

DC Office of the State Superintendent of Education
 Office of Review & Compliance
 Student Hearing Office
 1150 5th Street, SE
 Washington, D.C. 20003
 CONFIDENTIAL

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 OSSE
 STUDENT HEARING OFFICE

<p>[Parent]¹, on behalf of [Student],</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case #2009-1268</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>November 6, 2009</p> <p><u>Representatives:</u></p> <p>Marlon Charles, Petitioner</p> <p>Linda Smalls, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on October 29, 2009. The hearing concluded and the record closed on that date. The due date for the Hearing Officer's Determination (HOD) is November 6, 2009. This HOD is issued on November 6, 2009.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

Present at the due process hearing were: Petitioner's Counsel, Marlon Charles, Esq.; the Petitioner; the Student; [REDACTED] Group Home Case Manager; and Respondent's Counsel, Linda Smalls, Esq.

Three witnesses testified at the hearing²:

Petitioner, the Student's Mother (P)

[REDACTED]

The complaint in this matter was filed on September 4, 2009. A response to the complaint was filed on September 14, 2009. A prehearing conference was held on September 23, 2009, and a prehearing order was issued on September 24, 2009.

12 documents were disclosed by the Petitioner on October 21, 2009. (P 1 – P 12) P 1 through P 3, P 5 through P 7, and P 9 through P 11 were admitted into the record. The exhibits are:

- P 1 - Due Process Complaint Notice, September 2, 2009
- P 2 - Confidential Report of Psychological Reevaluation, November 14, 2008 (See R 6)
- P 3 - Individualized Education Program (IEP), December 18, 2008 (See R 3)
- P 5 - Manifestation Determination Form, April 6, 2009 (See R 10)
- P 6 - Student Timetables, August 28, 2009 and September 8, 2009
- P 7 - Attendance Records, August 17, 2009 to October 7, 2009
- P 9 - Discipline Records, August 26, 2008, September 11, 2008, October 20, 2008, April 6, 2009, April 7, 2009, February 11, 2009, March 13, 2009, April 21, 2009, April 20, 2009, April 7, 2009, August 26, 2008, December 18, 2008
- P 10 - Letter from Stewart to Varner, September 18, 2009
- P 11 - Professional Vita, Derek Merryshow

The documents not admitted are:

² The Respondent presented no witnesses and rested its case on the record.

³ D.M. presented expert opinions on the manifestation determinations, assessments, and student placement.

- P 4 - IEP, January 16, 2008
- P 8 - Report to Parents of Student Progress, October 24, 2008
- P 12 - Article: Impact of learning orientation on African American children's attitude toward high-achieving peers, Derek Merryshow, et al.

11 documents were disclosed by the Respondent on October 23, 2009. (R 1 – R 11)

All of the disclosed documents were admitted into the record. The exhibits are:

- R 1 - District of Columbia Public Schools' Notice of Insufficiency and Response to Parent's Due Process Complaint Notice, October 23, 2009
- R 2 - Review Evaluations and IEP Review, December 18, 2008
- R 3 - IEP, December 18, 2008 (See P 3)
- R 4 - Eligibility Meeting Report, December 18, 2008
- R 5 - Speech Language Re-Evaluation, October 8, 2008, one page
- R 6 - Confidential Report of Psychological Reevaluation, November 14, 2008 (See P 2)
- R 7 - Service Tracker, September 1, 2008 through October 31, 2008, February 10, 2010 through February 27, 2009, and February 11, 2009 through May 1, 2009
- R 8 - Parent/Guardian Consent to Evaluate, September 23, 2008
- R 9 - Functional Behavior Assessment, undated
- R 10 - Manifestation Determination Form, April 6, 2009 (See P 5)
- R 11 - Manifestation Determination Form, February 3, 2009

II. ISSUES⁴

- 1) Whether the Respondent failed to timely reevaluate the Student? Specifically, whether the Student's Parent requested a reevaluation that was refused by the Respondent and whether a reevaluation is necessary?
- 2) Whether the Respondent failed to provide psychological counseling services during the 2008-2009 school year in conformity with the Student's individualized education program (IEP)?

⁴ Of the five issues identified in the prehearing order, the Petitioner withdrew one at the start of the hearing leaving the four listed here.

3) Whether the Respondent failed to correctly determine whether the Student's behavior was a manifestation of his disability at any and all manifestation determination meetings during the 2007-2008 and 2008-2009 school years?

4) Whether the Respondent failed to provide an appropriate educational placement for the Student? Specifically, whether the Student requires a private full-time special education school in which to implement his IEP?

III. FINDINGS OF FACT

1. The Student is a fifteen year old learner with a disability currently enrolled at [REDACTED]. The Student began high school at [REDACTED] fall of 2009, and was enrolled at a middle school in the District during the 2008-09 school year.⁶ The Respondent determined the Student is eligible for special education and related services under the definition of emotional disturbance (ED).⁷
2. The Student's individualized education program (IEP) requires 26.5 hours per week of specialized instruction outside of the general education setting and one hour per week of behavioral support services outside of the general education setting.⁸

⁵ Testimony (T) of P, P 3/R 3.

⁶ T of P, T of D.M., P 6, P 7.

⁷ P 3/R 3, R 2, R 4.

⁸ P 3/R 3.

3. The Petitioner provided consent on September 23, 2008, for a reevaluation to be conducted.⁹ Assessments were to be conducted in the three core academic areas (math, reading, and writing) and in the areas of communication/speech and language, and emotional, social, and behavioral development.¹⁰ No evidence of a parental request for an assessment was presented at the hearing.

4. A speech and language assessment was completed on October 8, 2008.¹¹ It was discussed at the IEP team meeting on December 18, 2008, that the Student's communication skills were adequate and no speech language services were necessary.¹² A functional behavior assessment (FBA) was completed in October 2008.¹³ The FBA noted the Student is not taking medication for attention deficit hyperactivity disorder (ADHD) and this was discussed at the December 18, 2008, IEP team meeting.¹⁴ The FBA report describes the Student's behaviors and fails to provide any meaningful information on how to manage, prevent, or improve those behaviors.¹⁵ A comprehensive psychological assessment was completed on November 14, 2008.¹⁶ The psychological assessment looked at behavior,

⁹ R 8.

¹⁰ R 8.

¹¹ R 5.

¹² R 2.

¹³ R 9.

¹⁴ R 9, R 2 (At the meeting it was commented that the Student shows "significant symptoms of ADHD.")

¹⁵ R 9.

¹⁶ P 2/R 6.

intellectual functioning, and academic functioning.¹⁷ The reevaluation of the Student was not comprehensive enough because abbreviated scales were used and there was no social history completed.¹⁸ None of the assessment reports indicate a neuropsychological assessment was reviewed or had been previously conducted, although ADHD was mentioned at the team meeting and in the FBA report.¹⁹

5. Based on a review of the service tracker logs, the Student was not provided any behavioral support services in the month of January, received four hour for the month of February, one hour session in March, and no behavioral support services the rest of the year.²⁰
6. The Student missed a significant amount of school during the 2008-09 school year, although not enough evidence was provided to specify exactly how much.²¹ Of the Student's absences, a large part of the time they were the result of suspensions from school.²²
7. A manifestation determination meeting was held on or about February 3, 3009, as a result of the Student being engaged in a fight.²³ The team determined the

¹⁷ P 2/R 6.

¹⁸ T of D.M. (This witness provided expert testimony on this point, which is reliable. It was not refuted by any other testimony.)

¹⁹ R 2, R 5, P 2/R 6, R 9.

²⁰ R 7.

²¹ T of P, R 7.

²² T of P, R 7, P 9 (Based on the testimony of the Petitioner and the service tracker records, not all of the Student's suspensions are recorded in this collection of documents.)

²³ R 11.

Student's behavior was a manifestation of his disability because the behavior was caused by or had a direct and substantial relationship to his disability.²⁴ Another manifestation determination was made on or about April 6, 2009, as a result of the Student threatening a parent or teacher at the school.²⁵ The team determined the behavior was not a manifestation of the Student's disability because the behavior, in the team's judgment, was not caused by or did not have a direct and substantial relationship to the Student's disability, and was not the direct result of the district's failure to implement the Student's IEP.²⁶ This determination was in error because threatening was the kind of behavior the IEP was designed to address and because the IEP was not being implemented with regard to behavioral support services.²⁷

8. The Student missed classes, out of 30 school days, 14 times due entirely to unexcused absences during the first several weeks of school this year.²⁸ During that time period he also was late to class 31 times.²⁹
9. The Student requires therapy, behavioral interventions, and structure in order to benefit educationally.³⁰

²⁴ R 11.

²⁵ T of D.M., R 10/P 5.

²⁶ R 10/ P 5.

²⁷ T of D.M., R 2, R 3/P 3, R 4, R 6/P 2, R 9, R 10/ P 5.

²⁸ T of P, P 7.

²⁹ P 7.

³⁰ T of D.M.

10. The Student has been accepted by [REDACTED] for the 2009-2010 school year.³¹ The school has been certified by the District of Columbia to serve students receiving special education and related services as a result of eligibility determinations in the areas of ED, specific learning disabilities (SLD), and speech and language (S/L).³²

IV. CONCLUSIONS OF LAW

1. A free appropriate public education (FAPE) is provided when special education and related services are:
- (a) . . . provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the SEA, including the requirements of this part;
 - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

34 C.F.R. § 300.17. The Supreme Court has stated that:

if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.

Board of Educ. v. Rowley, 458 U.S. 176, 189 (1982).

2. Students must be comprehensively evaluated periodically in order to determine the “content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.” 34 C.F.R. § 300.304(b). *See also*, 34 C.F.R. § 300.304(c) “Other evaluation procedures”

³¹ T of C.S., P 10.

³² T of C.S.

(Assessments must be “administered by trained and knowledgeable personnel, . . .” include “all areas related to the suspected disability, . . .” be “sufficiently comprehensive to identify all of the areas of the child’s special education and related service needs, . . .” and must “provide relevant information that directly assists persons in determining the educational needs of the child are provided.”)

3. According to Federal Regulations at 34 C.F.R. § 300.530(e), Manifestation

Determination:

(1) 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

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(ii) If the conduct in question was the direct result of the LEA’s failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child’s disability if the LEA, the parent, and relevant members of the child’s IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child’s IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

4. Students with disabilities must be placed:

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §§ 300.114(a)(2), 300.116(a)(2).

5. There is no evidence the Parent requested an evaluation that was refused.

However, a FBA that was conducted was flawed in that it provided very little useful information for programming for the Student. The FBA, by and large, merely indicated what the Student’s behavior was, and even that was not very

thorough. A new FBA conducted by a knowledgeable and trained professional will benefit the team and the Student. Additionally, there is evidence in the record that the Student has ADHD, a condition impacting a person's executive function. It is unclear from the record whether there is a current assessment report on the Student's ADHD and how it is impacting his involvement and progress in the general education curriculum. Since an executive functioning deficit could be key to understanding the Student and his behaviors, such a report must be reviewed or, if it does not exist, created. The IEP will then have to be reviewed in light of the assessment data. In short, the Respondent failed to ensure there was comprehensive assessment data to appropriately program for the Student.

6. Only the implementation of the IEP since the start of calendar year 2009 could be considered in this case because the prior revision of the IEP and the services included therein were not made part of the evidentiary record. Based on the current IEP, and the service tracking logs, behavioral support services were not provided in conformity with the IEP. None were provided in January, they were provided in February, one session was provided in March, and none the rest of the year. The Student's suspension and alternative placement following the behavior incident in early April did not relieve the Respondent of its obligation to provide the services. *See* 34 C.F.R. § 300.101(a) ("A free appropriate public education must be available to all children residing in the State, . . . including children with disabilities who have been suspended or expelled from school. . . .") This deficiency reasonably contributed to the Student's behavior problems and also impacts the manifestation determination made on April 6, 2009.

7. The manifestation determination made on April 6, 2009, was incorrect for two reasons. First, the conduct in question, threatening behavior, was precisely the kind of behavior the IEP was designed to address. Second, although the IEP team failed to acknowledge it, the IEP was not being implemented. Specifically, the behavioral support services were not provided in conformity with the IEP. Thus, it is reasonable to conclude that the Student's threatening behavior was a direct result of the Respondent's failure to provide the services that were put in place to aid the Student in dealing with that behavior. The manifestation determination of April 6, 2009, was in error.

8. Finally, the evidence does not support a conclusion that the Student's current placement is inappropriate. The Student began attending a new school in August 2009. While the evidence does demonstrate the Student is not attending to his classes, this does not necessarily require a new location for services nor a more restrictive setting, although the IEP team may determine otherwise. In order to address the Student's current issue with his behavior (failing to consistently attend class) which will undoubtedly impede his involvement in and progress in the general education curriculum, additional support for the Student and his teachers will be necessary. D.W. testified reliably that therapeutic services, behavior interventions, and structure are important for the Student to benefit from school. The services in the IEP delivered at the current school will be changed to ensure this support is provided. A one on one paraprofessional to accompany the Student throughout his school day, ensuring he attends classes, and processing with him when or before he disengages from his school work, will be provided to address

his need for behavior interventions and structure during his day. The current one hour per week of behavior support service will be changed to clearly reflect that the Student will receive psychological counseling services. The Student's placement will be reviewed when the IEP is reviewed in light of the new assessment results as a result of this order.

V. DECISION

1. The Respondent failed to timely reevaluate the Student when it did not conduct an appropriate FBA and failed to review or propose a neuropsychological assessment to consider whether or how the Student's executive functioning is impacting his academic and functional performance. Data from an appropriate FBA and a neuropsychological assessment are necessary to appropriately program for the Student.
2. The Student's IEP required one hour per week of behavioral support services outside of the general education classroom. This regimen was not followed when no such services were provided in January 2009, once in March, and not in April or May. The Respondent was responsible for ensuring the service was provided regardless of the Student's location (e.g. suspended from school or sent to an alternative location).
3. The Respondent failed to correctly determine the Student's threatening behavior was a manifestation of his disability on April 6, 2009. The Respondent had not been implementing the Student's IEP and the behavior exhibited was that which the IEP was designed to address.

4. The evidence does not support a conclusion that the Student's current placement is not appropriate and that he requires a more restrictive educational setting. The IEP must be changed to ensure it includes a therapeutic component, daily structure, and behavior interventions. The Student's placement must be revisited as part of the review of the ordered assessments, following the revision of the IEP.

VI. ORDER

1. The Student must be provided with a FBA conducted by a professional credentialed by the Behavior Analyst Certification Board. The FBA must be completed no later than December 18, 2009. The FBA is to gather data on the antecedent(s) and function(s) of the Student's behavior, including his attendance, and to provide recommendations for correcting or avoiding the occurrence of the behavior.
2. The Student must be provided with a neuropsychological assessment no later than January 8, 2010, if such an assessment has not been completed since November 1, 2006. The neuropsychological assessment is to gather data on the Student's executive functioning skills and provide recommendations for programming in order to deal with any executive functioning skill deficits.
3. The ordered assessments must be at no cost to the Student's Parent.
4. If the Student's Parent fails to ensure the Student is at school (where the FBA is necessarily conducted) or at the location of the neuropsychological assessment (typically a clinical location), the deadline for completing either assessment will be extended day for day until the assessment can be completed.

5. Within two weeks of the completion of the last assessment ordered, the IEP team must meet to review and, if necessary, revise the IEP based on the recommendations in the assessment reports. At least three alternate times for the meeting must be proposed to the Parent including when and where the IEP team will meet if the Parent fails to respond or select one of the proposed times to meet. The proposed meeting times may not be consecutive during a single day (e.g. 1:00 to 2:00, or 2:00 to 3:00).
6. A paraprofessional will be provided to work with and monitor the Student on a one on one basis throughout his school day. The paraprofessional will ensure the Student attends classes, will assist the Student with academic work, and will process with the Student when he begins to experience behavioral issues in order to help him stay focused on academic work whether in the classroom or in a location outside of the classroom away from other students. This service will begin no later than November 16, 2009, and will continue at least until the IEP team meets and determines it is no longer necessary for the Student to receive a FAPE.
7. The current "behavioral support services" in the IEP is changed to "psychological counseling services" and must begin no later than the week of November 16, 2009.
8. All other IEP and due process requirements under the IDEA and the DCMR must be followed in the completion of this order.

IT IS SO ORDERED.

Dated this 6th day of November, 2009.

A handwritten signature in black ink, appearing to be 'Jim Mortenson', written over a horizontal line.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Independent Hearing Officer is final, except that any party aggrieved by the findings and decision of the Independent Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

APPENDIX A

Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

Student:

[REDACTED]

ID#:

[REDACTED]

School:

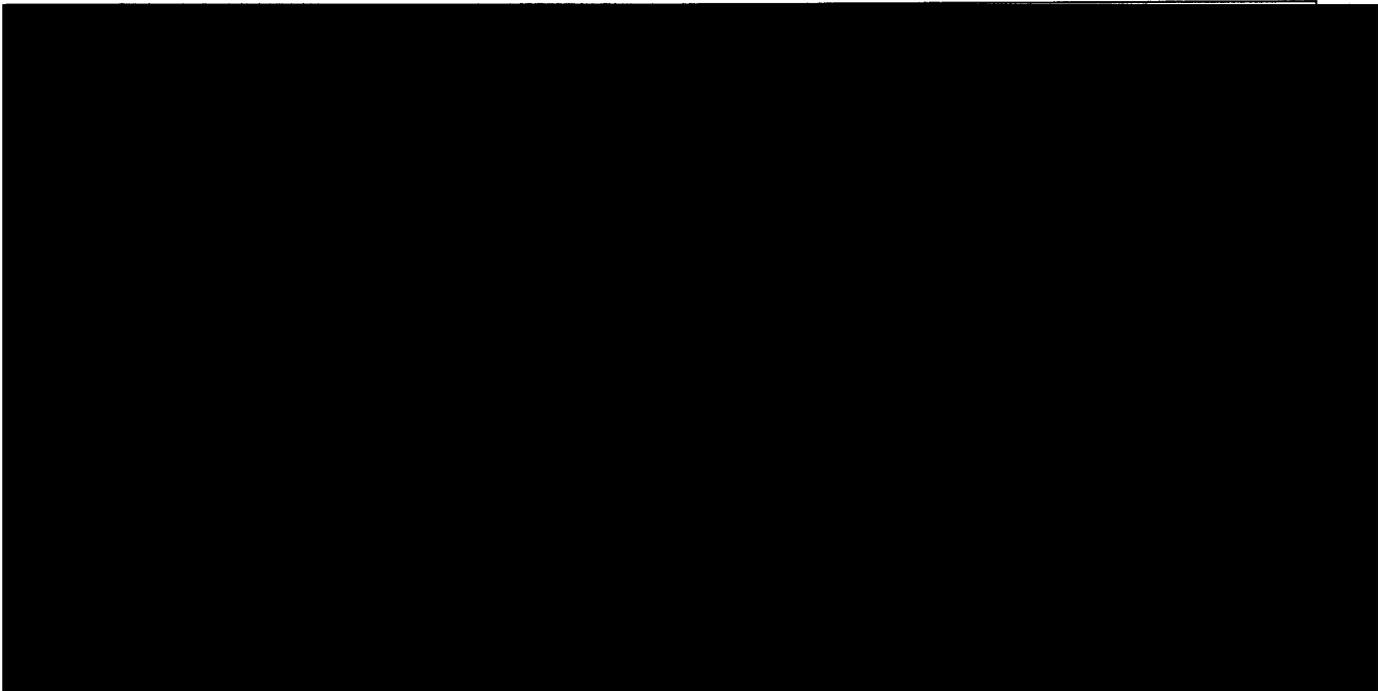
[REDACTED]

School 2008-2009:

[REDACTED]

Petitioner:

[REDACTED]



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