

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Boston Collegiate Charter School

BSEA #1610551

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC §1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC §794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

On June 8, 2016, Parent filed a request for an expedited hearing with the Bureau of Special Education Appeals (BSEA) in which she challenged the Boston Collegiate Charter School’s (BCCS’s) determination that several disciplinary incidents were not manifestations of Student’s identified social-emotional disabilities. In her hearing request, Parent seeks findings that the alleged conduct at issue was a manifestation of Student’s disabilities. She also seeks expungement of those disciplinary incidents from Student’s school records, compensatory services for days that Student was allegedly unlawfully excluded from school, and various additional findings of fact and rulings of law. At the hearing, Parent requested an order directing BCCS to train staff in meeting the needs of children with social-emotional disabilities; however, the hearing request was not amended to incorporate this additional request for relief.

The School contends that the Manifestation Determination Reviews (MDRs) at issue correctly determined that Student’s behavior was not a manifestation of his disabilities, and that Student, therefore, is entitled to no compensatory services.

The BSEA granted the Parent’s request for an expedited hearing, and set an initial hearing date of June 23, 2016. On that date the hearing went forward, all testimony was completed, and all documentary exhibits were accepted into the record.

Throughout these proceedings, both Parent and BCCS were represented by counsel. Each party presented documentary evidence and examined and cross-examined witnesses. At the joint request of the parties, the matter was postponed to June 27, 2016 for telephonic oral closing arguments. Upon completion of the arguments on that date, the record closed.

The record in this case consists of the Parent's exhibits P-A through P-N, BCCS (School's) exhibits S-1 through S-21 and approximately six hours of electronically recorded testimony and argument.

Those present for all or part of the proceeding were:

Parent	
Student's Uncle	
Emily Charton	Middle School Principal, BCCS
Nadia Cyprien	Director of Student Support, BCCS
Jeff Bostic, M.D.	Psychiatrist, Mass. General Hospital (testified by speaker phone)
Tobi Afolyan	Student's paraprofessional (testified by speaker phone)
Whitney Schwartz, Esq.	Student's CRA attorney, Committee for Public Counsel Services (CPPS)
Marlies Spanjaard, Esq.	Director, EdLaw Project
Madison Leonard,	Intern, EdLaw Project
Danielle Lubin	Intern, BSEA
Jessica Rubin-Wills, Esq.	Attorney for Student
Colby Brunt, Esq.	Attorney for BCCS
Sara Cederholm, Esq.	Attorney for BCCS
Sara Berman	BSEA Hearing Officer

ISSUE PRESENTED

The issues for hearing are the following:

1. Whether BCCS incorrectly determined that certain conduct in which Student engaged during the 2015-16 school year was not a manifestation of Student's disabilities,
2. If BCCS' determinations were incorrect, whether Student is entitled to compensatory services for the resultant suspensions and exclusions from school;
3. If BCCS' determinations were incorrect, for which time period during 2015-2016 is Student entitled to relief.

POSITION OF PARENT

BCCS improperly suspended or otherwise excluded Student from school for a total of at least 21 school days during the 2015-2016 school year, as well as many additional hours, all for conduct that was a manifestation of his identified social-emotional disabilities. These disabilities, which including anxiety and attentional challenges, give rise to avoidant and oppositional behavior. Such behavior functions to remove Student from academic and social demands that he experiences as overwhelming.

BCCS conducted five separate manifestation determination reviews (MDRs) during the 2015-16 school year. Although each of these MDR's was conducted for similar types of behaviors, all of which were referred to in school-based evaluations and listed as "target behaviors" in Student's behavioral intervention plan (BIP), BCCS incorrectly determined in three of these MDRs that the behavior was not a manifestation of Student's disabilities. BCCS' argument that Student's behaviors were the product of willful choices designed to get Student removed from BCCS or avoid complying with teachers' directives, mischaracterizes the evaluations.

Further, BCCS improperly conducted "emergency removals" of Student for conduct that did not meet the regulatory criteria for emergency removal and "strongly urged" Parent to keep Student out of school for periods when he had not been suspended.

Finally, even after BCCS had identified Student's disabilities and developed an initial IEP in March 2016, it failed to implement its own Positive Behavior Support (PBS) Plan. There was no systematic oversight of the behavioral plan, and no positive incentives provided to Student. Instead, the School's reactions to Student's behaviors continued to be punitive.

As a consequence of its unlawful and improper exclusion of Student, BCCS owes Student compensatory services in the form of tutoring. Additionally, the BSEA should order BCCS to train staff in meeting the needs of students with emotional and behavioral disabilities.

POSITION OF SCHOOL

Parent's position is flawed both procedurally and substantively. First, BCCS had been concerned about Student's behavior from the start of the 2015-2016 school year or earlier, and had made several attempts to secure Parent's consent for an evaluation at that time. Parent refused to grant such consent until February 5, 2016 however. Until Parent provided consent to evaluate Student, Student had no entitlement to any of the disciplinary protections afforded to students with disabilities by federal and state special education law. Thus, the ten days of removal that would constitute a change in placement triggering these protections did not begin to accrue until after that date. No suspensions or other disciplinary removals from class prior to that date may be counted in determining what compensatory or other relief, if any, is owed to Student. Since the ten-day mark was not approached or reached until approximately May 27, 2106, only the MDR's held on that date and on June 8, 2016 may be considered in this proceeding.

Second, at all relevant times, BCCS correctly determined that the conduct leading to Student's suspensions did not constitute a manifestation of his disabilities. While there is no dispute that Student has a diagnosis of anxiety related to his ability to perform academically, as well as attentional challenges, much or most of his misconduct took place outside of the classroom, in the absence of any academic demands. Moreover, Student could immediately stop his misbehavior with certain individuals, even in stressful circumstances. This ability of Student to conduct himself appropriately in the presence of particular people is further evidence that he is in control of his inappropriate behavior.

Student did not want to attend BCCS and he willfully and consciously made behavioral choices that he believed would get him removed from that placement.

SUMMARY OF THE EVIDENCE

1. Student is twelve years old and has just completed the seventh grade at the Boston Collegiate Charter School. As of the date of hearing in this matter, the parties agree that Student will not be returning to BCCS for eighth grade, but instead will be attending an as-yet unspecified placement within the Boston Public Schools.
2. Student is described as an intelligent, articulate and charming young man with solid core academic skills. (Testimony of Charton, Cyprien, Bostic, Parent, S-3, S-4, S-6) Student's outside interests include video games, robotics, movies and socializing with friends. In school, Student is particularly interested in science and history. (S-4, S-6)
3. Beginning at the start of the 2015-2016 school year (seventh grade), Student began exhibiting increasingly problematic behavior in school, including, for example, disregarding or refusing to comply with teacher directives, leaving class frequently, failing to complete work, throwing items, wandering the halls, and escalating to using insulting and/or abusive language to school staff, refusing to attend class and barricading himself into an office. (Testimony of Charton, Cyprien, Afoyan, P-A, E, F, I, N; S-8, 9) There is no dispute that this behavior has interfered with Student's ability to make effective academic progress at BCCS. There also is no dispute that school-based evaluations conducted in March and May 2016 have determined that Student has social-emotional disabilities including anxiety and attentional difficulties which also impede his educational progress. (Testimony of Charton, Cyprien, Bostic, S-3, 4, 5, 6)
4. Student entered BCCS at the start of fifth grade (2013-2014 school year). At the time he entered BCCS Student had not been identified as a child with disabilities and did not have an IEP or §504 plan.¹ Student began having some mild behavioral concerns towards the end of sixth grade, and the BCCS Lower School staff offered to conduct an evaluation of Student. (Cyprien, Parent) Parent declined an evaluation at that time because she felt he “didn't need it.” (Parent) The record does not reflect either a formal referral or proposal to evaluate Student.
5. Behavior problems recurred at the beginning of seventh grade, consisting primarily of non-compliance with teacher requests, disrespectful language, leaving class, horseplay, talking in the hallways, and similar infractions. In addition to imposing multiple detentions and demerits, BCCS staff spoke repeatedly to Parent to discuss their concerns for Student and to encourage her to allow an evaluation. (Charton, Cyprien, P-A).

¹Student had an IEP between kindergarten and second grade for speech-language services to address articulation problems. (S-4)

6. On November 17, 2015, BCCS sent Parent an N-1 form (Notice of Proposed School District Action) in which it proposed conducting a full special education evaluation of Student consisting of psychological and educational assessments, a functional behavioral assessment (FBA), and classroom observation. As the School's reason for the proposal, the N-1 stated:

“[Student's] teachers, dean, principal and director of student support reviewed recent behaviors and academics in order to determine that due to his behaviors [student] is currently not accessing the curriculum and making effective progress...The team described recent behaviors includ[ing] continued struggle to remain in class, calling out, moving around building without permission, and general opposition [that] are impeding...teaching and learning. He is currently failing all of his classes. The Team reported that it is often a struggle to redirect [Student] in and out of class due to non-compliance.” (S-1)

7. Parent rejected the proposed evaluation on December 10, 2016. Parent testified that at the time, she felt that Student did not have a learning disability and, therefore, there was no need to have him evaluated. (Parent) Concerned that Parent's refusal to consent to an initial special education evaluation left BCCS with few avenues to assist Student, in January 2016 BCCS filed a Child Requiring Assistance (CRA) petition with the Juvenile Court. On February 5, 2016, following advice she had received from Student's CRA attorney, probation officer and Juvenile Court judge, Parent consented to a special education evaluation of Student. (Parent, Charton)
8. Between the start of the school year in September 2015 and the date Parent consented to the evaluation in early February 2016, BCCS imposed on Student a total of nine (9) days of out-of-school suspension and one (1) day of in-school suspension for infractions such as inappropriate behavior toward another student, failure to comply with school safety rules, and excessive detentions. (S-3)
9. BCCS conducted Student's initial special educational evaluation, consisting of a psychoeducational evaluation and functional behavioral assessment (FBA) in March 2016. (S-4, 5)
10. The psychoeducational evaluation was conducted on March 2, 4, 7 and 8 by BCCS school psychologist Paula Rengifo, M.S.Ed. and consisted of standardized cognitive and achievement testing, interviews with and questionnaires completed by teachers, Parent and Student, projective testing, classroom observations, and a review of Student records. (S-4)
11. Cognitive testing with the WISC-V revealed that Student had solidly average scores in all domains, with no significant variation among index scores or subtests. Student's academic skills as measured by the WIAT-III fell in the average to high-average

range in areas related to reading, listening and oral expression, average to low average in math, and average to low average in written expression. (S-2)

12. To examine Student's social-emotional functioning, the evaluator administered the Behavioral Assessment Scales for Children (BASC-II) to Student, Parent, and two teachers. Student's responses were "Clinically Significant" for "somatization" and "test anxiety." He reported feeling misunderstood by teachers and having difficulty relaxing and sleeping. (S-2)

The two teacher reports yielded ratings of "Clinically significant" or "At-Risk" in multiple categories, including "hyperactivity," "aggression," "conduct problems," "externalizing problems," "somatization," "attention problems," "school problems," "atypicality," "withdrawal," "study skills," "anger control," "bullying," "developmental social disorder," "emotional self-control," "executive functioning," "negative emotionality" and "resiliency." (S-2) Specific teacher responses to the BASC-II indicated that one or both teachers felt that Student had trouble controlling impulses, frequently broke rules, had attention problems, appeared disconnected from his surroundings, had trouble making friends, had difficulty adapting to changes, overcoming stress or adversity and maintaining his mood. Both teachers reported that Student could behave in a disruptive, intrusive or threatening manner to other students. (S-2) Parent's BASC-II responses identified few problem areas, but Parent did indicate that Student sometimes had health-related complaints, short attention span, distractibility, and difficulty adjusting to change or recovering from setbacks. (S-2)

13. The school psychologist's summary indicated that while Student had some minor academic needs (in the areas of math fluency and written expression), the major area of concern was his social-emotional functioning. The evaluator noted "marked behavioral challenges that are significantly impacting his ability to access academic content." The evaluator further reported that Student had an "inability to successfully use self-regulation skills to control his emotions" as well as his body, and that he received both positive and negative attention from his behaviors. She further noted that Student experienced "daily worry, restlessness, difficulty concentrating, and sleep disturbance" along with "psychosomatic symptoms that may evidently indicate an underlying emotional problem." In sum, the evaluator felt that despite Student's strong cognitive and academic profile, his "emotional and self-regulation difficulties are significantly interfering with his ability to perform; the data suggests that his symptoms are consistent with hyperactivity, inattention and anxiety." (S-2)

14. The evaluator made several recommendations, including outside mental health services, further evaluation of Student's social-emotional functioning, creation of an individualized Behavior Intervention Plan (BIP), mental health supports within the school day, and various classroom accommodations to help Student focus and address areas of weakness in work completion and writing. (S-2) Finally, the evaluator warned that "it is critical that [Student's] family seek to find him...therapy so that his mental health needs are addressed in going forward. If left untreated, [Student] may experience further decline in his functioning." (S-2)

15. On March 15, 2016, BCCS Middle School Principal Emily Charton sent an email to Parent stating that Student had been “extremely disruptive in multiple classes today. He was disrespectful to students, staff, and school property. Mr. Coleman [BCCS Dean of Students] will be reaching out with the suspension hearing information. Also, we will ensure that there is a manifestation determination meeting in place after the suspension hearing.” (S-9)
16. On the same date, as advised by Ms. Charton, BCCS served Parent with a Notice of Hearing to Consider Short Term Suspension, to take place on March 16, 2016. The factual basis stated for the suspension was “[Student] was inappropriate, non-compliant, and disrespectful to students, staff, and school property.” (S-8)
17. Attached to the notice was a list of 21 infractions that Student allegedly committed on March 15, 2016. Some examples of the behavior included refusing (with profanity) to pick chips up from the floor, leaving advisory class without permission, throwing a breakfast bag across the room, talking during announcements, kicking a wall, leaving a bag in the hallway and refusing to remove it, throwing a bag across the room to the trash can, interrupting and disturbing other students, calling another student a “(expletive) snitch,” refusing to leave the classroom when asked, and generally refusing to obey staff directives. (S-8)
18. Also on March 15, 2016, BCCS sent Parent a written invitation to a Manifestation Determination Meeting (MDR) that was to take place on March 16, 2016. (S-9)
19. As of these dates (March 15 and 16, 2016), the school psychologist had conducted the evaluation referred to above, but had not yet issued her report. The FBA had not yet been conducted. The Team meeting to consider Student’s eligibility for special education had not yet taken place, but already had been scheduled for March 23, 2016. (Parent, Charton, Cyprien, P-B)
20. Parent objected to having the MDR scheduled before the psychological report had been completed, but the School declined to postpone the MDR. (Mother)
21. The suspension hearing and MDR proceeded as scheduled on March 16, 2016. A report of the MDR issued on that date listed Student’s suspected disability as “Social Emotional and Attentional,” and noted that Student’s psychological evaluation was in process. The specific conduct listed on the notice was “used inappropriate language and tone toward staff; placed himself and others in physical harm by standing on the desk and jumping off, swore at another student and called him a “snitch,” and accrued 11 automatic detentions and 11 demerits.” (S-10)
22. The MDR report form initially bore a check mark next to the answer “yes” to the question “was the conduct caused by or have a direct and substantial relationship to the suspected disability,” but, in the section of the form entitled “Proposed Action,” stated “[i]t was determined that the conduct was not a manifestation of [Student’s] disability. (P-D, Charton) BCCS determined that the “yes” answer had been entered

in error, and reissued the form on the same date to answer the question “no.” (S-10, Charton)

23. Pursuant to the suspension hearing and MDR, Student was suspended out of school for two days, March 17 and 21, 2016.
24. On March 16, 2016 a team consisting of two of Student's teachers, the BCCS Middle School Principal, the Director of Student Support, the school psychologist who had conducted the psychological evaluation, and the Dean of Students conducted a Functional Behavioral Assessment (FBA) and developed a Behavior Intervention Plan for Student. (S-5)
25. At the time the FBA was completed, Student had received a total of 11 out of school suspensions (including the two days imposed as a result of the suspension hearing and MDR of March 16, 2016), two days of in-school suspensions, and 58 “automatic detentions” for the 2015-2016 school year, all imposed for various disruptive behaviors that increasingly interfered with Student's ability to complete schoolwork. (S-5)
26. The FBA report indicated that Student often was unable to acknowledge his misbehavior or take responsibility for it; rather, he was prone to blame others for his conduct. The FBA listed multiple “target behaviors,” including inappropriate behavior toward staff (e.g., walking away from conversation, informing staff that he would not follow a directive.), interruption of teaching and learning (refusing to complete tasks, complete work, follow directions, calling out, fidgeting with objects, swearing, laughing, writing on desk, etc.), and unsafe behaviors (sticking head out of window, leaving school without permission, grabbing objects from others, climbing on a desk and jumping off, and throwing items such as lunch bags and pens from a distance to the trash, blocking a doorway, throwing a backpack and leaving it in the hall, chasing and horseplay with other students, door-slamming, jumping and slapping walls or top door frame, and falling out of a chair during class.) (S-4)
27. According to the FBA, antecedents to the targeted behaviors included, for example, staff assistance or direction with a task, being required to do challenging tasks, seeking attention from peers, missed instruction due to bathroom breaks, redirections, assigned tasks, challenging tasks, large groups, distractions, and unstructured time. (S-4)
28. Prior interventions listed included detentions, suspensions, removal from class, disciplinary hearings, contact with family, conduct reports to family, and opportunities to conference with an adult, make up missed work, and write a reflection on the misbehavior. (S-4)
29. According to the FBA, the functions of Student's behavior were to avoid work or class, enable Student to engage in negative interaction with staff, seeking peer interaction, and gain control over Student's environment. (S-4)

30. The FBA report contained “Suggested Interventions/Behavior Plan” which recommended that staff not attempt to address all areas of need at once but, rather, to first target off-task behavior, defined as calling out, making noises, leaving his seat, throwing items, horseplay, work avoidance, and speaking to peers. The FBA team suggested that much of Student’s non-compliant and/or aggressive behavior occurred in response to being redirected when he was off task, and that if Student were successful in staying on task, these negative reactions would diminish. (Cyprien, S-5)
31. The report went on to recommend development of an incentive plan for on-task behavior, which would entail a daily joint review of behavior by Student and an identified staff member, focusing on what Student had done right that day rather than what he had done wrong. To ensure Student’s “buy-in” to the plan, the required frequency of desired behavior would be low and incentives relatively easy to earn, at least initially. (S-5)
32. Additional recommendations included encouragement of positive relationships with all staff, in school counseling and support to teach appropriate skills for gaining peer and staff attention, positive and private feedback about off-task behaviors, frequent acknowledgement of on-task behavior by teachers (perhaps at intervals), a structured plan for consequences including a consistent number of warnings across all settings, private feedback explaining the reason for a consequence such as a demerit, and private, in-the-moment discussion of problematic behavior. Finally, the FBA team recommended alternative transition plans to reduce distraction and frequent, regular, direct support and guidance for teachers by the Dean of Students, Director of Student Support or school counselor. (S-10)
33. On March 23, 2016, BCCS held the previously-scheduled Team meeting. The Team found Student eligible for special education and on or about March 30, 2016 issued an IEP covering the period from April 1, 2016 to April 3, 2017. The IEP indicated that Student’s eligibility was based on “Emotional Impairment and Attentional [disabilities]” In the section entitled “Key Evaluation Results Summary,” the IEP quoted extensively from the school psychologist’s conclusions, referred to above in Paragraphs 16 and 17. (S-3)
34. The proposed IEP contained goals in social skills (maintenance of appropriate boundaries and respectful language), coping skills (using appropriate skills to manage behavior and ask for help when frustrated), and organization. The IEP provided that Student would learn and work on these skills in counseling sessions, and then apply them in the classroom setting. (S-3)
35. The IEP service grid provided for 15 minutes per week of staff consultation in Grid A. In Grid B, Student would receive 7x45 minutes per day of support with “self-regulation” from a “behavioral aide/paraprofessional.” Grid C noted that Student would receive 5x51 minutes per week each of math and reading instruction and 5x10 minutes weekly of organizational support. (S-3)

36. Additionally, the IEP called for numerous accommodations, including preferential seating, private and/or non-verbal redirection, reduction of distractions, and the like. (S-3)
37. Finally, the IEP also contained a proposal for an extended evaluation consisting of a psychiatric assessment to “further explore [Student’s]” social-emotional functioning. Parent accepted the proposed IEP and placement on March 31, 2016. (Parent, Cyprien, S-11). On May 1, 2016, Parent also accepted the proposed extended evaluation (S-3, Parent)
38. Meanwhile, on the morning of March 30, 2016, before Parent had received the proposed IEP, BCCS informed Parent that Student was to be “emergency removed” based on behaviors that included refusing to enter his advisory room, running around hallways, attempting to enter other advisory rooms, refusing to follow directions, talking during announcements, screaming at and refusing to back away from a staff member who had given him a consequence for this behavior, throwing a full lemonade bottle against a bookcase, slamming a door, kicking the drink bottle around the hallway, and moving around the hallway flailing his arms and refusing to allow staff near him to help him de-escalate. (Parent, Charton, P-E)
39. BCCS informed Parent that Student would be suspended for two days per the “emergency removal” provisions of the BCCS Code of Conduct, that a suspension hearing and MDR would be held on March 31, 2016, followed by a family meeting to discuss implementation of the IEP on the following Monday (April 4, 2016). (P-E)
40. The MDR held on March 31, 2016 determined that the conduct of March 30, 2016 had a “direct and substantial relationship” to Student’s disability. Parent received and accepted the IEP at the MDR meeting. (S-11) Student returned to school on April 1, 2016, having missed 2 days due to the suspension. (Parent)
41. Student’s accepted IEP was put into place on or about April 4, 2016. As called for in the IEP, Student was placed in small group classes for reading instruction and math and was assigned a 1:1 paraprofessional to support him throughout the day, including in his mainstream classes. (Parent, Cyprien, Charton) The record contains no information about the training or qualifications of the paraprofessional or about his specific functions.
42. Initially, for about 1.5 weeks in early April, Student’s situation seemed to improve with implementation of the IEP. He was attending to task and doing schoolwork. (Parent, Charton, Cyprien) His behavior plan allowed him to use the computer as an incentive. Shortly, however, Student expressed concern about the 1:1 paraprofessional, complaining that he did not want someone with him all the time, especially when he used the bathroom. (Charton, Parent) At some point thereafter, BCCS hired a different paraprofessional, Mr. Tobi Afolyan, who remained in that position until the end of the school year. (Parent, Charton)

43. In or about mid-April 2016 Student's problematic behavior re-emerged, including swearing, posturing, and slamming doors. (Charton) Also, he began resisting leaving the computer.² (Cyprien)
44. On May 5 and 6, 2016 Student was involved in a series of behavioral incidents that ultimately resulted in another suspension hearing and MDR. The incidents included blocking his paraprofessional's access to the Student Support office, first with his body and then with chairs, refusing to show Mr. Afolyan his homework, refusing to stop playing computer games, hitting Mr. Afolyan's hand and using a racial epithet, and making insulting comments to Mr. Afolyan. (S-12) On the same day, another teacher reported that Student had grabbed her around the waist when she attempted to stop him from running in the hallway. On May 6, Student reportedly used insulting language (including racial slurs) to other staff. At some point during this period, Student accused an aide of touching him inappropriately. (S-12)
45. On May 6, 2016, BCCS issued a notice for a suspension hearing and MDR to take place on Monday, May 9, 2016. The conduct alleged included inappropriate comments to staff, placing his hands on a staff member, and making false accusations of misconduct against staff. (S-12, 13, 14)
46. The suspension hearing and MDR were held as planned on May 9, 2016, attended by Parent, Student's uncle, Ms. Cyprien, Student's school counselor, and the Dean of Students. The conduct alleged was determined not to be a manifestation of Student's disability. Student was suspended for 4 days (May 10, 11, 12 and 13, 2016). It is not clear from the record whether he also was suspended on May 9. (S-13, Charton)
47. The extended evaluation to which Parent had previously agreed took place on May 18, 2016 and was conducted by a Jeff Bostic, a licensed child psychiatrist who has been employed by Massachusetts General Hospital (MGH) for 22 years and who provides consultation services to over 90 school districts in Massachusetts. (Bostic)
48. Dr. Bostic's evaluation included interviews with Student, Parent and three BCCS staff, observation of Student in his science class, and review of school records. Based on his evaluation, Dr. Bostic concluded that Student "has struggled over the past two years as the academic and social demands continue to increase." (S-6) Dr. Bostic further noted that while Student reported and showed evidence of attentional problems,

"his most prominent 'pattern' now surrounds his underlying anxiety to avoid looking like he has any difficulty to others, and his consequent oppositionality so that he cannot fail at any task; he 'takes himself out of the game' so that he cannot fail or be exposed having any difficulty, most frequently through conflicts with staff.
(S-6)

² Parent had opposed using the computer as a reward for Student or allowing him to use it for anything other than school work because it was so difficult to move him from the computer to other activities. (Parent, Bostic)

49. Dr. Bostic's evaluation further stated that Student told different versions of events in order to save face. He noted that Student was "increasingly diverging from [peers'] academic performance," that he does not attempt to benefit from his smaller classes and 1:1 assistance and "now prioritizes avoiding doing tasks, such as regular schoolwork, where he feels different or less able, and distracts himself with computer activities...he will seek to do that which soothes/distracts him from underlying fears rather than face obstacles and partner with others to overcome those..." According to Dr. Bostic's report, Student "assails" or distances himself from adults who "impose tasks on him," and then blames them for, e.g., touching him "to shift the conversation away from...his reluctance to simply face the task at hand...He thus avoids being detected as 'behind' or struggling with any academic demand..." (S-6)
50. Student tells different versions of events to Parent and School staff; this has led to an "impasse" between Parent and School. (S-6, Bostic)
51. In both his report and testimony, Dr. Bostic stated that Student did not want to remain at BCCS; he felt that the school was too large, too fast-paced, and that staff were "out to get him." Finding the school setting to be "unworkable," Student "keeps everyone [Parent and School staff] fighting all day." (Bostic)
52. In Dr. Bostic's opinion, Student has multiple psychiatric disorders, including underlying anxiety and fear, mild ADHD, oppositional defiant disorder and worsening mood regulation. (S-6)
53. Regarding the oppositional defiant disorder, Dr. Bostic opined that "much of his avoidance of tasks is volitional, done, as he reports, because he does not want to be at this school." (S-6). In his testimony, Dr. Bostic elaborated that Student's oppositionality served to keep him "out of the game" at school and had become a "default" pattern. (Bostic)
54. Dr. Bostic concluded that the BCCS placement was not appropriate for Student, and that he required a "simpler, less complex environment given the magnitude of his social-emotional disability (this is not primarily manipulative, as his entire life actually works out quite poorly for him..." Such a placement would include a therapeutically sensitive setting, with self-contained classroom, structure, an ongoing behavioral component, direct instruction in organizational skills, multiple therapeutic staff, and a focus on keeping him engaged. (S-6, Bostic)
55. On May 18 and 19, 2016 Student's paraprofessional reported to Parent multiple incidents of work refusal and non-compliant behavior. (P-I, J) On May 20, BCCS reported that Student was running through the halls, not following instructions, cursing, screaming, and shaping his fingers like a gun and pointing them at others. Unable to reach Parent, BCCS had Student seen by the Boston Emergency Services Team (BEST), the Boston Police Department and Emergency Medical Services in an effort to calm him down. Eventually, BCCS arranged to have Student transported to Boston Children's Hospital where Parent met them. Children's Hospital cleared

Student for release and to return to school on the following school day (May 23, 2016) (Parent, Cyprien, Charton, P-K, L)

56. In an email to Parent dated May 23, 2016, Principal Emily Charton recommended that Parent keep Student out of school until after the Team meeting scheduled for May 25, 2016 based on the events of the prior week and Student “being unable to remain safe” at school. The email noted that this recommendation did not constitute suspension, and that “this is your [Parent’s] choice.” Ms. Charton offered tutoring for Student. Parent kept Student at home on May 24 and 25, 2016. (P-M, Parent, Charton)
57. On May 25, 2016 the Team reconvened to consider Dr. Bostic’s evaluation. In an N-1 form and proposed IEP issued on the same day, BCCS proposed changing Student’s placement to a “therapeutic sub-separate setting” within the Boston Public Schools. The “Nonparticipation Justification” section of the proposed IEP stated that “[Student] struggles in large settings and generally resorts to attention seeking behaviors, missed instruction, and incomplete classwork...The [smaller] therapeutic setting will allow for less distractions. [Student] will be able to access the counseling services as needed due to his significant oppositional difficulties. He will receive self-regulation instruction...in order to better manage his behaviors...” (S-7)
58. As of the hearing date, Parent had not yet responded to the proposed IEP and placement, the appropriateness of which are not at issue in this hearing.
59. In a notice dated May 25, 2016, BCCS informed Parent that a short-term suspension hearing would be held on May 27, 2016 based on allegations that Student had made inappropriate comments to several school staff. A suspension hearing and MDR were held on May 27, and BCCS found the behavior not to be a manifestation of Student’s disability and suspended Student for a total of five days, from May 27 through June 3, 2016. Student was offered the option of two hours of tutoring per day or being provided with schoolwork to complete at home. (S-17, Afolyan, Charton, Parent)
60. On June 8, 2016, BCCS held another suspension hearing and MDR based on several behavioral incidents that took place on June 6 including several incidents of swearing and abusive language directed at Mr. Afolyan, running through the school to try to escape Mr. Afolyan’s supervision, using staff computers without permission, being verbally abusive to Mr. Afolyan during a basketball game, locking Mr. Afolyan out of the school building, and other, similar actions. (Afolyan, S-18, 19)
61. The findings of the suspension hearing were that Student had engaged in a physical altercation with a staff member and with another student and also had engaged in unsafe behavior by locking a staff member out of the building and preventing re-entry. (S-20) The MDR team found that this behavior was not a manifestation of Student’s disability. Because BCCS considered the behaviors “an escalation of the same behavior that he has been suspended for previously,” Student was suspended for eight (8) days, from June 6 through June 15, 2016. Student was offered tutoring or the opportunity to do schoolwork at home. (S-19, 20)

62. Student returned to school on or about June 16, 2016. Over the next few days he took his final exams, and was able to complete them, with no behavioral incidents, while Parent sat with him. This was consistent with other occasions where staff observed Student instantly de-escalate his behavior while in the presence of certain authority figures including Parent, his CRA probation officer, Dr. Bostic, and BEST personnel. (Charton, Cyprien, Afolyan)
63. According to Parent, she received yet another suspension notice on June 21, 2016; however, the record contains no documentation or further testimony about such a notice. (Parent)
64. Student was suspended from school for a total of 9 days out of school and one day in school before February 5, 2016. From February 5, 2016 through June 15, 2016, Student was suspended out of school for 21 days and in school for one day for a total of 22 days.

DISCUSSION

After carefully reviewing the documentary and testimonial evidence in light of the relevant provisions of law, I reach the following conclusions in this case. First, Student became eligible for the procedural protections of the IDEA and G.L. c. 71B with respect to discipline on February 5, 2016, when Parent consented to a special education evaluation by BCCS. He remained subject to those protections from that point forward. Days on which Student was suspended before Parent consented to his evaluation do not “count” towards the ten-day threshold for a disciplinary change in placement.

Second, Student’s disciplinary removals from BCCS reached the ten-day threshold for a change in placement point on May 27, 2016. From that point forward, Student could not be suspended for conduct that had a direct and substantial relationship to his disability.

Third, all conduct that was the subject of manifestation determination reviews (MDRs) held on May 27 and June 8, 2016 (and previously) had a direct and substantial relationship to the Student’s identified disabilities; BCCS’ determinations to the contrary were incorrect. Finally, Since Student was suspended for thirteen (13) days between May 27 and June 15, 2016 as a result of these incorrect determinations, he is entitled to compensatory services corresponding to thirteen days of exclusion from school. My reasoning follows.

Pursuant to the IDEA at 20 USC §1415(k) and its implementing regulations at 34 CFR §§300.530-536, school districts may not change the placements of students with disabilities for disciplinary purposes (*i.e.*, via suspension or expulsion) if the conduct triggering the removal is a manifestation of the students’ disabilities, that is, was caused by, has a direct and substantial relationship to those disabilities. 20 USC §1415(k)(1)(E)(I); 34 CFR §300.530(e).

The statute and regulation consider that in most instances, a change in placement occurs when a child has been removed for more than ten consecutive days in a school

year or when “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)(2).

To be covered by the IDEA’s procedural protections in disciplinary matters, a student must either have been determined eligible for special education at the time the misconduct at issue occurs or, if the child has a disability but has not yet been found eligible, if the school district “knew or should have known if the child had a disability” before the behavior that triggered the disciplinary action occurred. 34 CFR §300.534(a). The “knew or should have known” standard may be satisfied under various circumstances, including if school staff expressed specific concerns about a pattern of behavior to the special education director or similar supervisory personnel. 34 CFR §300.534(b)(3). However, a school district is not deemed to have knowledge of a child’s disability if the child’s parent has not allowed an evaluation of the child. 34 CFR §300.534(c).

In the instant case, Student began demonstrating concerning behaviors in the latter portion of sixth grade (2014-15 school year), continuing into the beginning of seventh grade (2015-16 school year). Between September 2015 and February 1, 2016, Student had accumulated 9 days of out-of-school suspension and one day of in-school suspension, all for similar types of behavior. Additionally, BCCS administrative and special education supervisory staff had expressed specific concerns about this behavior and had urged Parent to consider an evaluation during the latter part of sixth grade and the beginning of seventh grade, and, eventually, in November 2015, made a formal proposal to evaluate Student.

The combination of multiple suspensions during a relatively short period, for similar behavior, arguably constituted a pattern of removals pursuant to the regulation cited above. Moreover, the School’s expression of concern (and eventual proposal of an evaluation) likely would have given rise to deemed knowledge by BCCS of Student’s disability by November 2015 at the latest. By rejecting the proposed evaluation, however, by operation of the regulation, Parent foreclosed the opportunity for the 9 days of suspension before February 5, 2016 to be counted towards the 10-day placement-change threshold. 34 CFR §300.534(c), *supra*.

Beginning on February 5, 2016, when Parent consented to an evaluation, Student was protected by the relevant portions of the IDEA and its regulations, even though he was not actually determined to be eligible for special education until March 23, 2016. 34 CFR §300.534. Once he was subject to IDEA protections by virtue of Parent’s consent to evaluate, any days of suspension would “count” towards a determination that the School had changed Student’s placement. Between February 5, 2016 and May 27, 2016 Student had accumulated 8 days of out of school suspension and one day of in-school suspension for a total of nine days. After the MDR and suspension hearings of May 27, which imposed a 5 day suspension, the total number of days rose to 13. The 8-day suspension

imposed on June 8, 2016 brought the total to 22 days (including a one-day in-school suspension). This total comprised a series of short suspensions, imposed at frequent intervals, for the same or similar behavior by Student. Clearly, by May 27, 2016 there was a pattern of removals constituting a change in placement and triggering the MDR requirement.

BCCS determined that the Student's conduct leading to the MDR of May 27, 2016, as well as the subsequent MDR held on June 8, 2016 was not directly and substantially related to his disabilities. This conclusion on the part of the BCCS is not supported by any credible evidence in the record. In fact, even if I completely disregard any arguments made by Parent on this issue, the overwhelming and uncontroverted weight of the School's own documents and testimony establish that the behavior addressed in each and every one of the five MDR meetings held during the 2015-16 school year was "directly and substantially related" to Student's disability.

There is no dispute that Student has emotional and behavioral disabilities, including pervasive anxiety, features of ADHD, Oppositional Defiant Disorder, difficulties with self-regulation with respect to mood and behavior, sleep difficulties, and somatic complaints. There is also no dispute that Student's concerning behavior has been avoidant, oppositional, and increasingly dysregulated. His behavioral difficulties have escalated during the course of the 2015-16 school year, but have not changed much in character.

Indeed, it was BCCS that first suspected that Student had emotional difficulties based on this behavior. It was BCCS that first urged Parent to have Student evaluated, and went to the length of filing a CRA petition when Parent initially refused to consent to an evaluation. It was BCCS' own school psychologist who documented Student's emotional and behavioral difficulties, explained how they impeded Student's educational progress, and expressed concern about Student's mental health. BCCS' initial IEP for Student relied heavily on the psychologist's report to develop goals, services and accommodations that focused almost exclusively on Student's emotional and behavioral needs.

Additionally, Dr. Bostic's report and testimony underscored the relationship between Student's pervasive anxiety, difficulties with self-regulation, inability to allow others to see his real or perceived weaknesses, and oppositional behavior. It is important to note that Dr. Bostic recommended placing Student in a therapeutic educational setting, and that BCCS adopted this recommendation in its second proposed IEP. Both Dr. Bostic and BCCS took the position that Student's behavioral difficulties could only be addressed in such a setting. If Student's behavior was not related to his emotional disabilities, there would be no reason to recommend a therapeutic educational placement

BCCS' position that Student's most recent behavioral episodes were willful choices, made for the purpose of getting out of a school placement that he dislikes, are simply unsupported by any clinical evidence. To interpret Dr. Bostic's comments that Student relies on oppositional behavior to escape from anxiety-producing tasks, from exposure of his weaknesses, and from his current placement to mean that Student—who

is only 12 years old-- makes conscious choices to misbehave in furtherance of a larger motive is simply not persuasive. Dr. Bostic was very clear that Student has genuine psychiatric diagnoses and needs a therapeutic placement, not that he is simply a willful child who needs more correction or punishment. Similarly, BCCS' argument that Student is able to "turn off" his behavior in the presence of certain adults indicates that his behavior is under his conscious control and unrelated to his disabilities is unsupported by any of the school's own evaluations or other evidence. It is very plausible that a Student feels supported, contained or even intimidated by the presence of his Parent, probation officer, or evaluator. This does not mean that he can "switch off" his misbehavior at any time. Finally, BCCS' argument that Student's behavior occurred outside of the potentially stressful situation of the classroom similarly is unsupported by the evidence. Dr. Bostic's report in particular indicates that Student's anxiety about being discovered as flawed, among other things, is pervasive, and does not stop at the classroom door.

CONCLUSION AND ORDER

BCCS' determinations on May 27 and June 8, 2016 that Student's behavior was not a manifestation of his emotional disabilities was incorrect. I conclude that the behavior that triggered this disciplinary action was, in fact, directly and substantially related to Student's disabilities. I further find that BCCS was not justified in imposing thirteen total days of suspension as a result of these improper determinations. Student is entitled to compensatory services corresponding to thirteen days of unlawful exclusion from BCCS. Within thirty days from the date of this Decision, the Team shall convene to determine the type of service as well as the time, manner and location of delivery that is appropriate for Student.

Finally, Parent has requested an order directing BCCS to expunge the record of discipline from Student's file. The BSEA has no authority under the relevant student record statutes or regulations to issue such an order. However, Parent may request to have this Decision added to Student's school records.

By the Hearing Officer:

Sara Berman

Date: July 5, 2016

