

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.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
Respondent.)

Hearing Officer: Frances Raskin

OSSE
STUDENT HEARING OFFICE
2011 DEC 16 AM 9:05

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 school in the District of Columbia. On November 4, 2011, Petitioner filed a Due Process Complaint ("Complaint") against Respondent District of Columbia Public Schools, a local education agency ("LEA"), pursuant to the Individuals with Disabilities Education Act ("IDEA"). Because the Complaint raises issues related to the discipline of the Student by DCPS, 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 December 8, 2011.

¹ Personal identification information is provided in Attachment A.

This Hearing Officer was appointed to preside over this case on November 7, 2011. Respondent did not file a response to the Complaint in this case.²

The parties participated in a resolution meeting on November 15, 2011. The parties were unable to resolve the Complaint. Because the Complaint raised discipline issues, the twenty-school-day, due process hearing timeline began on November 4, 2011.

On November 23, 2011, this Hearing Officer held a prehearing conference on the record in which Roberta Gambale, counsel for Petitioners, and Tanya Chor, counsel for Respondent, participated.³ That same day, this Hearing Officer issued a prehearing conference summary and order.

The deadline for the parties to exchange five-day disclosures was November 23, 2011. On November 21, 2011, Petitioner filed her five-day disclosures. On November 22, 2011, Respondent filed its five-day disclosures.

The due process hearing commenced at 9:30 a.m. on December 1, 2011. This Hearing Officer admitted all eight documents that Petitioner disclosed in her five-day disclosures and all three documents that Respondent disclosed in its five-day disclosures.

Petitioner testified and presented two witnesses on her behalf, her educational advocate ("Advocate") and the Student's caseworker ("Case Worker"). Respondent presented one witness, the special education coordinator ("SEC") of the school the Student attends.

The due process hearing concluded at 12:00 p.m. on December 1, 2011. On December 2, 2011, the parties filed their written closing arguments. The record closed at 11:59 p.m. on December 2, 2011.

III. ISSUES PRESENTED.

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

² If DCPS has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, DCPS must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP Team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. 300.508(e).

³ This was the first date that both counsel and this Hearing Officer were available.

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") by failing to conduct initial evaluations of the Student as required by a July 9, 2011, Hearing Officer Determination ("HOD"), review these evaluations, and determine the Student's eligibility for specialized instruction and related services; and

B. Whether Respondent denied the Student a FAPE by failing to conduct a manifestation determination review ("MDR") and a functional behavioral assessment ("FBA") after suspending the Student on October 3, 2011.

Petitioner requests relief in the form of an order requiring Respondent to conduct initial evaluations of the Student, including a comprehensive psychological evaluation, vision and hearing screening, speech and language evaluation, as well as an FBA of the Student. Petitioner also requests that this Hearing Officer order Respondent to review the evaluations upon their completion, determine whether the Student is eligible for special education, develop an individualized educational program ("IEP") for the Student, if necessary, and discuss compensatory education for the Student. Petitioner is not requesting that this Hearing Officer determine whether the Student is eligible for specialized instruction and related services.⁴

IV. FINDINGS OF FACT

1. Petitioner is the mother of the Student.⁵ The Student is _____ years old and in the _____ grade at a DCPS school ("School").⁶ The Student has attended the School sporadically since the beginning of the 2010-2011 school year.⁷ In the March 2011, DCPS disenrolled the Student from the School because she had stopped attending school.⁸

2. On May 16, 2011, Petitioner filed a due process complaint against Respondent in which she alleged that Respondent had failed to timely conduct an initial evaluation of the Student.⁹ As relief, Petitioner requested that the hearing officer order Respondent to fund an independent comprehensive psychological evaluation, and conduct a vision and hearing screening and a speech and language assessment of the Student.¹⁰

⁴ Assertion of counsel for Petitioner at outset of due process hearing.

⁵ Testimony of Petitioner.

⁶ *Id.*

⁷ *Id.*; testimony of SEC.

⁸ Testimony of Petitioner; Petitioner Exhibit 6 at 5 (July 9, 2011, HOD).

⁹ Petitioner Exhibit 6 at 2.

¹⁰ *Id.*

3. After a due process hearing on July 8, 2011, the hearing officer issued an HOD on July 9, 2011. In the HOD, the hearing officer found that Petitioner had failed to prove that Respondent failed to timely conduct an initial evaluation of the Student.¹¹

4. The hearing officer found that Respondent was the prevailing party in the case.¹² After noting that Respondent had offered to conduct an initial evaluation of the Student, the hearing officer advised, but did not order, Respondent to “effectuate the initial evaluation.”¹³

5. During the summer of 2011, the Student was not enrolled in the School and did not attend extended school year or summer school there.¹⁴ Instead, she was incarcerated at the _____ a juvenile detention facility in Washington D.C., where she was placed by court order.¹⁵ While the Student was at Respondent did not conduct or complete evaluations of her.¹⁶

6. During the third week of August 2011, Petitioner enrolled the Student in the School for the 2011-2012 school year.¹⁷ On September 21, 2011, the Student was released from _____ into the custody of a shelter home (“Shelter Home”).¹⁸ The Student returned to school on or about September 26, 2011.¹⁹ Soon thereafter, the School sent the Student home for the day for arguing with the principal in an inappropriate manner.²⁰ The Student returned to the School the following day.²¹

7. In early October 2011, the School began gathering data to prepare for evaluations of the Student.²² The school psychologist was gathering observation material and other information to begin the psychological assessment.²³ As of December 1, 2011, these assessments had not been completed.²⁴

¹¹ *Id.*

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ Testimony of SEC. The School did not offer summer school or extended school year to its students during the 2011 summer. *Id.*

¹⁵ Testimony of Petitioner; stipulation of parties (only re: location of _____ and that it is a juvenile detention facility). Petitioner presented no evidence as to the length of time the Student spent at _____ during the summer of 2011.

¹⁶ Testimony of Petitioner.

¹⁷ Testimony of Petitioner.

¹⁸ Testimony of Case Manager.

¹⁹ Testimony of Petitioner, Case Manager.

²⁰ Testimony of Case Manager.

²¹ *Id.*

²² Testimony of SEC.

²³ *Id.*

²⁴ *Id.*

8. During the first week of October 2011, the Student was accused of using a cell phone in the classroom.²⁵ When the Student's class was brought to the main office, the Student denied possessing the cell phone and argued with the school principal in an inappropriate manner.²⁶ The Student then left the main office and shoved a Metropolitan Police Department officer who was working at the school.²⁷

9. As a result of this incident, the School suspended the Student on October 3, 2011.²⁸ On October 6, the Student's Case Manager attended a meeting with the principal and vice-principal of the School to discuss the Student's suspension.²⁹ The principal and vice-principal informed the Case Manager that DCPS would soon arrange a disciplinary hearing at Academy.³⁰ The principal and vice principal promised to advise the Case Manager of the date of the hearing.³¹

10. During the Student's suspension that began on October 3, 2011, the School provided schoolwork packets for the Student.³² When the Student finished each schoolwork packet, the Case Manager would return the finished packet to the School.³³ The School would then provide the Case Manager another schoolwork packet for the Student to complete.³⁴

11. On October 14, 2011, the Advocate sent an email to the SEC.³⁵ In the email, the Advocate stated that she understood that the Student had been suspended and that she had multiple suspensions.³⁶ The Advocate requested that the SEC schedule an MDR meeting to discuss the Student's suspensions and "the impact her disability has on these

²⁵ Testimony of SEC, Case Manager.

²⁶ *Id.*; Petitioner Exhibit 5 at 1 (Office Discipline Referral Form).

²⁷ Testimony of SEC, Case Manager. There was some dispute among the witnesses at the due process hearing regarding whether the School suspended the Student on October 3, 2011, or on October 7, 2011. The Case Manager testified that the School suspended the Student on October 3, 2011. The SEC testified that the incident that precipitated the suspension occurred on October 6, 2011, and the Student was suspended on October 7, 2011. Nonetheless, as explained below, whether this Hearing Officer accepts that the Student was suspended on October 3, 2011, or accepts that she was suspended on October 7, 2011, it will not affect the result of the analysis herein.

²⁸ Testimony of Case Manager.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Testimony of Advocate; Petitioner Exhibit 3 at 1 (October 14, 2011, email from Advocate to SEC).

³⁶ Petitioner Exhibit 3 at 1.

behaviors.³⁷ The Advocate also stated that Petitioner had requested that the Student be evaluated and that these evaluations should have been completed in September 2011.³⁸ The Advocate requested that the SEC schedule a meeting to review the evaluations and discuss the Student's eligibility for specialized instruction and related services.³⁹

12. The Advocate never received a response to her October 14, 2011, email from the SEC.⁴⁰ The Advocate did not attempt to follow-up with the SEC after sending this email.⁴¹

13. October 10, 2011, was a holiday on which all DCPS schools were closed.⁴² October 14, 2011, was not a school day because it was a professional development day.⁴³ October 17, 2011, also was not a school day because it was parent-teacher conference day.⁴⁴ Thus, between October 3, 2011, and October 18, 2011, the Student was suspended for a maximum of eight days.

14. On October 18, 2011, the Case Manager went to the School to return a schoolwork packet that the Student had completed.⁴⁵ The assistant principal of the School then informed the Case Manager that the Student would be allowed return to school.⁴⁶ The Student returned to the School that day.⁴⁷

15. While the Student was suspended, DCPS informed Petitioner that it was scheduling a disciplinary hearing for October 25, 2011.⁴⁸ The hearing did not take place on October 25, 2011, because the Student and Petitioner had to attend a hearing at the Superior Court of the District of Columbia.⁴⁹

16. On October 25, 2011, the Student was released from the Shelter Home and moved back into her home with Petitioner.⁵⁰

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Testimony of SEC.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Testimony of Case Manager.

⁴⁶ *Id.*

⁴⁷ *Id.*; testimony of SEC.

⁴⁸ Testimony of Case Manager.

⁴⁹ *Id.*

⁵⁰ Testimony of Petitioner, Case Manager.

17. In early to mid-November, the Student was arrested.⁵¹ Following her arrest, a Superior Court judge returned her to As of December 1, 2011, the Student was still incarcerated at

18. On November 17, 2011, the SEC sent a letter to Petitioner informing her that the School had received a referral for an initial evaluation of the Student.⁵⁴ In the letter, the SEC explained the steps it would take to begin the assessment process.⁵⁵ Enclosed with the letter was a procedural safeguards notice.⁵⁶ Petitioner does not recall giving her written consent for the Student to be evaluated.⁵⁷

19. On or about November 23, 2011, Petitioner received a letter from DCPS informing her that it was seeking to suspend the Student until February 2012.⁵⁸ At the hearing, the School planned to request a change in placement, i.e., a long-term suspension.⁵⁹ The School requested the hearing because it must receive authorization to suspend a student for forty-five days or more.⁶⁰

20. In the November 23, 2011, letter, DCPS informed Petitioner that it had scheduled the disciplinary hearing for November 21, 2011.⁶¹ However, the hearing never took place and there have been no further attempts to schedule it.⁶² To date, the Student's long-term suspension is still pending, and DCPS has made no final decision regarding the proposed long-term suspension of the Student.⁶³ To date, DCPS has not conducted an FBA or held an MDR.⁶⁴

Credibility Determinations

21. Petitioner was a credible witness. She was forthright about the Student's behavioral difficulties and generally recalled the dates and nature of her inappropriate behaviors. She also was forthright about the Student's repeated involvement with the juvenile justice system and incarcerations at

⁵¹ Testimony of Petitioner.

⁵² *Id.*

⁵³ *Id.*; testimony of SEC.

⁵⁴ Respondent Exhibit 3 at 1 (November 17, 2011, Letter from SEC to Petitioner).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Testimony of Petitioner.

⁵⁸ Testimony of Petitioner.

⁵⁹ Testimony of SEC.

⁶⁰ *Id.*

⁶¹ Testimony of Petitioner.

⁶² Testimony of SEC.

⁶³ *Id.*

⁶⁴ *Id.*

22. The Advocate was a credible witness and 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 a document admitted into evidence.

23. The Case Worker was a credible witness. She had an excellent recall of all of the dates of the important events in this case, including the date the Student arrived at the Shelter Home, the date of the Student's suspension, the date she returned to school, and the date she returned home. The Case Worker also precisely recalled the nature of the incident that led to the October 3, 2011, suspension. She was the most informative witness at the due process hearing because of her excellent recall.

24. The SEC was a credible witness. She was forthright about the events that led to the suspension, and the School's lack of progress in evaluating the Student. She had excellent recall of the pertinent dates in this case, including the dates of the suspension, the proposed date of the disciplinary hearing and the reasons why it did not take place. She also was forthright in admitting that DCPS has not held an MDR or conducted an FBA since suspending the Student.

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."⁶⁵ 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.⁶⁶ 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).⁶⁷

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)

⁶⁵ *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)).

⁶⁶ *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

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

whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.⁶⁸

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 educational benefits.⁶⁹ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive rights*.⁷⁰

The burden of proof is properly placed upon the party seeking relief.⁷¹ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁷²

V. DISCUSSION

A. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Conduct Initial Evaluations.

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated."⁷³ This child-find obligation extends to all children suspected of having a disability, not just children who are ultimately found to have disabilities.⁷⁴ The scope of the child-find duty includes children who are suspected of having a disability even though they are advancing from grade to grade.⁷⁵

The duty to locate and complete the evaluation of a student starts "as soon as a

⁶⁸ *Rowley*, 458 U.S. at 206-207.

⁶⁹ 34 C.F.R. § 300.513 (a)(2).

⁷⁰ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

⁷¹ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁷² 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).

⁷³ 20 U.S.C. §§ 1412(2)(C); 1414(a)(1)(A); *Integrated Design & Elecs. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 30 (D.D.C. 2008).

⁷⁴ *McKinley*, 570 F. Supp. 2d at 34-35 (citing 34 C.F.R. § 300.111(c)(1); *N.G. v District of Columbia*, 556 F. Supp. 2d. 11, 25 (D.D.C. 2008).

⁷⁵ *Kruvant v. District of Columbia*, 2005 U.S. Dist. LEXIS 34045, 25-26 (D.D.C. Aug. 10, 2005).

student is identified as a potential candidate for special education services.”⁷⁶ Once a child is identified, the Local Education Agency (“LEA”)⁷⁷ is then obligated to determine whether the student is in fact a child with a disability.⁷⁸ The IEP team must conduct an initial evaluation to determine whether a child is a child with a disability and to determine the educational needs of the child.⁷⁹

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.⁸⁰ If the child to be referred attends a D.C. public school or is enrolling in a D.C. public school at the time this referral is made, this referral shall be submitted by his or her parent to the building principal of his or her home school, on a form to be supplied to the parent by the home school at the time of the parent’s request.⁸¹ The referral must state why it is thought that the child may have a disability.⁸²

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.⁸³ 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.⁸⁴

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.⁸⁵ 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.⁸⁶

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

⁷⁶ *McKinley*, 570 F. Supp. 2d at 28-30 (citing, e.g., *Hawkins*, 539 F. Supp. 2d 108; *Abramson*, 493 F. Supp. 2d at 85).

⁷⁷ An LEA is defined as “[a]ny public agency having administrative control and direction of a public elementary or secondary school in the District of Columbia.” D.C. Mun. Reg. tit. 5-E § 3001.1.

⁷⁸ *Abramson*, 493 F. Supp. 2d at 85).

⁷⁹ 20 U.S.C. § 1414(a)(1)(C)(i).

⁸⁰ 34 C.F.R. § 300.301 (b).

⁸¹ D.C. Mun. Reg. tit. 5-E § 3004.1 (c).

⁸² *Id.* at 5-E § 3004.1 (b).

⁸³ D.C. Code § 38-2561.02.

⁸⁴ 34 C.F.R. § 300.301 (c).

⁸⁵ 34 C.F.R. § 300.305.

⁸⁶ *Id.*

content of the child's IEP.⁸⁷

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.⁸⁸ This FBA is essential to addressing a child's behavioral difficulties.⁸⁹

Here, Petitioner claims that the July 9, 2011, HOD ordered DCPS to conduct initial evaluations of the Student. The evidence shows, however, that the hearing officer found that Petitioner was not the prevailing party in that case because Petitioner had failed to prove that Respondent had failed to timely conduct an initial evaluation of the Student. The Hearing Officer did not order Respondent to conduct any particular evaluations of the Student; rather, he merely advised Respondent to "effectuate the initial evaluation."

Thus, Petitioner failed to prove that Respondent violated the July 9, 2011, HOD by failing to conduct initial evaluations of the Student. Petitioner also failed to present any testimony to show that Respondent had an independent obligation to evaluate the Student, other than that she had had a single behavioral incident in school that resulted in a suspension.⁹⁰

Nor did Petitioner present any evidence to prove that Petitioner or anyone else ever referred the Student for an evaluation.⁹¹ In other words, Petitioner failed to prove that Petitioner ever formally requested that Respondent conduct initial evaluations of the Student. Certainly, when the hearing officer advised Respondent to "effectuate the initial evaluation," he did not refer the Student for an evaluation if for no other reason that this language in the HOD does not meet the referral requirements as established in the District of Columbia Municipal Regulations. These regulations require, *inter alia*, that the referral "state why it is thought that the child may have a disability."⁹²

Finally, Petitioner failed to prove that, since the issuance of the HOD, the Student was physically present in school and available to be evaluated. The first day she attended school in the 2011-2012 school year was September 26, 2011. After just one week in school, she was suspended. She returned to school on October 18, 2011, but was there for only

⁸⁷ 34 C.F.R. § 300.304.

⁸⁸ *Id.*

⁸⁹ *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008) (finding that an FBA is an evaluation).

⁹⁰ Petitioner introduced no documentary evidence or testimony to show that the Student was not making academic progress in school, or that her behavioral difficulties *in school* impeded her learning or the learning of others, either of which may have triggered Respondent's child-find obligations or the duty to conduct an FBA. See *Harris, supra*, 561 F. Supp. 2d at 68.

⁹¹ D.C. Code § 38-2561.02.

⁹² D.C. Mun. Reg. 5-E § 3004.1 (b).

three to four weeks (during which time she was absent five days) before being arrested and sent to

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by failing to conduct initial evaluations. Respondent is the prevailing party on this claim.

B. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Conduct an MDR and FBA After Expelling Her on October 3, 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 10 consecutive school day, and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement.⁹⁴

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal, the 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.⁹⁵ After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, 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.⁹⁶

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 an MDR.⁹⁷ 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

⁹³ DCPS does not conduct assessments of students judicially placed at because it is not the LEA for those students. See D.C. Code §38-2602(b)(10) (stating that the Office of State Superintendent of Education shall provide for the education of children in the custody of the Department of

⁹⁴ 34 C.F.R. § 300.530 (b)(1).

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

⁹⁶ *Id.* at (d)(1)(ii).

⁹⁷ 34 C.F.R. § 300.530 (e)(1).

implement the IEP.⁹⁸

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.*⁹⁹ An LEA must be deemed to 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 expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;¹⁰⁰ the parent of the child requested an evaluation of the child;¹⁰¹ or the teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.¹⁰²

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.*¹⁰³

Here, Petitioner asserts that the Student is entitled to the disciplinary protections of IDEA, including the requirements that the LEA conduct an MDR within 10 days of a change in placement for disciplinary reasons and conduct an FBA after the Student has been suspended for 10 days. Because these provisions apply to students with disabilities, and since the Student has not been determined to be a student with a disability, Petitioner must prove that DCPS knew that she was a student with a suspected disability *before the behavior that precipitated her suspension occurred.*¹⁰⁴

Petitioner failed to present any documentary evidence or testimony to show that DCPS had any such knowledge. Petitioner presented no evidence to show that she had expressed concern in writing to any DCPS personnel or any of the Student's teachers that the Student was in need of special education and related services. Petitioner presented no evidence to show that she had requested an evaluation of the Student. Petitioner also presented no evidence to show that any of the Student's teachers, or other DCPS personnel, expressed specific concerns about a pattern of behavior demonstrated by the

⁹⁸ *Id.*

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

¹⁰⁰ *Id.* at (b)(1).

¹⁰¹ *Id.* at (b)(2).

¹⁰² *Id.* at (b)(3).

¹⁰³ 34 C.F.R. § 300.534 (d)(1) (emphasis added).

¹⁰⁴ *Id.* at § 300.534 (a).

Student to anyone, much less directly to the DCPS director of special education or to other DCPS supervisory personnel. Thus, Petitioner failed to prove that the Student was entitled to the disciplinary protections of IDEA that apply to students with disabilities.

Additionally, as stated above, DCPS is required to conduct an FBA only after a child *with a disability* has been removed from his or her current placement for *10 school days* in the same school year. DCPS is required to conduct an MDR *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. Here, Petitioner proved only that the Student was removed from school for, at most, nine school days in the 2011-2012 school year. Thus, DCPS was not obligated to conduct an MDR or an FBA.

Finally, Petitioner failed to prove that the Student was denied a FAPE or otherwise suffered educational detriment because DCPS did not conduct an MDR or FBA. Rather, while the she was suspended, the School sent the Student schoolwork packets, which she completed. Thus, Petitioner has not shown that the Student suffered any educational deficit or other denial of FAPE during the eight to nine days she was suspended from school.

For this reason, Respondent is the prevailing party on this claim.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this 15th 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).