 200.116(c).

6. The Student’s placement at _____ School is more restrictive than his placement at _____ because he has been placed in a more restrictive education setting (3.75 hours of specialized instruction outside of the general education setting as opposed to 3 hours. However, the Student is not receiving his behavioral support services outside of the general education setting. Students who are under a disciplinary removal are not necessarily entitled to all of the services they would receive under their IEP if not removed from their educational setting. *See*, 71 Fed. Reg. 46716 (August 14, 2006). However, they “must continue to receive educational services, 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 his or her IEP.” 71 Fed. Reg. 46717 (August 14, 2006). Thus, the Respondent is not given free reign to simply provide or deny whatever services it wishes. No education services were provided from the Student’s removal on November 7, 2011, until on or about January 13, 2012. Then, there is no indication why the Student’s services were altered by removing the behavior support services and increasing the specialized instruction outside of the general education setting. The Student’s IEP must be implemented as written at _____ given the Respondent’s choice to keep him in school following his disciplinary removal and must follow proper due process procedures if it believes the Student needs different services or placement. *See*, 34 C.F.R. § 300.17 (Special education and related services must be provided in conformity with the student’s IEP).

VII. DECISION

The Respondent prevails on Issue #1 because it has shown it made the correct manifestation determination in November 2011.

The Petitioners prevail on Issue #2 because they have shown that there was an inappropriate placement of the Student made when the Respondent did not provide any educational services following Student's expulsion until January and then, did not provide behavioral support services and arbitrarily increased his specialized instruction outside of the general education setting.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Respondent implement the Student's IEP as written beginning no later than February 17, 2012. Because the Student is otherwise performing well at no additional remedy is required.

IT IS SO ORDERED.

Date: February 10, 2012



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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