

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

Parent, on behalf of)
STUDENT,¹)
)
Petitioner,)
)
v.)
)
PUBLIC CHARTER SCHOOL,)
)
Respondent.)

Hearing Officer: Frances Raskin

OSSE
STUDENT HEARING OFFICE
2011 DEC 14 AM 9:25

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. BACKGROUND

Petitioner is the mother of a -year-old student ("Student") who attends a public charter school ("Charter School") in the District of Columbia. On October 26, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the Charter School pursuant to the Individuals with Disabilities Education Act ("IDEA"). Because the Complaint raises issues related to the Charter School's discipline of the Student, this Hearing Officer placed this case on the expedited discipline timeline, which required the due process hearing to be held within twenty school days of Respondent's receipt of the Complaint, i.e., by November 28, 2011.

This Hearing Officer was appointed to preside over this case on October 28, 2011. Respondent filed a timely Answer on November 4, 2011.²

¹ Personal identification information is provided in Attachment A.

Respondent filed a Motion to Dismiss on November 4, 2011. Petitioner filed a Response to the motion on November 9, 2011. This Hearing Officer issued an Order denying the motion on November 17, 2011.

The parties participated in a resolution meeting on November 7, 2011. The parties were unable to resolve the Complaint.

On November 14, 2011, Petitioner filed three notices to appear. This Hearing Officer recommended that the Chief Hearing Officer sign two of the notices to appear because Respondent stated that it would make the third witness available voluntarily. On November 18, 2011, the Chief Hearing Officer signed and issued the two notices to appear as recommended by this Hearing Officer.

On November 15, 2011, Petitioner filed a Motion to Invoke Stay Put. On November 18, 2011, Respondent filed an opposition to the Motion. On November 22, 2011, this Hearing Officer denied the Motion to Invoke Stay Put.

On November 18, 2011, Respondent filed a Motion to Quash. On November 21, 2011, this Hearing Officer denied the Motion to Quash.

On November 18, 2011, the parties exchanged and filed their respective five-day disclosures.

The due process hearing commenced at 10:00 a.m. on November 28, 2011. At the outset of the hearing, this Hearing Officer entered into evidence all but two of Petitioners' proposed exhibits³ and all of Respondent's proposed exhibits.⁴

Petitioner testified and presented one witness on her behalf, her educational advocate ("Advocate"). Respondent did not present any witnesses. At the conclusion of the due process hearing, Respondent agreed to provide the Student interim, alternative services consisting of two hours per day of individual instruction until the issuance of this Hearing Officer Determination ("HOD").

² Respondent did not challenge the sufficiency of the Complaint.

³ This Hearing Officer admitted into evidence Petitioner's exhibits 1-16, inclusive, and P-19. This Hearing Officer did not admit into evidence Petitioner's exhibits 17 and 18 because they were curriculum vitae for individuals whom Petitioner did not plan to call to testify.

⁴ This Hearing Officer admitted into evidence Respondent's exhibits 1-19, inclusive.

On December 5, 2011, the parties filed written closing arguments. On December 7, 2011, Respondent filed a Response to Petitioner's Closing Argument. The hearing record closed at 11:59 p.m. on December 7, 2011.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied the Student a FAPE by failing to conduct initial evaluations in all areas of suspected disability in response to Petitioner's request of October 4, 2011;

B. Whether Respondent denied the Student a FAPE by failing to conduct a manifestation determination and functional behavioral assessment ("FBA") after expelling him on October 24, 2011, for behaviors that including biting a teacher; and

C. Whether Respondent denied the Student a FAPE by failing to provide the Student services in an interim alternative setting after expelling him on October 24, 2011.

Petitioner requests relief in the form of an order requiring Respondent to re-enroll the Student at the PCS; evaluate the Student in all areas of suspected disability, including by conducting psychological, speech and language, and occupational therapy evaluations; conduct an FBA; and provide him compensatory education.

IV. FINDINGS OF FACT

1. Petitioner is the mother of the Student.⁵ The Student is years old.⁶ During the 2010-2011 school year, the Student was enrolled in a daycare facility.⁷ This daycare facility was not a formal school that provided academic instruction.⁸

2. In January 2011, District of Columbia Public School's ("DCPS") Early Stages program conducted assessments of the Student to determine his overall developmental functioning, eligibility for special education and related services, and his educational placement and programming needs.⁹ DCPS began a multidisciplinary evaluation of the

⁵ Testimony of Petitioner.

⁶ Petitioner Exhibit 9 (September 13, 2011, Pre-Expulsion Conference Plan for Improvement);

⁷ Respondent Exhibit 3 at 12 (February 11, 2011, Speech Language Evaluation).

⁸ Testimony of Petitioner.

⁹ Respondent Exhibit 1 at 2 (January 26, 2011, Developmental Evaluation). DCPS is not a party to this case.

Student on January 26, 2011, that consisted of developmental, psychological, and speech-language assessments.¹⁰

3. The developmental assessment included a Battelle Developmental Inventory, second edition (BDI-2).¹¹ The BDI-2 is a standardized assessment that measures children's developmental performance across five domains: adaptive, personal-social, communication, motor, and cognitive.¹²

4. The Student's performance in the adaptive domain was in the low-average range,¹³ while his performance in personal and cognitive domains was in the average range when compared to his same-age peers.¹⁴ Within the cognitive domain, the Student's performance in the attention and memory sub-domain was in the low-average range.¹⁵ The Student exhibited mild developmental delay in perception and concepts, another sub-domain of the cognitive domain.¹⁶ In none of the five domains, however, was the Student's performance sufficiently below average to qualify him for school-based services.¹⁷

5. The psychological assessment of the Student, conducted on January 26, 2011, and February 2, 2011, included behavioral observations; a clinical/developmental parent interview; the Wechsler Preschool and Primary Scale of Intelligence - Third Edition ("WPPSI-III"); the Behavior Assessment System for Children - Second Edition ("BASC-II"); and classroom observation.¹⁸ At the time of the assessment, the Student's verbal and nonverbal performance ranged from the below average range to the high average range when compared to his same-age peers.¹⁹ His cognitive skills in the area of

¹⁰ *Id.* See also Respondent Exhibit 2 at 7 (February 2, 2011, Confidential Psychological Report) (reflecting that the examiner conducted a psychological evaluation of the Student on January 26, 2011, and February 2, 2011); Respondent Exhibit 3 at 12 (reflecting that examiner conducted speech-language evaluation of the Student on January 26, 2011, and February 10, 2011).

¹¹ Respondent Exhibit 1 at 2.

¹² *Id.*

¹³ The adaptive domain contains two sub-domains: self-care and personal responsibility. *Id.* at 4. Self-care refers to a child's ability to perform the tasks associated with daily routines and increasing autonomy. *Id.* At the time of the assessment, he needed assistance with removing his clothes and controlling his bowel movements on a regular basis. *Id.* He exhibited no deficiencies in the personal responsibility sub-domain. *Id.*

¹⁴ *Id.* at 3, 5.

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ Respondent Exhibit 2 at 7.

¹⁹ *Id.* at 8.

verbal knowledge were very strong when compared to his same-age peers.²⁰ His non-verbal skills, while average overall, were an area of more varied performance.²¹ His non-verbal reasoning skills also were within the average range when compared to his same-age peers.²²

6. The Student's behavioral performance was the most significant in the area of externalizing behaviors, including hyperactivity and impulsivity.²³ He exhibited vulnerabilities in behaviors often associated with disruption and non-compliance, including significant tantrums.²⁴ As of February 2011, these behaviors had improved significantly as a result of family counseling services.²⁵

7. The psychological assessment recommended that the Student be provided a behavioral plan tailored to his needs.²⁶ The assessment further recommended that, as instructional demands increase in school, the Student should be carefully monitored in light of his vulnerabilities in attention and hyperactivity.²⁷

8. The speech-language assessment of the Student, conducted on January 26, 2011, and February 10, 2011, was completed to determine the presence or absence of a deficit in the area of communication, which may adversely impact his academic, social-emotional, or vocational development.²⁸ At the time of the assessment, the Student's voice, resonance, and fluency skills were within normal limits.²⁹ His overall expressive and receptive language skills were in the average range of performance, although he demonstrated a mild delay in auditory comprehension at the time of the assessment.³⁰ His articulation skills were in the average range.³¹ His speech intelligibility skills were within the expected range.³²

9. On March 8, 2011, DCPS issued a Prior Written Notice ("PWN") indicating that it found that the Student did not meet the criteria to qualify as a student with a disability pursuant to IDEA.³³ DCPS found that the Student did not exhibit severe

²⁰ *Id.* at 9.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Respondent Exhibit 3 at 12.

²⁹ *Id.* at 15.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Respondent Exhibit 5 at 26 (March 8, 2011, PWN).

developmental delays that were at least two years below his chronological age in the areas assessed in the developmental and psychological assessments.³⁴ DCPS found that the Student's abilities were not adversely impacting his educational performance.³⁵ DCPS further found that the Student does not have a speech-language impairment.³⁶

10. On March 8, 2011, DCPS further found that, although the Student exhibited behavioral vulnerability, he demonstrated the ability to be redirected and was able to provide evidence that he was mentally attending to task.³⁷ DCPS recommended that a functional behavioral assessment ("FBA") be completed once the Student registered in his neighborhood school.³⁸ DCPS suggested that the results of the FBA be used to assist school staff with developing a behavioral implementation plan ("BIP") to support the Student's educational needs.³⁹ In summary, DCPS found that the Student was not a student with a disability who needs special education and related services.⁴⁰

11. Petitioner did not take any steps to challenge the DCPS evaluations.⁴¹ She also did not file a due process complaint or otherwise challenge the determination by DCPS that the Student was not eligible for special education and related services.⁴²

12. At the beginning of the 2011-2012 school year, Petitioner enrolled the Student in the Charter School.⁴³ The Student's behavioral difficulties surfaced almost immediately upon his enrollment in the Charter School.⁴⁴

13. On August 24, 2011, the second day of the 2011-2012 school year, the Student played with toys when he should have.⁴⁵ When asked to sit down, the Student walked around his classroom and then ran out the door.⁴⁶ The following day, after his teacher tried to stop him from running around the classroom, the Student hit his teacher's arm then grabbed her wrist and attempted to twist her arm.⁴⁷

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; Respondent Exhibit 6 at 31 (March 8, 2011, Multidisciplinary Team Meeting Notes).

³⁸ Respondent Exhibit 5 at 26; Respondent Exhibit 6 at 30.

³⁹ Respondent Exhibit 6 at 30.

⁴⁰ Respondent Exhibit 5 at 28; Respondent Exhibit 6 at 31.

⁴¹ Testimony of Petitioner.

⁴² *Id.*

⁴³ Testimony of Petitioner.

⁴⁴ *Id.*

⁴⁵ Petitioner Exhibit 11 at 1 (School Year 2011-2012 First Quarter Log Entries).

⁴⁶ *Id.*; Testimony of Petitioner.

⁴⁷ Petitioner Exhibit 11 at 1.

14. On August 30, 2011, the Student pushed another student in his class when the student took something from him.⁴⁸ The next day, the Student hit the teacher with his hands and kicked the teacher with his feet.⁴⁹ The Student also hit the teacher with a toy shovel.⁵⁰

15. On September 7, 2011, the Student kicked a chair at the class while they were sitting on the carpet and then twice hit his teacher on the hand.⁵¹ That same day, when his teacher tried to help him up after he refused to stand, the Student bit the teacher on the wrist.⁵² He also kicked another student in the back during the morning bathroom routine.⁵³

16. On September 13, 2011, the Charter School developed a "Pre-expulsion Conference Plan for Improvement."⁵⁴ The plan included behavioral interventions and rewards.⁵⁵ The plan stated that the Student would be expelled if, prior to October 13, 2011, he has any emotional reaction that disrupts the learning environment or exhibits any behavior that endangers the classroom teacher and students.⁵⁶ The plan stated that, if the Student was successful, the Charter School would hold a meeting on October 13, 2011, to discuss a continued plan of support for him.⁵⁷ Petitioner and the Student signed the plan, indicating that they understood that the Student was on pre-expulsion status at the Charter School and that they were committed to achieving the plan.⁵⁸

17. On September 22, 2011, the Student pinched the special education coordinator ("SEC").⁵⁹ On September 26, 2011, the Student refused to follow directions and, when redirected by his teacher, he hit her several times.⁶⁰ That same day, he spit on his teacher.⁶¹

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Petitioner Exhibit 9 at 1 (September 13, 2011, Pre-expulsion Conference Plan for Improvement); Respondent Exhibit 14 at 56 (same).

⁵⁵ *Id.*

⁵⁶ Petitioner Exhibit 9 at 2; Respondent Exhibit 14 at 57.

⁵⁷ *Id.*

⁵⁸ Petitioner Exhibit 11 at 1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Respondent Exhibit 7 at 33 (September 22, 2011, letter from Darnell Henderson to the Charter School principal).

18. On September 22, 2011, Petitioner, through her counsel, requested that the Charter School authorize Petitioner to obtain an independent comprehensive psychological evaluation at the Charter School's expense.⁶² In the letter, Petitioner's counsel stated that Petitioner was requesting this independent evaluation because of the Student's ongoing academic difficulties and because she disagreed with the DCPS evaluation of January 26, 2011.⁶³

19. On September 22, 2011, the Charter School, through its counsel, responded in a letter to Petitioner's counsel that it was unwilling to conduct the evaluation because, if Petitioner disagreed with the evaluation DCPS conducted, she was not entitled to an independent evaluation at the Charter School's expense.⁶⁴ The Charter School explained in the letter that, because DCPS is a separate local education agency ("LEA") from the Charter School, the Charter School is not obligated to provide Petitioner an independent evaluation at the Charter School's expense.⁶⁵ The Charter School stated that it was unwilling to fund an independent evaluation where Petitioner expressed disagreement with an evaluation that the Charter School did not conduct.⁶⁶ The Charter School suggested that Petitioner direct her request to DCPS.⁶⁷

20. On September 29, 2011, the Student refused to sit on the carpet during group instruction and yelled "no, no" very loudly as his teacher tried to redirect him.⁶⁸ He then grabbed onto his teacher's leg and she tried passing out papers.⁶⁹ He then hit and kicked her repeatedly.⁷⁰

21. On September 30, 2011, he kicked, screamed, and cried for about ten minutes after being told that he would not play at a sand table because it was already full.⁷¹ He then chose to go to a different center after he calmed down.⁷²

22. On October 4, 2011, the Student spit on the SEC, pinched her, and then threw an air freshener at a window.⁷³ He kicked another student who was sleeping in the

⁶² Respondent Exhibit 8 at 36 (September 22, 2011, letter from Lauren Baum to Darnell Henderson) (referencing September 22, 2011, letter from Mr. Henderson).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

classroom.⁷⁴ Upon being removed from his classroom, he pumped soap into his hands and rubbed it all over the SEC's pants.⁷⁵ He then ran out of the classroom.⁷⁶

23. On October 4, 2011, after being told he could not have a snack until he sat in a designated area, he kicked his teacher in the knee repeatedly.⁷⁷ When the teacher left to sit at another table, the Student followed her and pushed a chair into her shin.⁷⁸ He also struck his teacher several times after being asked to return a coat he took from someone.⁷⁹

24. On October 4, 2011, Petitioner, through her counsel, requested that the Charter School evaluate the Student to determine his eligibility for special education and related services.⁸⁰ In the letter, Petitioner's counsel requested that the Charter School conduct comprehensive "initial evaluations," including a psychological assessment with a clinical component, and occupational therapy and speech-language assessments.⁸¹ Petitioner's counsel further requested that the Charter School conduct an FBA.⁸² Petitioner's counsel explained that Petitioner was making the request as a result of the Student's ongoing academic difficulties.⁸³

25. On October 5, 2011, the Charter School convened a meeting of the Student's multidisciplinary team ("MDT").⁸⁴ Petitioner and the Advocate attended the meeting.⁸⁵ The purpose of the meeting was to discuss the Student's progress and any concerns Petitioner may have, and to discuss whether to evaluate the Student in light of Petitioner's request for evaluations.⁸⁶ Petitioner expressed concern about the Student's behaviors and that they impeded his ability to learn in the school setting.⁸⁷

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Petitioner Exhibit 11 at 1 (School Year 2011-2012 First Quarter Log Entries).

⁸⁰ Petitioner Exhibit 15 at 1 (October 4, 2011, letter from Darnell Henderson to the Charter School Principal); Respondent Exhibit 9 (same); Stipulation of parties.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Petitioner Exhibit 7 at 1 (October 5, 2011, MDT Meeting Notes); Respondent Exhibit 11 at 45 (same); testimony of Advocate.

⁸⁵ Petitioner Exhibit 7 at 2; Respondent Exhibit 11 at 46.

⁸⁶ *Id.*

⁸⁷ *Id.*

26. At the October 5, 2011, meeting, the Charter School agreed to conduct a BASC-II, which consists of a parent and teacher questionnaire, of the Student.⁸⁸ The Charter School psychologist stated that the BASC-II would provide the MDT with more details about the Student's behaviors and social and emotional development in the home and school settings.⁸⁹ The MDT also agreed that the Charter School should conduct an FBA to determine the Student's behavioral functioning in the school setting.⁹⁰ The MDT believed that the outcome of the FBA would allow it to revise the Student's behavior plan to be more tailored to his needs.⁹¹ The MDT rejected Petitioner's request for a clinical assessment and occupational therapy evaluation.⁹² The MDT agreed to reconvene in about three weeks to review the results of the FBA and BASC-II and to determine whether the Student required additional behavior supports.⁹³

27. At the October 5, 2011, meeting, the MDT discussed the time of day when the Student's behavioral problems surfaced.⁹⁴ The MDT observed that the Student preferred to play and acted out when he was asked to do school work.⁹⁵ Petitioner noted that the Student had the same problem the previous year when he was in day care.⁹⁶

28. The Charter School agreed to provide the Student behavioral interventions until it completed his evaluations.⁹⁷ These interventions included placing the Student in small groups several times throughout the day to address his social-emotional regulation.⁹⁸ The Charter School also planned to provide the Student incentives for positive behaviors,⁹⁹ teach him appropriate ways to interact with peers,¹⁰⁰ introduce social skills,¹⁰¹ and provide him movement breaks throughout the day.¹⁰² The Charter School agreed to provide the Student counseling with the school counselor to work on social stories.¹⁰³

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Petitioner Exhibit 7 at 2; Respondent Exhibit 11 at 2.

⁹⁴ Petitioner Exhibit 8 at 2 (October 5, 2011, Advocate Notes).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Petitioner Exhibit 7 at 2; Respondent's Exhibit 11 at 46.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Petitioner Exhibit 8 at 1.

¹⁰¹ *Id.*

¹⁰² *Id.*; Petitioner Exhibit 7 at 2; Respondent Exhibit 11 at 46.

¹⁰³ Petitioner Exhibit 7 at 2; Respondent Exhibit 11 at 46.

29. On October 4, 2011, and October 6, 2011, the Charter School conducted evaluations of the Student and developed a draft FBA.¹⁰⁴ On October 5, 2011, the Charter School psychologist conducted a behavioral assessment of the Student.¹⁰⁵ The behavioral assessment consisted of a BASC-II and a record review.¹⁰⁶

30. On October 6, 2011, the Advocate sent a letter to counsel for the Charter School.¹⁰⁷ In the letter, the Advocate stated that Petitioner was requesting that the Charter School conduct initial evaluations, not re-evaluations, of the Student.¹⁰⁸ The Advocate stated that because the Charter School is its own LEA, the evaluations conducted by DCPS were not relevant to Petitioner's request that the Charter School conduct initial evaluations of the Student.¹⁰⁹

31. On October 24, 2011, the Charter School expelled the Student after he bit a teacher at the Charter School on October 18, 2011.¹¹⁰ The Charter School provided Petitioner an "Expulsion Recommendation Form" that instructed her to transfer the Student to another school immediately.¹¹¹ On this form, the Charter School informed Petitioner that she must enroll the Student in a new school within 48 hours or it would be obligated to report the Student as truant to the District of Columbia Child and Family Services Agency.¹¹² Petitioner refused to sign the form.¹¹³

32. Since the Charter School expelled the Student on October 24, Petitioner has not enrolled him in school.¹¹⁴ Instead, the Student has remained at home with her.¹¹⁵ Prior to the due process hearing on November 28, 2011, the Charter School has provided no instructional materials or other educational services to the Student since his expulsion.¹¹⁶

33. On November 17, 2011, the Charter School psychologist issued a report on her behavioral assessment of the Student.¹¹⁷ That same day, the Charter School developed a draft FBA.¹¹⁸

¹⁰⁴ Respondent Exhibit 16 at 63-64 (undated Draft Functional Behavioral Assessment).

¹⁰⁵ Respondent Exhibit 17 at 68-75 (November 17, 2011, Report of Behavioral Assessment).

¹⁰⁶ *Id.* at 68.

¹⁰⁷ Respondent Exhibit 12 at 50 (October 6, 2011, Letter from Advocate to Lauren Baum).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Stipulation of parties; testimony of Petitioner. *See also* Respondent Exhibit 15 (October 24, 2011, Expulsion Recommendation Form).

¹¹¹ Respondent Exhibit 15 at 59.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Testimony of Petitioner.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Respondent exhibit 17 at 68.

Credibility Determinations

34. Petitioner was a credible witness. She was forthright about the Student's behavioral difficulties and recalled the dates and nature of his inappropriate behaviors. She admitted that she did not challenge the DCPS evaluations or eligibility determination. She also was forthright about her failure to enroll the Student in school.

35. The Advocate was a credible witness. Her testimony was corroborated by the documents in the record. However, her testimony did not illuminate the facts or issues in this case as she simply recounted the events as reflected in the documents admitted into evidence.

V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."¹¹⁹ Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.¹²⁰ FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP).¹²¹

In deciding whether Respondent provided a student a FAPE, the inquiry is limited to (a) whether Respondent complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.¹²²

In matters alleging a procedural violation, a hearing officer may find that the 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

¹¹⁸ Respondent Exhibit 16 at 61-66.

¹¹⁹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).

¹²⁰ *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

¹²¹ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

¹²² *Rowley*, 458 U.S. at 206-207.

educational benefits.¹²³ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.¹²⁴

The burden of proof is properly placed upon the party seeking relief.¹²⁵ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹²⁶

V. DISCUSSION

A. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Conduct Initial Evaluations, or Reevaluations, in Response to Petitioner's October 4, 2011, Request.

Either a parent of a child or an LEA may initiate a request for an initial evaluation to determine if the child is a child with a disability.¹²⁷ The initial evaluation must consist of procedures to determine if the child is a child with a disability and to determine the educational needs of the child.¹²⁸

In the District of Columbia, LEAs shall conduct an initial evaluation of a child suspected of having a disability within 120 days from the date the student was referred for an evaluation.¹²⁹ As part of an initial evaluation, the student's individualized educational program ("IEP") team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child.¹³⁰ On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child.¹³¹

In conducting evaluations, an LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child to determine whether the child is a child with a disability and to determine the

¹²³ 34 C.F.R. § 300.513 (a)(2).

¹²⁴ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

¹²⁵ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹²⁶ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

¹²⁷ 34 C.F.R. § 300.301 (b).

¹²⁸ 34 C.F.R. § 300.301 (c).

¹²⁹ D.C. Code § 38-2561.02.

¹³⁰ 34 C.F.R. § 300.305.

¹³¹ *Id.*

content of the child's IEP.¹³²

In the case of a child whose behavior impedes the child's learning or that of others, the team also must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.¹³³ This FBA is essential to addressing a child's behavioral difficulties.¹³⁴

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation.¹³⁵ Reevaluations should be conducted in a "reasonable period of time," or "without undue delay," as determined in each individual case.¹³⁶

A reevaluation may occur not more than once a year, unless the parent and the LEA agree otherwise.¹³⁷ A student must be reevaluated at least once every three years, unless the parent and the LEA agree that a reevaluation is unnecessary.¹³⁸ The parent of a child with a disability has the right to obtain an independent educational evaluation ("IEE") at an LEA's expense if the parent disagrees with an evaluation obtained by the LEA.¹³⁹

Here, DCPS conducted initial evaluations of the Student in all areas of suspected disability in January and February 2011. By March 8, 2011, DCPS had reviewed its developmental, psychological and speech-language assessments of the Student and determined that he did not meet the criteria to qualify as a student with a disability pursuant to IDEA. DCPS found that the Student did not exhibit severe developmental delays or a speech-language impairment or otherwise have deficits that adversely impacted his educational performance. DCPS determined that, although the Student exhibited behavioral vulnerability, he demonstrated the ability to be redirected and was able to mentally attend to tasks.

On March 8, 2011, DCPS issued a PWN informing Petitioner of its determination that the Student was not a student with a disability who requires special education and related services. Petitioner did not challenge the DCPS assessments or even inform DCPS that she disagreed with the assessments it had conducted. Petitioner did not request that

¹³² 34 C.F.R. § 300.304.

¹³³ *Id.*

¹³⁴ *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008) (finding that an FBA is an evaluation).

¹³⁵ 34 C.F.R. § 300.303 (a)(2).

¹³⁶ *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

¹³⁷ 34 C.F.R. § 300.303 (b)(1).

¹³⁸ *Id.* at § 300.303 (b)(2).

¹³⁹ 34 C.F.R. § 300.502 (b)(1).

DCPS fund independent assessments. Petitioner also did not file a due process complaint or otherwise challenge the determination by DCPS that the Student was not eligible for special education and related services.

Instead, on September 22, 2011, Petitioner requested that Respondent fund independent assessments. Because Respondent had not conducted the Student's initial assessments, it had no obligation to fund independent assessments. Rather, DCPS, as a separate LEA, was the entity that was required to provide Petitioner an IEE, but only if Petitioner informed DCPS that she disagreed with the assessments it had conducted and requested the IEE.¹⁴⁰

Petitioner argues that, while a parent of a child with a disability has the right to an IEE at an LEA's expense if she disagrees with an evaluation conducted by that LEA, the parent has the right to obtain this IEE from *any* LEA. However, Petitioner has presented no authority to establish this point. Moreover, this would be contrary to the language of the regulation, which refers to the specific LEA that obtained the regulation, not any LEA. Thus, Petitioner was not entitled to an IEE from Respondent when she expressed disagreement with the evaluations conducted by DCPS.

Additionally, Petitioner failed to prove that Respondent was obligated to conduct re-evaluations in response to her October 4, 2011, request. Rather, Petitioner was not entitled to these re-evaluations because the DCPS evaluations were less than a year old.¹⁴¹

Nonetheless, Respondent agreed to conduct a BASC-II and an FBA of the Student. Respondent completed these assessments prior to the due process hearing, about six weeks after Petitioner requested re-evaluations. Petitioner failed to present any evidence to show that the Student was harmed by Respondent's refusal to conduct the assessments Petitioner requested.¹⁴²

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by failing to evaluate him in response to Petitioner's requests of October 4, 2011.

¹⁴⁰ See 34 C.F.R. § 300.502 (b)(1) (stating that the parent of a child with a disability has the right to obtain an IEE at public expense if the parent disagrees with the evaluation obtained by *the LEA*).

¹⁴¹ As stated above, a parent is entitled to a re-evaluation not more than once a year, unless the LEA agrees to conduct the reevaluation in a shorter time period. 34 C.F.R. § 300.303 (b)(1). Here, Petitioner requested re-evaluations of the Student just six months after DCPS had completed its evaluations of the Student.

¹⁴² Additionally, Petitioner also failed to assert a claim in the Complaint, or present any evidence at the due process hearing, that would allow this Hearing Officer to find that Respondent had an independent obligation to evaluate the Student. In other words, Petitioner failed to plead or prove that the Student's behavioral difficulties triggered Respondent's child-find obligations.

B. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Conduct a Manifestation Determination and FBA, and by Failing to Provide Him Services In An Interim, Alternative Setting after Expelling Him on October 24, 2011.

School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate, interim, alternative, educational setting, another setting, or suspension for not more than ten consecutive school days.¹⁴³ School personnel also may remove a child with a disability who violates a code of student conduct from his or her current placement for not more than ten school days in that same school year for separate incidents of misconduct.¹⁴⁴

After a child with a disability has been removed from his or her current placement for ten school days in the same school year, during any subsequent days of removal, the local educational agency ("LEA") must provide educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.¹⁴⁵ As appropriate, the LEA also must conduct an FBA of the student and develop behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not recur.¹⁴⁶

Within 10 school days of any decision to change the placement of a child with a disability for a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP team must conduct a manifestation determination review ("MDR").¹⁴⁷ In other words, the LEA, parent, and relevant members of the child's IEP team 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.¹⁴⁸

A child who has not been determined eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided to special education students, as discussed above, *if the LEA had knowledge that the child was a child with a suspected disability before the behavior that precipitated the disciplinary action occurred.*¹⁴⁹ An LEA must be deemed to

¹⁴³ 34 C.F.R. § 300.530 (b).

¹⁴⁴ *Id.*

¹⁴⁵ 34 C.F.R. §§ 300.530 (b)(2), 300.530 (d)(1)(i).

¹⁴⁶ *Id.* at (d)(1)(ii).

¹⁴⁷ 34 C.F.R. § 300.530 (e)(1).

¹⁴⁸ *Id.*

¹⁴⁹ 34 C.F.R. § 300.534 (a) (emphasis added).

have knowledge that a child is a child with a disability if, *before the behavior that precipitated the disciplinary action occurred*, the parent of the child requested an evaluation of the child.¹⁵⁰

An LEA would not be deemed to have knowledge that the child was a child with a suspected disability if the parent of the child has not allowed an evaluation of the child, has refused IDEA services, or *the child has been evaluated and determined to not be a child with a disability*.¹⁵¹ If the LEA does not have knowledge that the child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors.¹⁵²

Additionally, if a request is made for an evaluation of the child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.¹⁵³ Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.¹⁵⁴

Here, the parties stipulated, and the evidence showed, that the conduct that led to the expulsion of the Student occurred on October 18. The parties further stipulated, and the evidence showed, that Respondent expelled the Student after a meeting on October 24, 2011. The parties stipulated and Petitioner proved that she requested that Respondent evaluate the Student on October 4, 2011, two weeks before the behavior that precipitated his expulsion. Thus, Petitioner asserts, Respondent *had knowledge* that the Student was a student with a disability on October 4, 2011, when Petitioner requested that it conduct initial evaluations of the Student.

However, this ignores the fact that DCPS evaluated the Student and, in March 2011, found that he was not eligible for specialized instruction and related services.¹⁵⁵ As a result of this finding by DCPS, this Hearing Officer deems that Respondent *did not have knowledge* that the Student was a student with a suspected disability when it expelled him on October 24, 2011.¹⁵⁶

Thus, the Student is not entitled to the protections of the disciplinary provisions of

¹⁵⁰ *Id.* at (b)(2) (emphasis added).

¹⁵¹ *Id.* at § 300.534 (c) (emphasis added).

¹⁵² *Id.* at § 300.524 (d)(1).

¹⁵³ *Id.* at § 300.524 (d)(2)(i).

¹⁵⁴ *Id.* at § 300.524 (d)(2)(ii).

¹⁵⁵ Furthermore, Petitioner did not include in the Complaint a claim that the Student actually was eligible for special education. Nor did Petitioner request that this Hearing Officer find him eligible, although she had listed witnesses in her five-day disclosure that could have testified on this issue.

¹⁵⁶ *Id.* at § 300.534 (c) (emphasis added).

IDEA that protect students with disabilities who violate codes of student conduct. Respondent was free to subject the Student to the disciplinary measures applied to children without disabilities who engage in comparable behaviors, including suspension or expulsion without educational services.

Additionally, Respondent conducted the Student's behavioral assessment and FBA in an expedited manner, as required by IDEA.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE when it expelled him on October 24, 2011. Petitioner further failed to prove that Respondent denied the Student a FAPE when it did not provide him services in an interim, alternative setting.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this 13th day of December hereby:

ORDERED that the Complaint is dismissed with prejudice.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is a final determination on the merits. 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).