OSSE
Student Hearing Office
June 10, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,[1] on behalf of,
Student,

Petitioner,

Date Issued: June 9, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [redacted] year old female, who is a grade student attending School A. The student's last[2] individualized education program (IEP) lists Multiple Disabilities (MD) as her primary disability and provides for her to receive five (5) hours per week of specialized instruction outside of the general education setting in mathematics, five (5) hours per week of specialized instruction outside of the general education setting in reading, five (5) hours per week of specialized instruction within the general education setting and one hundred twenty (120) minutes per month of behavioral support services outside of the general education setting.

On April 25, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by incorrectly determining that the behaviors leading the a proposed suspension on April 9, 2013 were not a manifestation of the student's disability; failing to hold the appropriate meeting to determine an interim alternative placement for the student; failing to provide specialized instruction and related services during the student's suspension; failing to provide the student with an appropriate IEP on November 30, 2012; failing to provide the student with a comprehensive psychological evaluation following DCPS'

[1] Personal identification information is provided in Appendix A.
[2] The record includes evidence that an updated IEP was developed for the student on January 25, 2013 however the record does not include a copy of the January 25, 2013 IEP. The record also includes evidence that the student's January 25, 2013 IEP Team determined that the student's primary disability classification is Other Health Impaired (OHI). There was no evidence presented which suggested that the student's level of services changed on January 25, 2013.

determination that one was necessary; failing to share the results of the evaluation with the parent at the November 2012 meeting; failing to implement the student's March 2012 IEP; and failing to provide the student with an appropriate placement. As relief for this alleged denial of FAPE, Petitioner requested an independent comprehensive psychological evaluation; within 15 calendar days of the completed comprehensive psychological evaluation for DCPS to convene IEP Team meeting to review the evaluation and revise the student's IEP as appropriate; compensatory education for the days the student missed instruction during the 45-day suspension either through tutoring or a credit bearing summer school course; for the Hearing Officer to determine that the student's behavior on March 27, 2013 was a manifestation of her disability; and for DCPS to convene an IEP Team meeting to revise the student's behavioral intervention plan (BIP).

On April 29, 2013, the Petitioner filed a Notice to Withdraw the issues in the Complaint related to the appropriateness of the student's November 30, 2012 IEP, implementation of the student's March 2012 IEP and placement. Pursuant to the District of Columbia Student Hearing Office Appropriate Standard Practices 3(E), Hearing Officers shall allow a Petitioner to withdraw a Due Process Complaint within fifteen (15) days of the service of the Complaint, or by written agreement of the parties. Unless otherwise requested in the withdrawal or agreement, the dismissal will be without prejudice. The Notice was filed within four (4) days of the service of the Complaint. Therefore, the issues regarding the appropriateness of the student's November 30, 2012 IEP, the implementation of the student's March 2012 IEP and the appropriateness of the student's placement were dismissed without prejudice.

On May 6, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that: DCPS made a correct determination on April 9, 2013 that the student's behavior was not a manifestation of her disability; the student's IEP Team conducted a functional behavioral assessment (FBA) and developed a BIP for the student in January 2013; the parent signed a consent to evaluate in December 2012; a comprehensive psychological evaluation was completed for the student in January 2013 and reviewed with both the parent and the parent's advocate on January 25, 2013; and DCPS generally denied that the student was not provided with an appropriate interim alternative placement.

The parties did not participate in a Resolution Meeting. Given the expedited nature of the case, the 20-school day timeline started to run on April 25, 2013, the day the Complaint was filed, and ended on May 23, 2013. The due process hearing was held on May 15 and 23, 2013 therefore the 10-school day timeline for the Hearing Officer Determination (HOD) is June 10, 2013.

On May 7, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on May 10, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order however the Petitioner clarified requested relief.

On May 10, 2013, Petitioner filed Disclosures including twenty-six (26) exhibits and three (3) witnesses.[3] On May 10, 2013, Respondent filed Disclosures including eleven (11) exhibits and six (6) witnesses.

The due process hearing commenced at approximately 10:58 a.m. on May 15, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. The hearing was not concluded on May 15, 2013 therefore the hearing continued on May 23, 2013 at 9:32 a.m. in Hearing Room 2009.

Petitioner's Exhibits 3-24 and 26 were admitted without objection. Petitioner's Exhibit 1 was admitted over Respondent's objection. Petitioner withdrew page 1 of Petitioner's Exhibit 2. Petitioner's Exhibit 2, pages 2-4, was admitted over Respondent's objection. Petitioner's Exhibit 25 was admitted, over Respondent's objection, for purposes of outlining the Petitioner's requested relief. Respondent's Exhibits 1-11 were admitted without objection.

The hearing concluded at approximately 11:34 a.m. on May 23, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS denied the student a FAPE by failing to properly determine that the student's behavior on March 27, 2013 was a manifestation of her disability?
2. Whether DCPS denied the student a FAPE by failing to determine an interim alternative placement for the student either before or during the student's April 9, 2013 manifestation determination review?
3. Whether DCPS failed to conduct a comprehensive psychological assessment/evaluation after DCPS, on November 30, 2012, determined that the assessment/evaluation was necessary, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS failed to provide the parent an opportunity to meaningfully participate in the decision-making process of her child by failing to share the results of the student's comprehensive psychological assessment/evaluation with the parent, and if so, whether this failure constitutes a denial of a FAPE?

[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is diagnosed with ADHD and meets criteria for a student with OHI and SLD. (Petitioner's Exhibits 18, 22 and 23; Respondent's Exhibits 1, 2 and 3; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
3. The student has a strength in nonverbal problem solving. (Respondent's Exhibit 3)
4. The student exhibits problems in the areas of motivation, anger and frustration. (Petitioner's Exhibits 6 and 15; Respondent's Exhibit 3; Student's Testimony; Mother's Testimony)
5. When the student is frustrated, overwhelmed or anxious with academic tasks, the student can become disruptive, defiant and argumentative. (Petitioner's Exhibits 12, 14 and 16; Respondent's Exhibits 1 and 3; Student's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
6. At times the student is able to control her behavior. (Student's Testimony)
7. Responding to redirection is a trigger for the student's inappropriate behavior. (Petitioner's Exhibits 12, 14, 16 and 22)
8. When the student is redirected, she becomes verbally aggressive, argumentative, disrespectful, uses profanity and may become defiant. (Petitioner's Exhibits 4, 12, 14, 16 and 22; Student's Testimony; Special Education Coordinator's Testimony)
9. The student's impulsions and disabilities do not manifest as physical aggression toward adults. (Petitioner's Exhibit 12, 14 and 22; Special Education Coordinator's Testimony)
10. The student has difficulty with social maladjustment. (Respondent's Exhibit 3)
11. The student verbally threatened a teacher in September 2011, kicked a wall in January 2012 and was involved in a group fight in March 2011 at LEA 2. (Petitioner's Exhibits 18, 19, 20 and 22)
12. On November 30, 2012, the student's IEP Team convened to discuss eligibility and update the student's IEP. (Petitioner's Exhibits 15)
13. The parent and the parent's advocate were present and participated in the November 30, 2012 IEP Team meeting. (Petitioner's Exhibits 15)
14. The student's November 30, 2012 IEP prescribes five hours per week of specialized instruction outside of the general education setting in math, five hours per week of specialized instruction outside of the general education setting in reading, five hours per week of specialized instruction within the general education setting and 120 minutes per month of behavioral support services outside of the general education setting. (Petitioner's Exhibit 15)
15. During the November 30, 2012 meeting, DCPS proposed that an FBA and psychological evaluation be conducted in order to appropriately determine the student's primary disability category. (Petitioner's Exhibit 15; Advocate's Testimony; Special Education Coordinator's Testimony)

16. The student's November 30, 2012 IEP Team discussed the need to explore a primary disability category because the student had needs related to specific learning disability (SLD), OHI and emotional disturbance (ED). (Petitioner's Exhibit 15)
17. On January 13, 2013, DCPS conducted the psychological evaluation which included the Reynold's Intellectual Assessment Scale (RIAS), Behavior Assessment System for Children-Second Edition (BASC-2) self-report, Clinical Assessment of Behavior (CAB) teacher and parent forms, Behavior Rating Inventory of Executive Function (BRIEF) teacher and parent forms, classroom observations and teacher and student interviews. (Petitioner's Exhibit 13; Respondent's Exhibits 1, 2 and 3; Advocate's Testimony; Special Education Coordinator's Testimony)
18. DCPS completed the report of the evaluation on January 25, 2013. (Respondent's Exhibit 3)
19. On January 25, 2013, the MDT met to review the results of the evaluations including the FBA and psychological and to develop a BIP for the student. (Petitioner's Exhibit 13; Respondent's Exhibits 1, 2 and 3; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
20. The parent and the advocate were aware that the January 25, 2013 meeting was to discuss the student's eligibility. (Petitioner's Exhibit 13; Respondent's Exhibits 1 and 2)
21. The student, case manager, social worker, school psychologist (who conducted the evaluation), parent, advocate and special education coordinator were present at the January 25, 2013 meeting. (Petitioner's Exhibit 13; Respondent's Exhibits 1 and 2; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
22. During the January 25, 2013 meeting, the school psychologist reviewed the student's scores on assessments administered for the psychological evaluation, including the RIAS, BASC-2, CAB, and BRIEF, and reviewed the results of the overall evaluation. (Petitioner's Exhibit 13; Respondent's Exhibits 1, 2 and 3; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
23. On January 25, 2013, the parent and the advocate disagreed with the psychologist's conclusions that the student would be better served as a student with OHI due to ADHD behaviors rather than SLD, that the student's behaviors are explained by characteristics of ADHD, and that the student does not meet the criteria for ED. (Petitioner's Exhibit 13; Respondent's Exhibits 1 and 2; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
24. The student's January 25, 2013 BIP identifies responding appropriately towards staff when she is given directives or being redirected, appropriately and respectively communicating feelings and positive social interactions with peers and refraining from engaging in aggressive and argumentative behaviors as the desired replacement behaviors for the student. (Respondent's Exhibit 4)
25. The BIP states that when the student engages in inappropriate behaviors, she will be redirected and reminded to use appropriate social interactions techniques in a calm manner encouraging positive and respectful dialogue; that teachers will use verbal encouragement when they see the student performing well in class and displaying positive social behaviors with peers; and when the student feels she is becoming

angry or frustrated, she will seek an adult to request a time out to use learned self-soothing and coping strategies. (Respondent's Exhibit 4)

26. The consequences for the student's negative behaviors (after two prompts) include a loss of privileges, a phone call home, separation from the classroom to calm down and refocus and a referral to the dean's office. (Respondent's Exhibit 4)
27. In March 2013, the student was enrolled in Learning Lab I, Biology I, World History, Algebra I, Basic Skills B, English I, and Reading Workshop II. (Petitioner's Exhibit 2)
28. The student's Learning Lab I, Basic Skills B and Reading Workshop II classes are taught by special education teachers, fully certified in Non-Categorical Special Education. (Petitioner's Exhibit 1; Special Education Coordinator's Testimony)
29. During the 2012-2013 school year, the social worker worked with the student on her emotional/social and behavioral goals outside of the general education environment during behavioral support services. (Petitioner's Exhibit 6)
30. Prior to March 27, 2013, the student believed that the security officer had insulted her without reason in the past. (Petitioner's Exhibit 5; Special Education Coordinator's Testimony)
31. On March 27, 2013, the student was on a "Do Not Admit" list because she had failed to attend an after-school detention the prior afternoon. (Petitioner's Exhibits 5, 8 and 10; Respondent's Exhibit 7, 8 and 9; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
32. The "Do Not Admit" list is a list of students who are not permitted to enter the school. (Mother's Testimony; Special Education Coordinator's Testimony)
33. On March 27, 2013, the student was attempting to enter School A and was told by the security guard that she was on the "Do Not Admit" list and was not permitted to enter the school. (Petitioner's Exhibits 5, 7, 8 and 9; Respondent's Exhibits 7, 8 and 9; Advocate's Testimony; Student's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
34. On March 27, 2013, when the student learned that she was on the "Do Not Admit" list, she attempted to go to the dean's office for assistance, as was previously agreed upon by the dean and the student. (Petitioner's Exhibits 5, 7, 8 and 9; Respondent's Exhibits 7, 8 and 9; Advocate's Testimony; Student's Testimony; Mother's Testimony)
35. On March 27, 2013, the security guard grabbed the student's book bag as the student walked past the security guard. (Petitioner's Exhibits 7 and 8; Respondent's Exhibit 8; Advocate's Testimony; Student's Testimony; Mother's Testimony)
36. On March 27, 2013, after the security guard grabbed the student's book bag, the student reacted by hitting the security guard in the face. (Petitioner's Exhibits 5, 7, 8 and 9; Respondent's Exhibits 6, 7, 8 and 9; Advocate's Testimony; Student's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
37. School A notified that the student that it would be recommended that the student be suspended from March 27, 2013 through June 11, 2013. (Petitioner's Exhibits 5, 8, 9 and 10; Respondent's Exhibits 6, 7, 8 and 9; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
38. The DCPS Spring Break was April 1-5, 2013. (Judicial Notice as requested by Respondent)

39. On April 3, 2013, DCPS provided a "work packet" of assignments from the student's classes for the student to complete. (Petitioner's Exhibits 4 and 9; Mother's Testimony; Special Education Coordinator's Testimony)
40. On April 9, 2013, DCPS conducted a manifestation determination review. (Petitioner's Exhibits 5, 7, 8 and 9; Respondent's Exhibits 7, 8, 9 and 10; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
41. At the April 9, 2013 manifestation determination review, the student's IEP Team determined that the behavior was not a manifestation of the student's disability. (Petitioner's Exhibits 5, 7, 8 and 9; Respondent's Exhibits 7, 8, 9 and 10; Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
42. On April 9, 2013, after the team determined that the student's behavior was not a manifestation of her disability, the special education coordinator informed the parent that DCPS would conduct a disciplinary hearing and that the student would most likely attend School B. (Advocate's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
43. At some point prior to May 6, 2013, the parent attempted to contact School B but was informed by School B that DCPS had not sent the student's paperwork. (Advocate's Testimony; Mother's Testimony)
44. On April 12, 2013, DCPS began the process to start the disciplinary hearing. (Petitioner's Exhibit 9)
45. The disciplinary hearing occurred on May 3, 2013. (Petitioner's Exhibits 5 and 9)
46. The disciplinary hearing officer supported the recommended Tier but reduced the days of suspension for the student, adjusting the end date of the student's suspension to May 24, 2013. (Petitioner's Exhibits 5 and 9;
47. On May 6, 2013, DCPS began the process to notify School B staff. (Petitioner's Exhibit 9)
48. From March 27, 2013 through the first day of the hearing, the student did not receive any services. (Petitioner's Exhibit 3; Mother's Testimony)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

Issue #1

For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if – (1) the removal is for more than 10 consecutive school days; or (2) The child has been subjected to a series of removals that constitute a pattern – (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR §300.536(a).

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR §300.530(e)(1). This process is known as a manifestation determination review. *See* 34 CFR §300.530(e).

In the present matter, on March 27, 2013, the student was on a "Do Not Admit" list because she had failed to attend an after-school detention the prior afternoon. The "Do Not Admit" list is a list of students who are not permitted to enter the school. When the student attempted to enter School A, to seek the assistance of the dean, the security guard grabbed the student's book bag and the student reacted by hitting the security guard in the face. On April 9, 2013, DCPS conducted a manifestation determination review. At the manifestation determination review, the student's IEP Team determined that the behavior was not a manifestation of the student's disability.

The student is diagnosed with ADHD and meets criteria for a student with OHI and SLD. Additionally, the student exhibits problems in the areas of motivation, anger and frustration. The student's most recent evaluation indicated that the student has difficulty with ADHD symptoms and social maladjustment. The student has a strength in nonverbal problem solving. When the student is frustrated, overwhelmed or anxious with academic tasks, the student can become disruptive, defiant and argumentative. The Student testified that when things "don't go my way, I get mad." However the Student also testified that at times she is able to control her behavior. Likewise, during her January 2013 psychological assessments, the student did not agree with her parent and teachers suggestions that that the student is angered easily and is prone to explosive displays or acting out. The student reported to the evaluator that she feels in control over events in her life.

The arguments of both Petitioner and Respondent in the hearing centered on whether the student's behavior on March 27, 2013 was caused by, or had a direct and substantial relationship to, the student's disability. The Respondent argued that the student's impulsive, disruptive and defiant behaviors do not manifest as physical aggression toward staff members. When the student feels a lack of control or challenged by a peer or a staff member, the student may become verbally aggressive, disrespectful and defiant. Therefore, it was the student's dislike of the security guard which prompted her physical aggression rather than a manifestation of the student's disability. The Petitioner argued that the student has a very high level of aggression, the security guard's redirection triggered the student's aggressive behavior, that LEA 2 always found the student's behavior to be a manifestation of her disability and that the disciplinary hearing officer found that the student's behavior was impulsive.

The record clearly indicates that the student has difficulty with redirection. The student's January 2013 FBA identifies the student's difficulty responding to redirection as a trigger for her inappropriate behavior, the student's January 25, 2013 BIP provides intervention strategies to address the student's negative behaviors when she is being redirected and the student's January 25, 2013 Confidential Psychological Reevaluation notes that when the student is redirected, she becomes argumentative, uses profanity and may become defiant. However, the record is absent of evidence which suggests that the student's "impulsive" response to redirection is physical aggression. In response to redirection the student becomes verbally aggressive, disrespectful and defiant. Although the student verbally threatened a teacher in September 2011, kicked a wall in January 2012 and was involved in a group fight in March 2011 at LEA 2, the student's impulsions and disabilities do not manifest as physical aggression toward adults. The record also indicates that the student believed that the security officer had insulted her without reason in the past.

In *M.P. v. North East Ind. Sch. Dist*., 49 IDELR 37 (W.D. Tex. 2007), although the student engaged in serious misconduct, such as sticking several classmates with needles and threatening a teacher, the student's behavior was not found to be a manifestation of his disability because the student's behavior was not an impulsive act, but rather a voluntary act and the student told evaluators that he was able to control his behavior. Likewise, in *Lebanon Special Sch. Dist*., 113 LRP 16893 (SEA TN April 16, 2013), a student with ED and OHI was not manifesting a disability when he engaged in property destruction and assaulted a staff member. The evidence indicated that the student intentionally sought to destroy his teacher's property and

punch a staff member and the student was capable of controlling his actions up until the point he reached full crisis mode. In the present matter, the Hearing Officer concludes that, as in the aforementioned cases, the student was capable of controlling her physical aggression on March 27, 2013. Therefore her physically aggressive response to the security officer's redirection was not a manifestation of her disability.

The Petitioner also argued that the behavior was a manifestation of the student's disability because DCPS failed to implement the student's IEP by failing to provide the specialized instruction prescribed by the student's IEP. This argument was not supported by the record.

The student's November 30, 2012 IEP[4] prescribes five hours per week of specialized instruction outside of the general education setting in math, five hours per week of specialized instruction outside of the general education setting in reading, five hours per week of specialized instruction within the general education setting and 120 minutes per month of behavioral support services outside of the general education setting. In March 2013, the student was enrolled in Learning Lab I, Biology I, World History, Algebra I, Basic Skills B, English I, and Reading Workshop II. Learning Lab I, Basic Skills B and Reading Workshop II are taught by special education teachers, fully certified in Non-Categorical Special Education. The social worker worked with the student on her emotional/social and behavioral goals. The record does not include evidence of the student's specialized instruction within the general education setting.

While neither party made an argument related to the implementation of the student's BIP, the record is clear that the student's January 25, 2013 IEP was not implemented on March 27, 2013. The student's January 25, 2013 BIP identifies responding appropriately towards staff when she is given directives or being redirected, appropriately and respectively communicating feelings and positive social interactions with peers and refraining from engaging in aggressive and argumentative behaviors as the desired replacement behaviors for the student. The BIP states that when the student engages in inappropriate behaviors, she will be redirected and reminded to use appropriate social interactions techniques in a calm manner encouraging positive and respectful dialogue; that teachers will use verbal encouragement when they see the student performing well in class and displaying positive social behaviors with peers; and when the student feels she is becoming angry or frustrated, she will seek an adult to request a time out to use learned self-soothing and coping strategies. The consequences for the student's negative behaviors (after two prompts) include a loss of privileges, a phone call home, separation from the classroom to calm down and refocus and a referral to the dean's office.

On March 27, 2013, the student was attempting to enter School A. The security guard informed the student that she was on the "Do Not Admit" list and told the student she was not permitted to enter the school. When she learned that she was on the "Do Not Admit" list, she attempted to go to the dean's office for assistance, as was previously agreed upon by the dean and the student. The security guard then grabbed the student's book bag as the student walked past the security guard. There was no evidence presented which suggested that the security

[4] There is evidence in the record which indicates that the student's IEP was updated on January 25, 2013 however neither party provided a copy of the student's January 25, 2013 IEP or evidence of the services included in the student's January 25, 2013 IEP.

guard redirected the student in a calm manner or allowed the student an opportunity to seek an adult to request a time out. In fact, the student was attempting to go to the dean's office to request assistance with the situation. Likewise, there was no evidence presented which suggested that the security guard gave the student two prompts to appropriately respond when the student was redirected, contacted an appropriate person to have the student's privileges removed, called the student's parent or gave the student an opportunity to calm down and refocus. The security guard's action was to grab the student's book bag to attempt to prohibit her from entering the school rather than follow the progressive consequences in the student's BIP.

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. The student's BIP is a part of her IEP. Therefore, School A was required to implement the student's BIP. The Hearing Officer concludes that the student's conduct on March 27, 2013 was the direct result of DCPS' failure to implement the student's January 25, 2013 BIP therefore DCPS incorrectly determined that the student's behavior on March 27, 2013 was not a manifestation of her disability.

If the LEA, the parent, and the relevant members of the child's IEP Team determine that the conduct in question was the direct result of the LEA's failure to implement the student's IEP, the LEA must take immediate steps to remedy those deficiencies. 34 CFR §300.530(e)(3). Since the behavior was a manifestation of the student's disability because DCPS failed to implement the student's January 25, 2013 BIP, on April 9, 2013, DCPS should have taken immediate steps to remedy those deficiencies.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to review the student's BIP on March 27, 2013 and by failing to take steps to remedy the deficiencies in DCPS' failure to implement the student's January 25, 2013 BIP.

Issue #2

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child carries a weapon to or possesses a weapon at school; knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school; or has inflicted serious bodily injury upon another person while at school. *See* 34 CFR §300.530(g).

A child with a disability who is removed from the child's current placement must continue to receive 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; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. The services may be provided in an interim alternative educational setting. 34 CFR §300.530(d)(1).

The Petitioner alleged that DCPS denied the student a FAPE by failing to determine an interim alternative placement for the student either before or during the student's April 9, 2013

manifestation determination review. Although the initial recommendation for the student's suspension was 45 days, no evidence was presented which suggested that the incident on March 27, 2013 caused serious bodily injury to the staff member. Neither 34 CFR §300.530(g) nor 34 CFR §300.530(d)(1) *require* that a student be placed in an interim alternative educational setting during the period of suspension. However, both regulations require that services be provided to the student, regardless of whether the behavior was a manifestation of the student's disability, once a child has been removed from his or her current placement.

On March 27, 2013, the student assaulted a staff member at School A. On March 27, 2013, the student received notice of suspension from March 27, 2013 through June 11, 2013. On April 3, 2013, DCPS provided a "work packet" of assignments from the student's classes for the student to complete. On April 9, 2013, DCPS conducted a manifestation determination review. At the manifestation determination review, the student's IEP Team determined that the behavior was not a manifestation of the student's disability. After the team determined that the behavior was not a manifestation of the student's disability, the special education coordinator informed the parent that DCPS would conduct a disciplinary hearing and that the student would most likely attend School B.

On April 12, 2013, DCPS began the process to start the disciplinary hearing. The disciplinary hearing occurred on May 3, 2013. The disciplinary hearing officer supported the recommended Tier but reduced the days of suspension for the student, adjusting the end date of the student's suspension to May 24, 2013. On May 6, 2013, DCPS began the process to notify School B staff. At some point prior to May 6, 2013, the parent attempted to contact School B but was informed by School B that DCPS had not sent the student's paperwork. From March 27, 2013 through the date of the hearing, the student did not receive any services.

On March 27, 2013, DCPS recommended that the student be suspended for 45 days, thus removing the student from her current placement. At that point, the student was entitled to receive services so as to enable her to participate in the general education curriculum and progress toward meeting her IEP goals. *See* 34 CFR §300.530(d)(1).

The Respondent argued that the delay in providing services to the student was caused by Spring Break and the parent's failure to contact School B and suggested that the work packet provided to the student sufficed as "services" between the student's suspension date and admittance into School B. The Hearing Officer is not persuaded by these arguments. First, the DCPS Spring Break lasted one week. More than one month elapsed between the student's suspension and the date that DCPS began to notify School B so that the student could receive services at that location. Next, the parent did not bear the responsibility of coordinating the student's enrollment into School B. DCPS did not begin the process to enroll the student into School B until May 6, 2013. Until that date, the parent did not have the authority to enroll the student in the alternative school. Finally, a "work packet" does not qualify as "services so as to enable the child to continue to participate in the general education curriculum" or services to enable the student to "progress toward meeting the goals."

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to provide services so as to enable the student to continue to participate in the general education

curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

The Petitioner met its burden with respect to Issue #2.

Issue #3

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b).

In the present case, the Petitioner alleged Issue #3 and Issue #4 in the alternative. On November 30, 2012, the student's IEP Team convened to discuss eligibility and update the student's IEP. During the meeting, DCPS proposed that an FBA and psychological evaluation be conducted in order to appropriately determine the student's primary disability category. On January 13, 2013, DCPS conducted the psychological evaluation which included the RIAS, BASC-2 self-report, CAB teacher and parent forms, BRIEF teacher and parent forms, classroom observations and teacher and student interviews. DCPS completed the report of the evaluation on January 25, 2013.

The Hearing Officer concludes that DCPS conducted a comprehensive psychological assessment/evaluation after DCPS, on November 30, 2012, determined that the assessment/evaluation was necessary.

The Petitioner failed to meet its burden with respect to Issue #3.

Issue #4

The Petitioner alleged that DCPS failed to provide the parent an opportunity to meaningfully participate in the decision-making process of her child by failing to share the results of the student's comprehensive psychological evaluation with the parent at the January 25, 2013 IEP Team meeting.

The IDEA's procedural safeguards help ensure that parents are able to participate fully in decisions affecting their child's education. *See Rowley*, 458 U.S. at 183 n.6; *see also Holland v. District of Columbia*, 71 F.3d 417, 421 (D.C. Cir. 1995). The IDEA "guarantees parents of disabled children the opportunity to participate in the evaluation and placement process." *LeSesne ex rel. B.F. v. District of Columbia*, Civil Action No. 04-0620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005); *see also* 20 U.S.C. §§ 1414(f), 1415(b)(1). It has been clearly established that the parent's right is not merely participation, the participation must be meaningful. *See Rowley*, 458 U.S. at 208 ("Congress sought to protect individual children by providing for parental involvement ... in the formulation of the child's individual educational program."); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004), (citation omitted) ("Participation [of parents] must be more than a mere form; it must be meaningful.")

The evaluation procedures provided for in 20 U.S.C. §1414 also emphasize the importance of parental participation. They require the determination of the child's eligibility to be "made by a team of qualified professionals and the parent" and "a copy of the evaluation report and the documentation of determination of eligibility [to be] given to the parent." 20 U.S.C. § 1414(b)(4).

In the present matter, the student's November 30, 2012 IEP Team determined that an FBA and psychological evaluation should be completed to assist in determining the appropriate primary disability category for the student. The Team discussed the need to explore a primary disability category because the student had needs related to SLD, OHI and ED. The parent and the parent's advocate were present and participated in the November 30, 2012 IEP Team meeting. On January 13, 2013, the evaluation was conducted and the final Confidential Psychological Reevaluation report was dated January 25, 2013. On January 25, 2013, the MDT met to review the results of the evaluations including the FBA and psychological and to develop a BIP for the student. The student, case manager, social worker, school psychologist (who conducted the evaluation), parent, advocate and special education coordinator were present at the January 25, 2013 meeting. During the meeting, the school psychologist reviewed the student's scores on assessments administered for the psychological evaluation, including the RIAS, BASC-2, CAB, and BRIEF; and reviewed the results of the overall evaluation. The parent and the advocate disagreed with the psychologist's conclusions that the student would be better served as a student with OHI due to ADHD behaviors rather than SLD, that the student's behaviors are explained by characteristics of ADHD, and that the student does not meet the criteria for ED.

Conflicting testimony was presented related to whether or not the parent was given a copy of the Confidential Psychological Reevaluation at the January 25, 2013 MDT meeting. The Parent and the Advocate testified that the parent was not given a copy of the Confidential Psychological Reevaluation at the meeting. The Special Education Coordinator testified that the school psychologist gave a copy of the Confidential Psychological Reevaluation to the advocate after the advocate indicated that she was not able to follow the evaluator's recitation of the scores during the meeting. The Special Education Coordinator testified that he also believed that a copy of the Confidential Psychological Reevaluation was given to the Advocate because a concern was raised that the Confidential Psychological Reevaluation included the incorrect date. For this specific matter, the Hearing Officer gives more weight to the testimony of the parent and the advocate because the parent and the advocate provided personal knowledge of the lack of receipt of the Confidential Psychological Reevaluation, while the special education coordinator's testimony was based on an action taken by the school psychologist. Therefore, the Hearing Officer concludes that DCPS violated 34 CFR §300.306(a)(2) by failing to provide an copy of the evaluation report to the parent at the January 25, 2013 MDT meeting.

However, "procedural violations of IDEA do not, in themselves, inexorably lead a court to find a child was denied FAPE." *Schoenbach v. District of Columbia,* 309 F. Supp. 2d 71, 78 (D.D.C. 2004); 20 U.S.C. § 1415(f)(3)(E)(ii). An IDEA claim is viable only if the procedural violations of procedural affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia,* 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia,* 524 F. Supp. 2d

43, 48 (D.D.C. 2007); *see also Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

The Petitioner argued that the parent did not have an opportunity to meaningfully participate in the student's January 25, 2013 IEP Team meeting because DCPS' failure to provide a copy of the Confidential Psychological Reevaluation report to the parent at the meeting impeded her opportunity to understand that DCPS was proposing a change in the student's disability classification from MD to OHI. This argument is not supported by the record. The advocate's notes from the November 30, 2012 IEP Team meeting indicated that the reason DCPS was recommending the psychological evaluation was to determine an appropriate primary disability category for the student. The parent and the advocate were present at the November 30, 2012 meeting. The parent and the advocate were also present at the January 25, 2013 meeting and were aware that the meeting was to discuss the student's eligibility. Both the advocate's notes and DCPS' notes from the January 25, 2013 IEP Team meeting indicated that the school psychologist reviewed the student's assessment results and that the parent and the advocate disagreed with the recommendation that the student's disability category be changed to OHI. "Meaningful participation in the decision-making process under 34 CFR §300.513(a)(2)(ii) does not mean a certain outcome acceptable to a parent must result or that a misleading IEP cannot be drafted." *S.T. v. Weast*, 54 IDELR 83, 110 LRP 17143 (March 18, 2010).

In *Amanda J. v. Clark County Sch. Dist*., 267 F.3d 877 (September 25, 2001), the court found that the District's failure to give the student's parents copies of psychologist's and speech pathologist's report was a denial of a FAPE. However, in *Amanda J*., the parents were denied the information in the evaluations indicating the possibility of autism and the need for further psychiatric evaluations thereby preventing the student's parents from fully and effectively participating in the creation of an appropriate IEP for the student. *Id.* Conversely, in the present matter, the Petitioner presented no evidence or argument that the IEP developed for the student on January 25, 2013 was inappropriate. The Petitioner was not denied the information contained within the evaluation; the Petitioner disagreed with the results of the evaluation related to the student's primary disability classification.

The IDEA does not give a substantive right to a particular disability classification. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability that is listed in 34 CFR §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 34 CFR §300.111(d). The student does have a right to an IEP which addresses her unique needs, regardless of her disability classification. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324.

As previously indicated, the Petitioner presented no evidence or argument that the IEP developed for the student on January 25, 2013 was inappropriate or did not address her unique needs.

The Hearing Officer concludes that DCPS failure to provide a copy of the January 25, 2013 Psychological Evaluation to the parent at the January 25, 2013 IEP Team meeting did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or cause a deprivation of educational benefit.

The Petitioner failed to meet its burden with respect to Issue #4.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . 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 v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4 h Cir. 2003).

As relief, the Petitioner requested compensatory education for the days the student missed instruction during the 45-day suspension either through tutoring or a credit bearing summer school course, for the Hearing Officer to immediately return the student to School A and for DCPS to convene an IEP Team meeting to revise the student's BIP.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

The starting point for calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE. The duration is the period of the denial. 20 U.S.C. §1415(f)(3)(C); 20 U.S.C. §1415(b)(6)(B); *See also Reid*, 401 F.3d at 523; *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007). The Hearing Officer finds that the starting point of the denial of FAPE is March 27, 2013, the date that the student was suspended and not provided services pursuant to 34 CFR §300.530(d). The end point of the denial of FAPE is May 16, 2013, the date the Hearing Officer was informed that the student began to receive services.

An award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued. *Reid*, 401 F.3d at 524. During the period of March 27, 2013 – May 16, 2013, the student did not receive services for 29 school days, for a

total of approximately 75 hours of specialized instruction and two hours of behavioral support services.

One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a large group environment. Since the student's behavior, rather than the student's academic functioning, impacts her educational performance, the Hearing Officer concludes that an appropriate compensatory education award is for the student to be provided with one-on-one tutoring, during the summer break, for five hours per week to compensate for the specialized instruction missed by the student and five hours of behavior support services to assist the student in learning strategies to appropriately respond to redirection.

The Petitioner also requested that the student be returned to School A. Since the Hearing Officer concluded that the student's behavior was a manifestation of her disability because DCPS failed to implement the student's January 25, 2013 BIP, the LEA is obligated to return the child to the placement from which the child was removed, unless the parent and LEA agree to a change of placement as part of the modification of the behavioral intervention plan. *See* 34 CFR §300.530(f). However, in this matter, only nine school days remain before the end of the regular school year. It is possible that the transitioning back to School A may cause the student to be frustrated, overwhelmed or anxious.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Issues #3 and #4 are **dismissed** with prejudice.
2. By June 12, 2013, DCPS contact the student to determine if the student prefers to return to School A or stay in School B for the remainder of the 2012-2013 school year.
    a. If the student prefers to return to School A for the remainder of the 2012-2013 school year, ensure the student's reenrollment in School A by June 13, 2013.
3. By June 17, 2013, DCPS ensure that the student is enrolled in DCPS' summer school, for the 2013 summer break, for Algebra I and English I.
4. By June 20, 2013, DCPS to convene an IEP Team meeting to review the student's BIP.
5. DCPS provide a total of five (5) hours per week of independent one-on-one tutoring in Algebra and English for the student, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be provided each week that summer school, for the 2013 summer break, is in session.
6. That DCPS provide a total of five (5) hours of independent behavioral support services, at a rate not to exceed OSSE's established rate for this service, to be completed by September 30, 2013.
7. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: June 9, 2013

Melanie Byrd Chisholm
Hearing Officer