District of Columbia

Office of the State Superintendent of Education

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OSSE
STUDENT HEARING OFFICE
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Confidential

STUDENT[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on June 5, 2012, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending District of Columbia Public Schools ("DCPS"). On March 16, 2012, DCPS determined the student was ineligible as a child with a disability under IDEA. However, the student who is the Petitioner in this matter asserts that she should have been found eligible on that date with a classification of emotional disturbance ("ED") and/or specific learning disability ("SLD").

During the 2011-2012 school year ("SY") the student attended a DCPS high school hereinafter referred to as "School A." She was suspended from School A for misconduct on at least three occasions during SY 2011-2012: August 31, 2011, through September 14, 2011, September 15, 2011, through September 20, 2011, and February 14, 2012, through March 30, 2012.

During the suspensions the student's school attendance, academic performance and school behavior were being addressed through the DCPS student support team ("SST") process and DCPS was on notice that the student was suspected of having a disability that would perhaps make her eligible for special education services under IDEA. As a result, the student's three suspensions should have been reviewed by DCPS under IDEA procedures to determine if the student's behavior(s) that led to the suspensions were manifestations of her suspected disability. With regard to these suspensions DCPS did not make such a determination until directed to do so by a February 21, 2012, Hearing Officer's Determination ("HOD").

On September 9, 2011, prior to the student turning age eighteen, the student's parent filed a due process complaint against DCPS alleging DCPS failed to evaluate the student and determine her eligible under IDEA. At the September 30, 2011, resolution meeting the complaint was resolved with DCPS providing the parent a letter authorizing an independent comprehensive psychological evaluation and a functional behavioral assessment ("FBA").

The independent evaluation was completed and provided to DCPS on December 19, 2011. On January 6, 2012, the student's parent filed another due process complaint alleging, inter alia, that DCPS failed to (1) timely convene an eligibility meeting for the student after its receipt of the independent evaluation, (2) that the student should have been found eligible under "child find" and (3) that DCPS failed to comply with IDEA's manifestation determination review ("MDR") requirements with regard to the student's suspension(s).

The February 21, 2012, HOD adjudicating the January 6, 2012, complaint, made findings of fact and conclusions of law determining, inter alia, that DCPS had not failed to timely convene an eligibility meeting after its receipt of the independent evaluation. However, the Hearing Officer

found that DCPS failed to indentify and evaluate the student under its "child find" obligations for two years prior to the filing of the January 26, 2012, complaint, and failed to conduct a MDR when the student was suspended from September 15, 2011, through September 20, 2012.

The HOD ordered DCPS, inter alia, to convene an eligibility meeting to determine the student's eligibility under IDEA and convene a MDR to determine if the student's behavior that resulted in the student's suspensions from August 31, 2011, to September 20, 2011[2], was a manifestation of her suspected disability. The HOD dismissed the parent's request for compensatory education without prejudice.

Pursuant to the February 21, 2012, HOD, on March 16, 2012, DCPS convened the eligibility meeting and convened a MDR. The DCPS personnel at the meeting found the student ineligible for special education services. The parent, the student and their representative who attended the meeting disagreed with decision. As to the MDR the team reviewed the three suspensions and the DCPS personnel concluded the student's behavior in two of the three suspensions was not a manifestation of a suspected disability. The parent and her representative disagreed. The DCPS representatives determined that the student's behavior that led to the September 15, 2011, through September 20, 2011, suspension was a manifestation of a suspected disability but had occurred prior to the implementation of a SST intervention. The DCPS representative(s) took no action to compensate the student for any time the student lost from school during the September 15, 2011, through September 20, 2012, suspension.

On May 8, 2012, after the student became age eighteen, through counsel she initiated the current due process complaint challenging DCPS' March 16, 2012, ineligibility determination and challenging the March 16, 2012, MDR decisions. Petitioner seeks as relief (1) that the Hearing Officer determine the student eligible and direct DCPS to do so, and (2) that the Hearing Officer order DCPS to provide and/or fund compensatory education for the time the student was suspended from school for the alleged inappropriate disciplinary removal(s), and order the student's educational record reflect that the suspension(s) did not or should not have occurred.

DCPS filed a response to the complaint on May 12, 2012. DCPS denied the student has been denied a FAPE and asserted in response: that the finding of ineligibility was sound and supported by the existing data and the student's three years of absenteeism and substance abuse were considered in conjunction with other data which supported the finding of ineligibility. As to the MDR, DCPS asserted the team correctly determined the student's behavior was not a manifestation of her suspected disability and as to the August 31, 2011, asserts the issue was addressed in a prior HOD.

The resolution meeting was held May 21, 2012. No agreement between the parties was reached. This is an expedited disciplinary matter and the hearing is being held within 20 school days of

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[2] The Hearing Officer notes that the February 21, 2012, HOD states that the suspension from August 31, 2011, through September 14, 2012, amounted to 9 school days of suspension. However, these actually amounted to 10 school days. Thus, the student's 11th day of suspension for the school year occurred on September 15, 2011, during a second suspension that ran from September 15, 2011, to September 20, 2011. DCPS was not required to conduct a MDR until the student had reached the 11th day of suspension in the school year. Thus, a MDR was not required on the first suspension from August 31, 2011, through September 14, 2011. The MDR was only required for the suspension that occurred from September 15, 2011, through September 20, 2011.

the date the complaint was filed and the HOD is due ten school days after the hearing: on June 19, 2012. (However, the Hearing Officer notes that June 14, 2012, is the close of SY-2011-2012 and thus marks the end of school days until the start of SY 2012-2013 in August 2012. The HOD will, nonetheless, be issued on or before June 19, 2012.)

A pre-hearing conference was conducted on May 25, 2012, at which the issues to be adjudicated were discussed and determined. On May 31, 2012, the Hearing Officer issued a pre-hearing order.

ISSUES: [3]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to determine the student eligible as a child with a disability under IDEA entitled to special education at the March 16, 2012, eligibility meeting.

2. Whether DCPS denied the student a FAPE by failing to review and consider all relevant information (including the student's December 15, 2011, psychological evaluation) during the March 16, 2012, manifestation determination review and by failing to find that the student's behavior that occurred on or about September 15, 2011, was a manifestation of her suspected disability.[4]

3. Whether DCPS denied the student a FAPE by failing to review and consider all relevant information (including the student's December 15, 2011, psychological evaluation) during the March 16, 2012, manifestation determination review and by failing to find that the student's behavior (fighting) that occurred on or about February 14, 2012, was a manifestation of her suspected disability. [5]

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[3] The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

[4] As to issue #2 the Hearing Officer determined in the Findings of Fact that the student did not incur more than ten school days of suspension in SY 2011-2012 until September 15, 2011.

[5] Petitioner asserted the following in the due process complaint regarding the number of days the student missed school as result of the disciplinary removal: "The student was suspended for an incident occurring on 2/14/2012. The suspension began on 2/15/2012 and she was at home until she started at on 3/20/2012. That turns out to be 24 school days. She then attended [A]cademy from 3/20/2012 to 3/20/2012 [3/30/12] (which is a total of 9 school days.) She was supposed to go back to School A after spring break, [4/2/12 through 4/9/12] so she was supposed to return to [School A] on 4/9/2012. [4/10/12] However, when she tried to return on 4/9/2012 the school officials would not let her in and she again missed school for 5 school days (from 4/9/2012 to 4/13/2012). She was allowed to return for DC CAS testing from 4/16/2012 to on or about 4/18/2012 and then kicked out again. She was again out of school from 4/19/2012 to on or about 4/26/2012 (which is again another 7 school days where she was at home.) Therefore she has missed at least 30 full days of school, partly due to long term suspensions and partly due to several short term suspension where she is simply sent home for the day, or for a few days (many of which are not documented)."

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-23 and DCPS Exhibit 1-10) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. DCPS disclosed witnesses, however, presented no witnesses at the hearing to refute the testimony presented by Petitioner's witnesses.

FINDINGS OF FACT: [6]

1. The student is age in grade and DCPS on March 16, 2012, determined the student was ineligible as a child with a disability under IDEA. (Student's testimony, testimony, Petitioner's Exhibits 6-4)

2. In September 2004 when the student was age ten an independent neuropsychological evaluation was conducted of the student. The evaluation report noted the student had had a longstanding history of disruptive behavior in school and poor academic performance. The evaluator concluded the student's behavior and school failure was directly related to her neurological profile that was below expectations in the areas of attention, executive functioning, memory and learning. The evaluator diagnosed the student with a cognitive disorder, major depression and Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD"). The evaluator recommended that the student be educated in a full time therapeutic program with a multi-sensory approach to learning and behavior management. (Petitioner's Exhibit 8-8, 8-9)

3. No eligibility determination was apparently ever made following the September 2004 evaluation. The student thereafter moved on to a DCPS middle school and then began high school in ninth grade at a DCPS school during SY 2009-2010. Due to repeated altercations with other students and consequential school transfers the student attended three different DCPS high schools during the subsequent three school years. Due to repeated suspensions, poor attendance and failing grades the student has earned only 2.5 academic credits and repeated ninth grade in SY 2010-2011 and SY 2011-2012. (Parent's testimony, Petitioner's Exhibits 4-3, 15, Respondent's Exhibits 3, 6)

4. The student began her third year in ninth grade at the start of SY 2011-2012 attending her current DCPS high school, School A, where she began attending in the spring of SY 2010-2011. During SY 2011-2012 the student received documented off-site suspensions for 10 school days from August 31, 2011, through September 14, 2011 for inciting others

[6] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

to violence or disruption; for 4 school days from September 15, 2011, through September 20, 2011, for interfering with school authorities or participating in a major disruption. (Petitioner's Exhibit 4-3, 4-4, DCPS Exhibit 3-1)

5. The student also was suspended from School A for in school fighting in an incident that occurred on February 14, 2012. The student was suspended from School A from February 15, 2012, through March 14, 2012 at total of 20 school days missed. (DCPS Exhibit 3-7, 3-8)

6. During the three suspensions DCPS was on notice that the student was to be considered a child with a disability under IDEA and afforded the protections under IDEA because DCPS was on notice the student had a suspected disability and should have been identified under DCPS' "child find" obligations. (Petitioner's Exhibit 4-6, 4-7)

7. During all three suspensions the student's school attendance, academic performance and school behavior were being addressed through DCPS student support team ("SST") process and DCPS was on notice that the student was suspected of having a disability that would perhaps make her eligible for special education services under IDEA. As a result, the student's three suspensions should have been reviewed by DCPS under IDEA procedures to determine if the student's behavior(s) that led to the suspensions were manifestations of her suspected disability. (Petitioner's Exhibit 4-6, 4-7,6-1, 6-2, 6-3, 6-4)

8. On September 9, 2011, the student's parent filed a due process complaint against DCPS alleging DCPS failed to evaluate the student and determine her eligible under IDEA. At the September 30, 2011, resolution meeting the complaint was resolved with DCPS providing the parent a letter authorizing an independent comprehensive psychological evaluation and functional behavioral assessment ("FBA"). (Petitioner's Exhibit 4-5, Respondent's Exhibit 7)

9. The independent evaluation was completed and provided to DCPS on December 19, 2011. On January 6, 2012, the student's parent filed another due process complaint alleging, inter alia, that DCPS failed to (1) timely convene an eligibility meeting for the student after its receipt of the independent evaluation DCPS had authorized, (2) that the student should have been found eligible under "child find" and that DCPS failed to comply with IDEA's manifestation determination review ("MDR") requirements with regard to the student's suspension(s). The independent FBA was attempted and DCPS developed a behavior intervention plan ("BIP") for the student; however, an IEP team never reviewed the BIP. (Petitioner's Exhibit 4-6)

10. A HOD issued on February 21, 2012, that made findings of fact and conclusions of law determining, inter alia, that DCPS had not failed timely convene an eligibility meeting after its receipt to the independent evaluation, but had failed indentify and evaluate the student under its "child find" obligations for two years prior to the filing of the January 26, 2012, due process complaint, and failed to conduct a MDR when the student was suspended from September 15, 2011, through September 20, 2012. (Petitioner's Exhibit 4-6, 4-9, 4-10)

11. The HOD ordered DCPS, inter alia, to convene an eligibility meeting to determine the student's eligibility under IDEA and convene a MDR to determine if the student's behavior that resulted in the student's suspensions from August 31, 2011, to September 20, 2011, was a manifestation of her suspected disability. The HOD dismissed the parent's request for compensatory education without prejudice. (Petitioner's Exhibit 4-11)

12. Pursuant to the February 21, 2012, HOD, on March 16, 2012, DCPS convened the eligibility meeting and convened a MDR. The DCPS personnel at the meeting found the student eligible for special education services. The parent and her representative who attended the meeting disagreed with decision. As to the MDR the team reviewed the three suspensions and the DCPS personnel concluded the student's behavior in two of the three was not a manifestation of a suspected disability. The parent and her representative disagreed. The DCPS representatives determined that the student's behavior that led to the September 15, 2011, through September 20, 2011, suspension was a manifestation of a suspected disability but had occurred prior to the implementation of a SST intervention. The DCPS representative(s)granted the student nothing to compensate her for the manifestation determination that was apparently in her favor. testimony, Petitioner's 6-5, 6-6, 6-7, 6-8)

13. The student was suspended for an incident that occurred on February 14, 2012. The suspension began on February 15, 2012, and she was at home until she started at Academy on March 14, 2012, for a total of 20 school days. Therefore the student missed 20 full days of school, due to the long-term suspension for the incident that occurred on February 14, 2012. (DCPS Exhibit 3-8)

14. The student's December 15, 2011, independent comprehensive psychological evaluation report revealed that the student has an IQ score of 72, which in the low range of functioning, she is performing at the 4th to 5th grade level in reading, math and written language, she has been diagnosed with Mood Disorder Not otherwise Specified ("NOS"), Attention Deficit Hyperactivity Disorder ("ADHD") and Major Depressive Disorder. The evaluator concluded the student's behavior negatively impacts her academic progress and she should be identified as a student with an emotional disturbance, (Mood Disorder NOS). The evaluator also concluded the student meets criteria for Learning Disorder NOS as she evidences academic weakness in all subjects (math, reading and written expression) that will require remediate through full time specialized education supports. The evaluator also concluded "the student's behavior difficulties, and the impact of her ADHD and Mood Disorder on her learning and social functioning suggest that she will require placement in a therapeutic school for students with... Emotional Disturbance. She should be educated in a class with a small student to teacher ratio." (Dr. Nelson's testimony, Petitioner's Exhibit 10-3, 10-4, 10-12, 10-14)

15. Dr. Nelson's report specifically noted the student denied use of drugs, alcohol, or that she has experimented with these substances. Based on her interaction with the student and review of the evaluation data Dr. Nelson concluded the student has exhibited over a long period of time, and to marked degree , through her repeated suspensions for fighting with peers and being disagreeable with school faculty and staff, that she has exhibited

inappropriate types of behavior and an inability to build or maintain satisfactory interpersonal relationships with peers and teachers that has adversely affected the student's educational performance. Dr. Nelson provided an opinion that student's behaviors that occurred on September 14, 2011, and February 14, 2012, were manifestations of her diagnosed condition(s) and disability of emotional disturbance. (Dr. Nelson's testimony, Petitioner's Exhibit 10-3, 10-4, 10-12, 10-14)

16. On March 5, 2012, a DCPS psychologist completed a written review of the student's December 15, 2011, comprehensive psychological evaluation. The report stated the following: "poor attendance, drug involvement, social maladjustment and lack of instruction are exclusionary factors for special education." The report recommended the student continue to work with the SST to receive academic and behavioral interventions to promote academic success and provide the essential data for special education consideration. (Respondent's Exhibit 1-7, 1-8)

17. Petitioner presented a compensatory education plan designed to compensate the student for the services that student did not receive in the two year period prior to the filing of the January 6, 2012, due process complaint. Petitioner alleged the student should have been receiving specialized instruction and counseling services since January 2010 and thus should be provided 150 hours of independent tutoring and 50 hours of independent counseling. testimony, Petitioner's Exhibit 21)

18. For the two periods of suspensions the plan proposed to provide the student 15 hours of independent tutoring and 5 hours of independent counseling for the suspension from August 31, 2011, to September 14, 2011, and 180 hours of independent tutoring and 10 hours of independent counseling for the thirty days of services the student missed for the suspension from February 15, 2012, through March 14, 2012. However, the compensatory education plan did not present a direct correlation to the total services the student missed and the place the student would have been had she found eligible in January 2010 or not missed the services related to her suspensions. testimony, Petitioner's Exhibit 21)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking

relief. [7] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides:

A free appropriate public education or 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 Sec. 300.320 through 300.324

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue 1: Whether DCPS denied the student a FAPE by failing to determine the student eligible as a child with a disability under IDEA entitled to special education at the March 16, 2012, eligibility meeting.

Conclusion: Petitioner presented sufficient evidence to sustain the burden of proof by a preponderance of evidence that the student qualifies as a child with a disability under IDEA with a classification of ED. Although there was evidence the student may also qualify under the SLD classification, because the student meets one criteria for eligibility and is entitled to special education services, the Hearing Officer will direct an IEP team to determine if the student should be qualified under an additional classification and whether her IEP when developed should address concerns related to any additional classification.

34 C.F.R. § 300.306 provides:

> Determination of eligibility.
>
> (a) General. Upon completion of the administration of assessments and other evaluation measures--
> (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and
> (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

[7] The burden of proof shall be the responsibility of the party seeking relief. 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.

(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--
(1) If the determinant factor for that determination is--
(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
(ii) Lack of appropriate instruction in math; or
(iii) Limited English proficiency; and
(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).
(c) Procedures for determining eligibility and educational need.
(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must--
(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
(ii) Ensure that information obtained from all of these sources is documented and carefully considered.
(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324.

34 C.F.R. §300.8 provides:

Child with a disability.
(a) General.
(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... a serious emotional disturbance (referred to in this part as "emotional disturbance"), ...a specific learning disability, ... or multiple disabilities, and who, by reason thereof, needs special education and related services.
(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.
(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.
...(4) (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Dr. Nelson presented uncontroverted and credible testimony interpreting evaluative data that clearly demonstrates the student is performing at the 4th to 5th grade level in reading, math and written language, and has been diagnosed with Mood Disorder NOS, ADHD and Major Depressive Disorder. Dr. Nelson concluded the student's in school behavior negatively impacts her academic progress and she should be identified as a student with an emotional disturbance in need of special education services. DCPS presented no witness to refute the testimony or the evaluative data. The DCPS' review of Dr. Nelson's evaluation noted the student's alleged drug use and absenteeism as a basis for her not being found eligible. However, Dr. Nelson's evaluation refuted this comment in the DCPS report. Consequently, the Hearing Officer concludes the student should have been found eligible by DCPS on March 16 2012, and concludes the student is eligible as a child with a disability under IDEA with a classification of ED and in need of special education services.

The Hearing Officer notes when the student was evaluated in 2004 a therapeutic placement was recommended. In addition, Dr. Nelson credibly testified that the student is in need of a full time therapeutic educational placement where both her emotional academic concerns can be addressed. Petitioner did not, however, present any placement for the student nor provide sufficient data for the Hearing Officer to attempt to craft an IEP for the student.

Consequently, the Hearing Office will direct that DCPS convene meeting to determine an appropriate full time therapeutic educational placement/location of services that can provide the student at least 26.5 hours of specialized instruction in an out of general education setting as well as provide the student individual and/or group emotional and behavioral support services in a school setting.

Issue 2: Whether DCPS denied the student a FAPE by failing to review and consider all relevant information (including the student's December 15, 2011, psychological evaluation) during the March 16, 2012, manifestation determination review and by failing to find that the student's behavior that occurred on or about September 14, 2011, was a manifestation of her suspected disability.

Conclusion: Pursuant to Title 5 Chapter B25, of the DCMR 2510.16 DCPS has the burden of proving that the student's behavior was not a manifestation of his suspected disability. DCPS presented no evidence to refute Dr. Nelson's testimony that the student's behavior related to the September 14, 2011, incident was a manifestation of her suspected disability. Consequently the Hearing Officer concludes the MDR determination made by DCPS with regard to that incident was inappropriate and in error.

DCPS has the right to remove children with disabilities for up to ten days in a school year without providing the student services under his/her IEP. 34 CFR 300.530(b)(2). When DCPS removes a child with a disability for more than 10 cumulative days in a school year, it may continue to remove the student from his/her placement, but must provide services to the student for all times over the initial 10 days of removal. 34 CFR 300.530(b)(2); 34 CFR 300.530(d).

DCPS also may remove children with disabilities on multiple occasions for not more than 10 consecutive school days (as long as the it continues to provide services for all time periods after the first ten days). 34 CFR 300.530(b)(1). However, DCPS may not remove children with disabilities for more than 10 cumulative school days if the reasons for the disciplinary removal constitute a pattern of behavior under the regulations. Id.

If DCPS decides to change the student's placement due to violations of the student code of conduct, it must conduct a meeting to determine if the student's behavior is a manifestation of his or her disability. 34 CFR 300.530(e) or whether the behavior was a direct result of it's failure to implement the student's IEP. 34 CFR 300.530(e)(1)(i,ii).

If the latter, DCPS must take immediate steps to remedy any deficiencies in implementing an IEP. 34 CFR 300.530(e)(3). If the it is determined the student's behavior was a manifestation of his or disability then DCPS must either conduct a FBA and implement the a behavioral intervention plan ("BIP"), or if a BIP already is in place, revisit the BIP and modify it to address the student's behavior. 34 CFR 300.530(f)(1).

Regardless of the ultimate determination, DCPS generally must return the student to his/her placement unless the parent and DCPS agree to a change of placement. 34 CFR 300.530(0(2).

Parents have a right to appeal a change in placement due to disciplinary removals or the results of the manifestation determination with an expedited due process hearing. 34 CFR 300.532.

The District of Columbia has switched the burden of proof to the District. Specifically, in cases where the determination made at a manifestation determination is challenged DCPS has the burden of demonstrating that the student's actions for which he/she has been disciplined is not a manifestation of the student's disability. (Chapter B25, DCMR 2510.16).

If the a Hearing Officer concludes DCPS has not met that burden regarding the manifestation determination or a change in placement for disciplinary removals the Hearing Officer may: (1) put the student back in his/her former placement; or (2) place the student in an alternative education setting for up to 45 days it is determined that maintaining the current placement of the child is substantially likely to result in the injury to the child or to others. 34 CFR 300.532(b)(2)(i, ii). And the Hearing Officer can provide other relief including compensatory education to make the child whole. A.G. v. District of Columbia, 57 IDELR 9 (D.D.C. 2011).

The Hearing Officer concludes based on the lack of any evidence to refute Dr. Nelson's testimony that the student's behavior during the incident that occurred on September 14, 2012, and for in school fighting that occurred February 14, 2012, was a manifestation of her suspected disability and thus the student should not have been removed from school A for either incident.

Consequently, because the student's FBA and BIP has yet to be reviewed and implemented by a IEP team, the Hearing Officer will also direct that when the IEP team is convened pursuant to the Oder below they shall review the student's BIP and determine if it is effective in addressing the behaviors for which the student was inappropriately suspended. In addition, to compensate the student for the 34 days that the student was without services the Hearing Officer will provide the student with a compensatory education award.

Issue 3: Whether DCPS denied the student a FAPE by failing to review and consider all relevant information (including the student's December 15, 2011, psychological evaluation) during the March 16, 2012, manifestation determination review and by failing to find that the student's behavior (fighting) that occurred on or about February 14, 2012, was a manifestation of her suspected disability.

Conclusion: As mentioned above DCPS failed to present evidence to refute Dr. Nelson's credible testimony that testimony that the student's behavior that occurred February 14, 2012, was a manifestation of her suspected disability and thus the student should not have been removed from school A for the incident. Consistent with the findings and conclusions above the Hearing Officer has directed that DCPS provide the remedy below.

Compensatory Education

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."? "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." *Reid, 401 F.3d 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner presented a compensatory education plan designed to compensate the student for the services that student did not receive in the two year period prior to the filing of the January 6, 2012, due process complaint. Petitioner alleged the student should have been receiving specialized instruction and counseling services from since January 2010 and thus should be provided 150 hours of independent tutoring and 50 hours of independent counseling.

For the two periods of suspensions the plan proposed to provide the student 15 hours of independent tutoring and 5 hours of independent counseling for the suspension from September 15, 2012, to September 20, 2011, and 180 hours of independent tutoring and 10 hours of independent counseling for the thirty days of services the student missed for the suspension from February 15, 2012, through March 14, 2012.

The testimony and documents offered by Petitioner with regard to compensatory education did not specifically prove the total number of hours the student missed warranted the tutoring and counseling hours requested as is required under *Reid.*

Despite the fact that Petitioner presented insufficient evidence as to compensatory education, it is inequitable for the student to be provided nothing. Based upon the student's severe academic deficits and DCPS' failure to timely identify, evaluate and find her eligible and for the inappropriate suspensions the Hearing Officer order that DCPS a reading assessment and provide what the Hearing Officer considers a reasonable award of tutoring services and counseling services as compensatory education for the denials of FAPE found.

ORDER:

1. DCPS shall within ten (10) business days of the issuance convene an IEP meeting to develop and IEP consistent with the findings of this HOD and prescribing 26.5 hours of specialized instruction in an out of general education setting, and determine an appropriate therapeutic setting and appropriate location of services for the student.

2. IEP team when it meets shall also determine if the student should be qualified under an additional classification and whether her IEP when developed should address concerns related to any additional classification. The IEP team should also review the appropriateness of the student's BIP.

3. DCPS shall a fund a reading assessment at Lindamood Bell at the general rate that DCPS pays for such an assessment to Lindamood Bell.

4. DCPS shall fund 100 hours of independent tutoring and 25 hours of independent counseling for the student at the DCPS prescribed rates as compensatory education.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer 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. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: June 19, 2012