

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

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

OSSE
Student Hearing Office
June 10, 2013

Student,¹ by and through the
Petitioner,

Date Issued: June 7, 2013

Hearing Officer: Michael Lazan

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on April 25, 2013. This IHO was appointed to hear this matter on April 26, 2013. Respondent filed a Response to the Complaint on May 3, 2013. This Response was timely pursuant to application law and regulation.

A resolution meeting was held on May 14, 2013. This meeting was not timely pursuant to the regulations. The HOD was due on June 7, 2013, 10 school days after the date of the hearing.

¹ Personal identification information is provided in Appendix A.

A Prehearing Conference was held on May 3, 2013. Appearing were Donovan Anderson, counsel for Petitioner, _____ counsel for Respondent. A Prehearing Conference Summary and Order was issued on May 8, 2013.

A hearing date was held on May 23, 2013. This was a closed proceeding. Petitioner was represented by Donovan Anderson, Esq. Respondent was represented by

Esq. Petitioner entered into evidence exhibits 1-10; Respondent entered into evidence exhibits 1-13. Petitioner presented as witnesses: Petitioner; _____ School Psychologist at School C; _____ School D. Respondent presented no witnesses. At the end of the hearing day, the parties presented oral arguments.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is _____ years old, and eligible for services as a student with other health impairment. The Complaint involves claims implicating 34 CFR 300.507(a) and 34 CFR Sect. 300.532. The Complaint indicates that DCPS failed to develop an IEP for the Student that was reasonably calculated to provide educational benefit; that DCPS failed to evaluate the Student within 120 days of the parent’s consent; that DCPS had an improperly constituted manifestation meeting; and that DCPS has provided the Student with an inappropriate location of services.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Did DCPS provide the Student with three hours of special education support in its IEP dated December 20, 2012? If so, did DCPS fail to provide the Student with sufficient special education instructional support in its IEP dated December 20, 2012? If so, did DCPS deny the Student a FAPE?

2. Did the parent ask representatives of DCPS to evaluate the Student on or about May 18, 2012? If so, did DCPS then fail to evaluate the Student, in violation of regulations requiring an evaluation within 120 days of consent?

3. Did DCPS fail to conduct a manifestation review of the Student in connection to the suspension of the Student for ten days on April 10, 2013? If so, did the failure to conduct a manifestation review deny the Student a FAPE?

4. Did DCPS provide the Student with a location of services, School C, that is an inappropriate environment for him? If so, did DCPS deny the Student a FAPE?

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 thirteen year old who is eligible for services as a student with other health impairment. (R-9-1)

2. The Student is self-conscious about being labelled. He does not want any attention brought to him. (Testimony of

3. The Student has experienced considerable academic difficulty in the general education classroom during 2012-2013. ADHD affects him in the classroom. (R-10-11;

Testimony of

4. The Student has demonstrated an inability to complete homework and classroom work, does not actively participate in classroom activities, and exhibits difficulty with attention, impulsivity, focus. (R-10-2)

5. The Student is easily distracted by random stimuli and has difficulty focusing on lessons delivered in a whole group setting. (R-10-3)

6. The Student's inability to focus leads to him turning in incomplete assignments and missing homework. (R-1-2)

7. The Student lacks motivation and is defiant in school. (R-1-5)

8. The Student is impulsive, has poor decision making. He does not respond appropriately to peer pressure. (R-1-5)

9. The Student has difficulties with attendance, occasionally reporting to class late or failing to report to class at all. (R-10-3)

10. The Student has a deficit in reading. He struggles to answer questions. He would benefit from the use of visuals to support him in reading grade level texts. He needs work in phonemic awareness, fluency, comprehension. He would benefit from practicing his vocabulary, graphic organizers, guided notes, texts broken down into smaller sections. He would benefit from teacher check-ins. (R-1-2)

11. The Student needs assistance in establishing priorities. (R-10-3)

12. The Student needs frequent breaks from working, a longer "wait time" before answering a question, sitting away from a high traffic area with distractions such as noisy

heaters, air conditioners, the door, windows, and pencil sharpeners, models and visual displays for reference, use of tools such as timers for changes in activities. Teachers must also permit the Student to stand at certain times because he cannot sit for long, build in stretch breaks after sitting for any length of time. (R-10-13)

13. Teachers need to be patient when he fails to follow directions. (R-10-13)

14. The Student needs multi-sensory instructions. (R-10-13)

15. The Student needs an environment where the teacher has clear, concise expectations. (Testimony of

16. The Student would benefit from wraparound services. (Testimony of

17. The Student was eligible for services from second grade to fifth grade. (Testimony of Petitioner; R-8-3)

18. The Student went to School A at this time, and received inclusion classes. (Testimony of Petitioner)

19. In fifth grade, 2011-2012, the Student did well initially. He was declared ineligible for services in April, 2011, and went to a District of Columbia private scholarship program at School B, a private school. (Testimony of Petitioner)

20. At School B, the Student did not have a lot of support and did poorly. The curriculum was too difficult for him. He was there for one quarter. (Testimony of Petitioner; R-10-2)

21. In May, 2011, the Student went back to School A. (Testimony of Petitioner)

22. The parent then sought educational services for the Student through an IEP, and wrote a letter to the principal of School A asking for and consenting to an evaluation.

(Testimony of Petitioner; P-8-1)

23. Staff at School A did not initiate an evaluation. (Testimony of Petitioner)

24. Over 120 days elapsed without an evaluation. (Testimony of Petitioner)

25. The Student went to School C for the beginning of middle school. (Testimony of Petitioner)

26. The Student immediately struggled at School C. He had difficulty going to different classes, would forget to take his books to class. (Testimony of Petitioner; R-10-4)

27. There were over 20 children in the classes at School C. (Testimony of Petitioner)

28. The classroom was not structured, there was chaos in the classroom. (Testimony of

29. For the first part of the 2012-2013 school year through to December 20, 2012, the Student was not passing his core classes. (R-1-2; P-3-1)

30. The Student received all Fs with one C for the first term, 2012-2013. (R-1-2; P-3-1)

31. The Student was suspended numerous times during this school year. The suspensions. He was running the hallways and is constantly complaining about being sick. (Testimony of Petitioner; Testimony of

32. The Student was not going to all his classes and is spending a lot of time in the counselor's office. (Testimony of Petitioner)

33. The Student was yelling in class, screaming at others in class, lying, refusing to do what was requested by teachers. (R-1-5)

34. The Student was suspended on October 31, 2012 through November 5, 2012. This suspension was due to refusal to comply with direction and running out of the classroom without permission. (P-6-2)

35. The Student was suspended on December 13, 2012 through December 20, 2012 by engaging in reckless behavior that could cause harm to himself or others. (P-6-1)

36. School C conducted an evaluation of the Student during the 2012-2013 school year. (Testimony of Petitioner)

37. _____ of DCPS assessed the Student by report of November 19, 2012. The Student's full scale IQ was tested at 102 on the WISC-IV. His nonverbal reasoning abilities were much better developed than his verbal reasoning abilities. (R-10-4-5)

38. Ms. _____ reported that a teacher of the Student, _____ indicated that the Student has a "pervasive" lack of focus and is easily distracted by random stimuli. Ms. _____ reported that the Student is prone to arguments and disputes during class time and becomes off-task and distressed by trivial matters. Ms. _____ indicated that the Student struggled during whole group instruction. (R-10-3)

39. The Student's academic achievement was assessed through the Woodcock-Johnson-III Tests of Achievement. The Student's broad reading was a 95, broad math was a 91, math fluency was a 98, and broad written language was a 91. (R-10-7)

40. On the BASC-2 teacher's scale, there were indications that the Student's ADHD impedes his ability to access grade level material. (R-10-11)

41. BASC-2 scores were clinically significant in regard to hyperactivity, attention problems, attitude to school, attitude to teachers, inattention, and social stress in particular. (R-10-8-10)

42. BRIEF testing indicated that the Student had clinically significant scores in regard to emotional control, metacognition, working memory, organization, global executive composite. (R-10-8-10)

43. Ms. _____ also administered the Outcomes System Assessment, which indicated that he presents with numerous concerns such as arguing, yelling, lying, screaming at others, refusing to do things teachers ask, skipping class. (R-1-5; R-10-2)

44. Ms. _____ indicated that the Student needs interventions in reading, writing and mathematics, in the areas of behavior to address feelings of anxiety, inattention, focus and impulsivity. Ms. _____ indicated that the Student needs frequent breaks from working, a longer “wait time” before answering a question, sitting away from a high traffic area with distractions such as noisy heaters, air conditions, the door, windows, and pencil sharpeners, models and visual displays for reference, use of tools such a timers for changes in activities. She indicated that teachers must also permit the Student to stand at certain times because he cannot sit for long, build in stretch breaks after sitting for any length of time. She indicated that teachers at a school need to be patient when he fails to follow directions. She also indicated that the Student needs multi-sensory instructions. She also indicated that the Student needs an environment where the teacher has clear, concise expectations. She also indicated that the Student needs wraparound services. (R-10-11-13)

45. In the IEP of December 20, 2012, the Student was recommended for 2 hours a week of special education services in reading in the general education environment, and 1 hour a week of math in the general education environment. (R-1-6)

46. The Student was recommended for 120 minutes of behavioral support services per month. (R-1-6)

47. The Student was recommended for classroom accommodations of repetition of directions, writing in test books, preferential seating, a location with minimal distractions, small group testing, extended time on subtests. (R-1-8)

48. Behavioral, social and emotional goals in the IEP relating to a lack of motivation and defiant behavior relate to managing conflict on a daily basis 4 out of 5 trials by responding appropriately to peer pressure, ignoring distracting remarks and gestures of peers, and identifying appropriate ways to cope with conflict. (R-1-5)

49. Another behavioral, social and emotional goal in the IEP relates to following directions given by a teacher/school staff in 4 out of 5 trials by complying with requests from teachers/school staff, following verbal prompts in a timely manner, and following school rules. (R-1-5)

50. The Student's BIP dated December 20, 2012 recommends that the staff speak to him in a calm yet firm manner when he is not in his designated area. He should be given clear and concise rules and expectations. A daily monitoring sheet is recommended to outline behavior in class. A daily goal and objective sheet should be developed. The parent should be contacted weekly. Praise is recommended in 30 minute increments. It recommends giving the Student options (i.e., independent work, group work) when appropriate. It recommends that he be in close proximity to teacher/staff for added support. (R-2-2)

51. It recommends that he is rewarded when he is compliant. Rewards are to be computer time not to exceed 15 minutes, time out reflection time in an appropriate location, drawing time where appropriate, verbal praise. (R-2-3)

52. Consequences for behavior include verbal warning, behavior referral forms, calls to the parent, a parent conference, in-school suspension out of school suspension. (R-2-3)

53. The FBA for the Student identifies the function of the problem behavior as avoiding work or other academic tasks. (R-3-3)

54. Observations in connection to the FBA indicates that the Student did not work cooperatively with others, did not follow teacher directions, did not relate well to others, did not respond when called on, was hyperactive, disorganized. (R-3-3)

55. The IEP was implemented in January. (Testimony of Petitioner)

56. The BIP did not work for the Student. The Student took advantage of it to get out of class. (Testimony of Petitioner)

57. The school did not set up a rewards system for him. (Testimony of Petitioner)

58. There were no improvements in behavior or academics during the school year. (Testimony of Petitioner)

59. The Student was suspended on February 5, 2013 and from February 8, 2013 through February 14, 2013 by displaying disorderly conduct, causing a disturbance in the classroom, continuing to be defiant. (P-6-1)

60. The Student received two Fs, two Ds, and two Cs for the second term, 2012-2013. In language arts, it was indicated that the Student lacks initiative and has poor behavior. In extended literacy, the Student has excessive absences. (P-3-1)

61. The Student received four Fs, one D for the third term, 2012-2013. In Intro to Digital Arts Tech MS, the teacher indicated that the Student had excessive absences and requested a conference with the parent. The teacher noted that the Student lacks initiative, has poor behavior. (P-3-1)

62. The Student received an F in World Geography and Cultures in all three terms, with 17 absences. (P-3-1)

63. The Student was suspended off-site for 10 days as a result of disruption on school properties on April 10, 2013. (R-4-1; P-5-1)

64. He needs a new FBA and BIP to address his difficulty in going to class.
(Testimony of

65. No manifestation review has been conducted of the Student in connection to the suspensions on April 10, 2013. On May 14, 2013, Petitioner, the Student's advocate, a school administrator, and a school psychologist participated in a resolution meeting and determined that the Students behavior was a manifestation of his disability. (Stipulation of parties; email of Esq. dated May 20, 2013)

66. School D has 67 students, with 10 students in the classroom and two teachers.
(Testimony of

67. There are varying disabilities at School D, including LD, speech and language impairment. (Testimony of

68. Students are given breaks in class, and there are limited distractions in the classroom. (Testimony of

69. Instruction is differentiated in the classroom by certified special education teachers. (Testimony of

70. The behavior modification system at the school includes the use of "point sheets." Behavior is monitored every 30 minutes. Students get points for staying in class, meeting personal goals, completing work. Personal goals are developed for each child. (Testimony of

71. Students earn School D dollars and can get things from the school store as a reward. They can also be awarded field trips, lunch outside. (Testimony of

72. If Students do not behave, students will lose privileges. Students are given warnings before they lose privileges (Testimony of

73. If Students are on the “red” level, they earn no School D dollars. If they are on the yellow level, they earn .25 per day. If they are on the green level, .50 per day. If they are on the blue level, they earn .75 per day. If they are on the silver level, they will earn 1.00 per day and get lunch out once a week. (Testimony of

74. I found all the witnesses credible in this proceeding. In particular, I found the testimony of Ms. _____ to be frank and compelling.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Shaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”

v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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. 34 CFR Sect. 300.513(a).

1. FAPE Denial: Insufficient Support for December 20, 2012 IEP.

Petitioner contends that the IEP team provided the Student with insufficient support to address his special education needs in the December 20, 2012 IEP. In particular, Petitioner points out that this Student’s behavioral and emotional issues require greater support than the 3 hours per week of special education services, the behavior support services, the modifications in the IEP, and the BIP.

IDEA requires that school districts “consider the use of positive behavioral interventions and supports, and other strategies to address [that] behavior for a child whose behavior impedes the child’s learning or that of others.” 34 C.F.R. Sect. 300.324(a)(2)(i). Additionally, the IEP must contain levels of both academic and functional performance, 34 C.F.R. Sect. 00.320(a)(1), and must contain annual goals with both academic and functional components. 34 C.F.R. Sect.

300.320(a)(2).

The record indicates that the District conducted an evaluation of the Student prior to the December, 20, 2012 IEP meeting. As a major part of this evaluation, Ms. _____ of DCPS indicated that the Student will experience academic difficulty in the general education classroom. Ms. _____ indicated that the Student needs interventions in reading, writing and mathematics and interventions in the areas of behavior to address feelings of anxiety, inattention, focus and impulsivity.

To this end, Ms. _____ indicated that the Student needs frequent breaks from working, a longer “wait time” before answering a question, sitting away from a high traffic area with distractions such as noisy heaters, air conditions, the door, windows, and pencil sharpeners, models and visual displays for reference, use of tools such a timers for changes in activities. She indicated that teachers must also permit the Student to stand at certain times because he cannot sit for long, build in stretch breaks after sitting for any length of time. She indicated that teachers at a school need to be patient when he fails to follow directions. She also indicated that the Student needs multi-sensory instructions. She also indicated that the Student needs an environment where the teacher has clear, concise expectations.

To this IHO, these recommendations should have been incorporated into the IEP or the BIP. The recommendations are from DCPS’s own evaluator. This evaluator came across as particularly credible during the hearing. The Student had been performing poorly in School C in the first term of the 2012-2013 school year. The Student was not passing his core classes. The Student received all Fs with one C for the first term, 2012-2013. The Student was suspended at least twice during this time. He was running the hallways and constantly complaining about being sick. The Student was not going to all his classes and was spending a

lot of time in the counselor's office. The Student was yelling in class, screaming at others, and refusing to do what is requested by teachers.

Moreover, DCPS did not call any witnesses to rebut the contentions in Ms.

report, and there is no evidence or documentation in the record to specifically rebut the contentions of Ms.

However, many of Ms. recommendations did not make it into the Student's IEP or the Student's BIP. The Student is not provided with frequent breaks from working or a longer "wait time" before answering a question in the IEP or the BIP. The Student was not allowed to stand at certain times or given built in stretch breaks after sitting for any length of time in the IEP or the BIP. Teachers were not directed to be patient when the Student fails to follow directions in the IEP or the BIP. Multi-sensory instructions were not provided for in the IEP or the BIP. Additionally, the IEP does not address the Student's needs in mathematics, as there are no goals relating to mathematics and no academic levels relating to mathematics.

Petitioner also contends that the Student did not receive enough special education instruction in the classroom given the Student's poor academic and behavioral performance during the first term of 2012-2013. Ms. report references an interview with the Student's ELA teacher. Ms. indicates that the Student has a "pervasive" lack of focus and is easily distracted by random stimuli. She reports that he is prone to arguments and disputes during class time and becomes off-task and distressed by trivial matters. Ms. also indicates that the Student struggles in a large group setting. Accordingly, when in a large group setting during the first term of the 2012-2013 school year, the Student failed all his core classes.

To this IHO, the evidence before the IEP team should have led the team to calculate that the Student required more than 3 hours of special education instruction per week in a general education classroom. With more than 20 students in the classroom, a general education teacher on his/her own would not have enough training or resources to provide the Student with small group instruction, to make necessary accommodations in the classroom, to implement the BIP, and to provide the Student with a reasonable amount of oversight so that his behavior is controlled. A special education teacher in the room, or at least a teaching assistant in the classroom, was necessary to allow for necessary oversight of the Student, to allow for small group instruction, to provide accommodations, to assist the general education teacher in implementing the BIP, and to provide oversight over the Student to make sure he does not misbehave.

In this connection, Ms. _____ herself specifically testified that that the Student would “definitely” benefit from a smaller class size. Schoenbach v. District of Columbia, 309 F. Supp.2d 71 (D.D.C. 2004)(where reports indicated, inter alia, that large classroom setting could not meet student’s needs, FAPE denial found).

It is noted that the IEP does provide for behavioral support services for 2 hours a month, but there is nothing in the IEP to explain what these behavioral support services consist of or how these services could successfully address the Student’s many behavioral issues in the classroom. Nor was there any testimony from Respondent to explain how these behavioral support services could address the Student’s academic and behavioral needs.

Parenthetically, while District do have a duty to provide students with instruction in the LRE, courts have held that students with average academic functioning can require a significant amount of special education instruction if the Student is not able to be maintained in the general

education environment. See, e.g., J.P. by D.P. and I.P. v. New York City Dep't of Educ., 2012 WL 359977 (S.D.N.Y. 2012)(student with intransigence, tendency to shout out appropriately placed in self-contained classroom); Larson ex rel. Larson v. Ind. Sch. Dist. No. 361, 2004 WL 432218 at *14 (D. Minn. 2004)(where Student had behavioral issues including over 22 disciplinary actions against him, changes needed to be made in terms of type of services received and the way that services were to be provided).

Under the circumstances, I agree with Petitioner that Respondent did not provide the Student with sufficient support services in the December 20, 2012 IEP and thereby denied the Student a FAPE.

2. Failure to Evaluate Within 120 days.

The DC Code indicates that initial evaluations must be conducted within 120 days. D.C. Code § 38-2561.02(a); Smith v. Dist. of Columbia, 2010 WL 4861757 (D. D.C. Nov. 30, 2010). Petitioner testified that she requested an evaluation of the Student on May 18, 2012, and provides a document to this effect. (P-8) The document was addressed to the Principal of School A. The record indicates that no evaluation occurred until the Student attended School C, and no IEP was created for the Student until December 20, 2012, more than seven months later.

A failure to timely evaluate is a procedural violation of IDEA. Lesesne ex rel. B.F. v. District of Columbia, 2005 WL 3276205 (D.D.C. July 26, 2005); However, when the parents are able to show that harm resulted from the failure to evaluate, FAPE denial can result. Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004) (though DCPS admitted that it failed to satisfy its responsibility to assess the student within 120 days, of her parents' request, parents did not show harm).

The record indicates that the failure to evaluate had a material impact on the Student's education. Petitioner testified that she requested an evaluation at School A so that the Student could receive services once he started at School C in the fall. No such services were provided, and the Student did poorly in the first term at School C as a result. The Student failed all his core subjects at School C and was suspended numerous times for infractions such as reckless behavior, refusing to comply with direction and running out of the classroom. The December 20, 2012 IEP indicates that the Student's "lack of motivation and defiant behavior has prevented him from progressing in class." (R-1-5) It indicates that the Student has argued with others, yelled and screamed at others, refused to do what teachers have asked, lied, and skipped class. (Id.)

Parenthetically, were the Student evaluated by mid-September, 2012, the IEP team would have had sufficient evidence before it to conclude that the Student required at least some special education services. The Student had done poorly at School B once he had been declared ineligible for services, and then had immediate problems during the transition to School C when he was without services. The psychological assessment by Ms. _____ also indicates that the Student's problems were revealed in the _____ Outcomes System Assessment, which indicated that he presents with numerous concerns such as arguing, yelling, lying, screaming at others, refusing to do things teachers ask, skipping class. BASC-2 scores were clinically significant in regard to hyperactivity, attention problems, attitude to school, attitude to teachers, inattention, and social stress in particular. BRIEF testing indicated that the Student had clinically significant scores in regard to emotional control, metacognition, working memory, organization, global executive composite. Accordingly I agree with

Petitioner that the Student was denied a FAPE when Respondent failed to evaluate the Student within 120 days of Petitioner's consent.

3. Failure to Conduct a Manifestation Review.

.In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. 5 DCMR Sect. 2510.16

If a child with a disability who is removed from the child's current placement for 10 school days in the same year in a pattern of substantially similar behavior, a change of placement may occur. 34 CFR Sect. 300.530(d)(4); 34 CFR Sect. 300.536. 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 and if the conduct in question was the direct result of the LEA's failure to implement the IEP.

The District of Columbia also requires, pursuant to 5 D.C.M.R. Sect. 2510.12. that the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team first considers all relevant information, including evaluation and diagnostic and results, or other relevant information supplied by the parents of the child; (2) observations of the child; (3) the child's IEP and placement; and (4) any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel. The IEP team must

also determine that, in relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

These protections apply if students are not eligible for services but the parent of the child has expressed concern about the Student's special education needs or has requested an evaluation of the child. 34 CFR Sect. 300.534(b)(1)and (2).

In this case, Petitioner had alerted Respondent to the Student's behavior issues through a request for evaluation dated May 18, 2012. Thereafter, the Student was suspended for more than 10 school days during the 2012-2013 school year. The record indicates that the 10th day of suspension occurred during the suspension of the Student in February, 2013. The record establishes that all suspensions have occurred as a result of a pattern of incidents relating to defiant behavior in violation of school rules. The Student was first suspended for refusal to comply with direction and running out of the classroom without permission. The Student was then suspended for reckless behavior that could cause harm to himself or others. The Student was then suspended for disorderly conduct, causing a disturbance in the classroom, continuing to be defiant. The Student was then suspended as a result of disruption on school properties on April 10, 2013.

Respondent does not argue otherwise, and agrees that the Student was not provided with a timely manifestation determination. At the resolution meeting, Respondent agreed that these behaviors were a manifestation of the Student's disability.

As a result, I find that the Student was denied protections associated with a manifestation determination, in particular a return to the placement from which the student was removed, an FBA, and a BIP. 34 CFR Sect. 300.530(d) Though the Student received an FBA and BIP in connection to the December 20, 2012 IEP, such FBA and BIP had not been effective to that point. They should have been revised to address the recent behavioral violations, though, as I have indicated, additional behavioral services in the classroom beyond an FBA and BIP were and are necessary for this Student. 34 CFR Sect. 300.530(d)(ii), 300.530 (f)(ii). Accordingly, I find that Respondent denied the Student a FAPE by failing to conduct a manifestation determination review of the Student after he had been suspended for more than 10 school days for similar offenses during the 2012-2013 school year.

4. Location of Services

Petitioner contends that the Student was provided with an inappropriate location of services for 2012-2013, School D.

Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student's IEP. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009). Although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

Here, Petitioner does not adequately support her claims that the school itself was not appropriate. Ms. _____ testified that the Student's class was "chaotic," but there is no supporting documentation or testimony to clearly indicate what "chaotic" means in this context or to indicate specifically how this impacted the Student. Moreover, Petitioner points to no

authority suggesting that such a characterization of the instruction can result in a finding of FAPE denial. I find that Petitioner has not met her burden on this issue.

5. Remedy.

Petitioner asserts that appropriate relief in this matter is to order placement of the Student at School D, a non-public school in Maryland.

In v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Here, Petitioner presents testimony from School D, a branch of the same institution that was discussed in School D contains all special education students and provides the students with small class size with two teachers in the room. Students are given breaks in class, and there are limited distractions in the classroom. Instruction is differentiated in the classroom. The school uses a points sheet behavioral system, with behavior monitored every 30 minutes. Students get points for staying in class, meeting personal goals, completing work. Personal goals are developed for each child. Students earn School D dollars and can receive items from the

school store as a reward. They can also be awarded field trips, lunch outside. If Students do not behave, students will lose privileges. Students are given warnings before they lose privileges.

Applying the factors, I find that the Student has recently developed severe behavioral problems that have not improved over the course of the 2012-2013 school year. The Student's third term progress report indicates that the Student failed 4 courses. In the second and third terms of 2012-2013, the Student continued to engage in inappropriate conduct resulting in suspensions, most recently in April, 2013. Further, Respondent does not propose to provide this Student with any additional services at this time to address these behavioral and academic issues.

There is no reason to believe that these issues will resolve without significant change to the Student's program. The program at School D provides specific special education behavioral supports that have not been tried before for this Student. To address the Student's behavioral problems, a points-based system with tangible, desirable rewards is established. The classroom is designed so that there are no distractions for the students. Students receive breaks in the classroom. Instruction is differentiated in the classroom, and the school provides certified special education teachers. Importantly, the school has small class sizes of 10 students with 2 teachers, which should be helpful in addressing the Student's difficulties in regard to attention and hyperactivity. In this connection, it is important to note again that Ms. of DCPS specifically testified that the Student would benefit from a smaller class. Schoenbach, 309 F. Supp.2d at 81.

A relevant question here is whether School D is the least restrictive environment for the Student. An IHO or Court may order funding for a parental placement even if it is not the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29, n.3

(D.D.C. 2012). Still, courts do carefully consider whether the placement is the Student's LRE in determining the appropriateness of the parental placement. Id., at 34-36 (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial)

As noted, Respondent's interventions with the Student have not met with success, and Respondent does not propose to provide additional services in the general education setting for the forthcoming school year. Moreover, the record indicates that the Student does not like being different from other general education students in his class and does not like being singled out for special education services. In such a circumstance, a self-contained setting with similar peers should make the Student feel less "different" and may allow him to better accept the special education services that are being delivered to him.

In this connection, it is important to note that maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997) There is support in the caselaw for more restrictive placements when disabilities manifest themselves in aggressive and extremely disruptive behaviors -- especially when that behavior presents a risk of danger to students and school personnel. See, e.g., Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Finally, Respondent did not call any witnesses to explain how it could provide a FAPE for the Student at one of its general education placements. In fact, Respondent argues that its behavioral support services are adequate in regard to his needs. Given that the Student continues to fail his classes and been suspended at least twice since the IEP was created in December, 2012, this IHO must disagree. Under the circumstances, this IHO finds that School

D is an appropriately restrictive setting for this Student. This IHO will therefore award tuition payment for the Student at School D for the 2013-2014 school year.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by: a) providing insufficient services and accommodations in its IEP of December 20, 2012; b) failing to provide a manifestation determination review for the Student in connection to disciplinary incidents during the 2012-2013 school year; c) failing to timely evaluate the Student after Petitioner's May 18, 2012 referral;

2. Respondent is directed to pay tuition, related services and transportation costs for the Student to attend School D for the 2013-2014 school year. Respondent may request proof of attendance prior to payment of such tuition.

Dated: June 7, 2013

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: June 7, 2013

Michael Lazan
Impartial Hearing Officer