DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

---

on behalf of
Student, [1]

Petitioner,

v

Respondent.

Date Issued: April 15, 2010

Hearing Officer: Jane Dolkart

Case No:

Hearing Date: April 5, 2010
Room: 1

OSSE
STUDENT HEARING OFFICE
2010 APR 19 AM 8: 20

[1] Personal identification information is provided in Appendix A.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student presently in the grade at who is eligible to receive special education under the classification of Learning Disabled (LD) and Other Health Impaired (OHI, as a result of ADHD). The student's most recent IEP, dated February 4, 2009, provides the student with 15 hours per week of specialized instruction in an inclusion setting and one hour per week of occupational therapy (OT). On December 5, 2009, the student was found in the school bathroom. On December 7, 2009, the parent was sent a written expulsion notification informing her that the student was expelled from school for four days pending an expulsion hearing at which time respondent would make a determination on final expulsion. On December 15, 2010, convened a Manifestation Determination Hearing where the MDT Team determined that the student's drug use was not a manifestation of the student's disability. The parent and counsel were present at the hearing. Immediately following the Manifestation Determination Hearing, Respondent conducted an expulsion hearing and expelled the student. The student was placed in an alternative placement at

On February 2, 2010, Petitioner filed a Due Process Complaint (DPC) against respondent alleging that Respondent had violated the student's right to FAPE. The complaint alleged that the student was serving a 45 day suspension from The complaint did not contest the manifestation determination, nor did it indicate that the student had been expelled from Petitioner did not request an expedited hearing. An Amended Due Process Complaint was filed on March 8, 2010, and a Response was filed on March 17, 2010. The amended complaint alleged that the student had been denied FAPE because his conduct which led to his expulsion was a manifestation of his disability. The amended complaint also alleged that interfered in the student's ability to obtain FAPE at Options because failed to provide options with the student's assignments and textbooks, that failed to conduct an FBA or revise the student's BIP, and that the student's IEP was inappropriate.

A pre-hearing conference was held on March 3, 2010, at which time it became clear that had expelled the student, not suspended him for 45 days. A Prehearing Order was issued on March 14, 2010, in which Petitioner was ordered to file an amended complaint and a resolution meeting date was set. Petitioner did not request an expedited hearing at that time. A second prehearing conference was held on March 17, 2010, and an order was issued on March 21, 2010. A third prehearing conference was held on April 5, 2010, and an order was issued on April 6, 2010.

Petitioner requested an expedited disciplinary hearing on March 9, 2010. On March 11, 2010, Respondent filed an Opposition to Petitioner's Request for an Expedited Due Process Hearing. The Hearing Officer denied the request for an expedited hearing on

March 16, 2010, holding that Petitioner had effectively waived her right to an expedited hearing by waiting almost three months to file a complaint contesting the manifestation determination and the expulsion of the student. Upon further consideration, the Hearing Officer determined that a better reading of the IDEA Regulations at 34 CFR § 300.532 (c) required that an expedited hearing be held when there is a challenge to a manifestation determination and issued an Order Reversing Denial of Petitioner's Motion for an Expedited Hearing on March 30, 2010 In subsequent conversations with the parties it was agreed that the DPC would be bifurcated. An expedited hearing challenging the manifestation determination was held on April 5, 2010.

Motions

filed a Motion to Dismiss the Amended Complaint on March 19, 2010. Petitioner filed a response on March 23, 2010. On April 2, 2010, the Hearing Officer issued an order denying motion to dismiss.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.,* 34 CFR Part 300 *et seq.,* and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has denied the student FAPE by

1. Expelling the student for conduct related to his disability?

2. Failing to provide assignments and textbooks to his alternative placement at

3. Failing to conduct a Functional Behavioral Assessment (FBA) and revise the student's Behavioral Intervention Plan (BIP)?

4. Failing to develop an appropriate IEP?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated March 30, 2010, containing a list of witnesses with attachments P 1-23. The disclosure was admitted with the exception of P 11. Petitioner called as witnesses the student's mother, the student's educational advocate, and the student's Community Outreach Worker.

submitted a five day disclosure letter dated March 31, 2010, containing a list of witnesses with attachments R 1-27. The disclosure was admitted in its entirety. called as witnesses the student's special education teacher, a regular education teacher, the behavioral specialist, the executive director of and Dr. C. David Missar, an expert witness in clinical psychology.

V. FINDINGS OF FACT

1. This is a year old student presently in the eighth grade at who is eligible to receive special education under the classification of Learning Disabled (LD) and Other Health Impaired (OHI, as a result of ADHD). The student's most recent IEP, dated February 4, 2009, provides the student with 15 hours per week of specialized instruction in an inclusion setting and one hour per week of occupational therapy (OT). (P 12, Testimony of mother)

2. Petitioner does not contest the fact that on December 5, 2009, the student was found smoking marijuana with another student in the school bathroom. There are disagreements among the witnesses concerning the exact facts leading up to the smoking, but they are not relevant to this determination. (Complaint, Testimony of mother, educational advocate)

3. On December 7, 2009, the parent was provided a written expulsion notification informing her that the student was expelled from school for four days pending an expulsion hearing at which time respondent would make a determination on final expulsion. (P 5)

4. On December 15, 2010, convened a Manifestation Determination Hearing. Present at the hearing were Petitioner, Petitioner's attorney, Petitioner's educational advocate, the student, Petitioner's community support worker, the Executive Director of three or four of the student's teachers, behavioral specialist, school psychologist, and the SEC. (R 7)

5. At the hearing those present reviewed the student's IEP, FBA, BIP, report cards, evaluations, and behavioral incidents sheets. All personnel present at the hearing determined that the student's drug use was not a manifestation of the student's disability. All persons present on behalf of the student disagreed with this determination. (R 7, Testimony of mother, community support worker, educational advocate, Executive Director, behavioral specialist)

6. At the December 15, 2010, manifestation determination hearing, the parent was informed that an alternative placement had been arranged for the student at and the SEC at was made available by phone. (R 7)

7. Immediately following the manifestation determination hearing, an expulsion hearing was held and the student was expelled from which has a zero tolerance policy concerning the use of drugs on campus. The parent and educational advocate were at the

expulsion hearing. At the end of the hearing and later by mail, the parent was provide an Expulsion Notification informing the parent that the student had been expelled and providing the appeal process available to the parent. The other student caught smoking marijuana was not a special education student. He too was expelled. (R 8, Testimony of Executive Director)

8. The student was diagnosed with ADHD and has been receiving medication to treat his symptoms since that time. The student's symptoms manifest themselves at school in distractibility, lack of organization, disruption of the class, use of inappropriate language, and talking out of turn. Symptoms of ADHD include poor judgment and impulsivity. (P 6, R 17, 18, 20, 28, Testimony of

9. Two of the student's teachers and the behavioral management specialist testified. All of them have worked with the student extensively and all were credible witnesses. The student's teachers testified that the student is able to make sound decisions, is generally likeable, and is a leader, not a follower. They all agreed that the student can get agitated, does speak out of turn at times, and can use inappropriate language in class. None of them had experienced incidents in which the student had made poor judgments or seemed impulsive. (Testimony of

10. The physical education and health teacher testified that every year in health class student's are provided a 2-3 week program on substance abuse which has addressed the school's zero tolerance policy, the legal consequences of drug use and the health consequences of drug use. The students are also taught how to avoid peer pressure. (Testimony of

11. Dr. C David Missar testified as an expert in clinical psychology. Dr. Missar obtained his Ph.D in clinical psychology in 1993 and did a postdoctoral fellowship at the National Institute of Mental Health from 1993-1995. He has been in private practice since 1993, and for eight years both as an employee and by contract worked for the Youth Forensic Services Division, D.C. Commission on Mental Health Services. Dr. Missar has conducted thousands of psychological assessments, including many of students with special education needs. He has worked with thousands of students with ADHD. Dr. Missar has impressive credentials and was a credible witness. His testimony was given great weight.

Dr. Missar reviewed Respondent's entire document submission, including the student's IEP, FBA, BIP, individual progress reports, evaluations, and behavioral incident reports. He reviewed R 6-8 concerning the manifestation determination in this case. Dr. Missar has never met the student.

Dr. Missar agreed that students with ADHD can be impulsive, inattentive, and easily distracted in the classroom. He explained that the ADHD reactions happen immediately in response to some trigger without any mediating thoughts. However, Dr. Missar testified that smoking marijuana involves a degree of pre-planning, cognitive decision-

making not consistent with ADHD. This is particularly the case where the student has been taught the importance of not using drugs.
Dr. Missar testified and the hearing officer adopts as a factual finding that drug use is not directly related to ADHD, that there is no direct nexus between ADHD and drugs. That is, ADHD does not cause drug use. Dr. Missar also testified that ADHD does not make someone more susceptible to peer pressure. Susceptibility to peer pressure is a symptom of adolescence.

(Testimony of Dr. Missar)

12. Petitioner testified that the student was in the process of increasing and changing his medication around December 5, 2009, and that the student had not taken his medication on December 5th. Dr. Missar testified that ADHD drugs have a short half life and that the student would often be without the effect of the medication in a normal day. Failure to take medication would increase the behaviors he already engaged in, not cause new behaviors. (Testimony of mother, Dr. Missar)

12. Petitioner failed to present even a single witness with any expertise in clinical psychology. Furthermore, two of the three witnesses barely knew the student at the time of the conduct at issue. The educational advocate had known the student for one week when she attended his manifestation hearing, the community support worker had known the student for two weeks when he attended the hearing. Neither witness presented any evidence supporting a finding that the student's drug use was directly related to his ADHD. (Testimony of mother)

13. The student's mother's testimony was consistent with that of his teachers and Dr. Missar in describing the student's behaviors as a result of his ADHD. She did not testify to any behaviors by the student that would be consistent with his drug use. (Testimony of mother)

14. The record contains many incident reports concerning inappropriate behavior by the student in school. All of the reports are consistent with the testimony of the student's teachers and Dr. Missar. None provide evidence that the student had poor judgment or was impulsive in ways other than being disruptive and having outbursts in the classroom. (R 20, 28)

15. Petitioner did not contest the fact that the student's February 5, 2009 IEP was being implemented by There is ample evidence in the record to support the fact that it was being implemented.

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.,* guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare

them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

> Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency…, (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEAs guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16,* 331 IDELR 10 (3rd Cir. 1988).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005).

A. Was the student's behavior in smoking marijuana in the school bathroom a manifestation of his ADHD?

1. Legal Framework

The IDEA and its implementing regulations lay out in detail the circumstances under which a student with a disability who violates a code of student conduct may be subject to a change in placement. A change in placement occurs, *inter alia,* if the removal is for more than 10 consecutive school days. 34 CFR § 300.536. A child with a disability who is removed from his current placement must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals of his IEP. *Id* at 300.530(d)(1)(i).

Within 10 school days of a decision to change the placement of a child with a disability because of violation of a code of student conduct, the LEA must conduct a manifestation

determination to determine if the student's conduct is a manifestation of his disability. Participants in the manifestation determination must include the LEA, the parent and the relevant members of the student's IEP team. The participants must review all relevant information in the student's file, including his IEP and teacher observations and relevant information provided by the parent. *Id* at 300.530(e)(1). The conduct will be found to be a manifestation of the child's disability if:

> (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.
>
> *Id* at 300.530(e)(1)(i) & (ii)

If the conduct is determined to be a manifestation of the student's disability, the LEA must return the student to the placement from which the student was removed. *Id* at 300.530(f)(2). Under certain circumstances, including possession or use of illegal drugs, the LEA may remove a student to an interim alternative placement for not more than 45 school days even if the student's conduct is a manifestation of his disability. *Id* at 300.530(f)(2)(g).

If a student with a disability engages in behavior violating a school conduct code and it is determined that the behavior is not a manifestation of the student's disability, school personnel may apply the same disciplinary procedures in the same manner and for the same duration as would apply to a student without a disability.

Thus, if this student's behavior is found to be a manifestation of his disability, he must be returned to However, if this student's behavior is found not to be a manifestation of his disability he may be expelled so long as the same discipline would be applied to a student without a disability.

2. Application of Law to Facts

First, it is useful to state what this case is not about. Petitioner has not challenged the fact that the student smoked marijuana in the school bathroom. Second, Petitioner has not argued that the student's conduct was a direct result of the school's failure to implement the student's February 5, 2010 IEP. Third, Petitioner has not challenged the procedures by which the manifestation determination and expulsion were made. The sole issue in this case is whether the student's conduct was caused by, or had a direct and substantial relationship to the child's disability.

Petitioner has provided no credible evidence that suggests that the student's conduct was caused by, or had a direct and substantial relationship to the child's disability. Respondent, on the other hand, has provided ample evidence that the student's ADHD does not manifest itself in poor judgment or the kind of impulsivity that would lead to

smoking marijuana. Dr. Missar, an acknowledged expert in the field of clinical psychology with impressive experience in treating special education students and/or student's with ADHD provided convincing testimony that the student's conduct was not related to his ADHD.

Petitioner has failed to meet her burden of proof and manifestation determination and the student's consequent expulsion are upheld.

B. The Remaining Issues in the Due Process Complaint

Following the conduct of this hearing, a third prehearing conference was held on April 9, 2010. A prehearing order was issued on April 12, 2010. The purpose of the conference was to determine the viability of the remainder of the issues in the complaint and how to proceed if any were viable. At the end of the conference Petitioner indicated that she intended to withdraw the remainder of the complaint. A letter of withdrawal was received on April 12, 2010, and the remainder of the due process complaint will be dismissed.

VII. SUMMARY OF RULING

The student's conduct was not a manifestation of his disability and the manifestation determination is upheld, as is the expulsion of the student from

VIII. ORDER

It is hereby **ORDERED** that

1. The entire complaint is dismissed with prejudice

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: April 15, 2010