

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on October 23, 2014², at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.³

BACKGROUND AND PROCEDURAL HISTORY:

The student is receiving special education and related services, pursuant to the IDEA with a classification of emotional disturbance (“ED”).

During school year (“SY”) 2013-2014 the student attended a District of Columbia public charter (“School A”). DCPS is the local education agency (“LEA”) for School A.

The student’s October 3, 2013, individualized educational program (“IEP”), developed at School A. During SY 2013-2014 the student was excessively truant and was referred by School A to D.C. Superior Court for truancy. Because of the student’s continued truancy on March 5, 2014, School A dropped the student from its roster. The parent unsuccessfully attempted to enroll the student in another school then eventually called School A and reenrolled the student in School A on April 7, 2014. The student attended School A school for a short time after she was reenrolled and then the student’s parent withdrew her and enrolled her in another public charter school (“School B”) prior to the end of SY 2013-2014. The student currently attends School B.

On September 30, 2014, Petitioner filed this due process complaint. Petitioner asserts that following an incident on March 5, 2014, at School A and based upon truancy and behavioral infractions the student was dropped from the School A roster until April 7, 2014, without a manifestation determination review (MDR) to determine whether the behavior that led to her, “defacto expulsion” when she was removed from the school’s roster was a manifestation of her primary ED disability. Petitioner also alleges a functional behavior assessment (“FBA”) was not conducted at the time as was warranted and no interim or alternative placement was provided to the student. Petitioner seeks as relief and order directing DCPS fund a FBA and compensatory education and a credit recovery program.

DCPS filed a timely response to the complaint on October 10, 2014. DCPS denied any alleged violation(s) and or denial of a Free Appropriate Public Education (“FAPE”). DCPS asserts the

² This expedited hearing was conducted within twenty (20) school days of the date the complaint was filed and the Hearing Officer’s Determination (“HOD”) is issued in ten (10) school days of the date of the hearing.

³ One hearing was held for two separate cases involving the same student and parties. This HOD pertains to the single issue in the case # 2014-0420 that was subject to an expedited hearing and decision. The HOD pertaining to the other issues that were adjudicated at the October 23, 2014, hearing are the subject of a forthcoming HOD that will be rendered within the 75 day required timeframe from when the complaint in that case (2014-0395) was filed.

student was not suspended during SY 2013-2014 and DCPS was not required to convene an MDR meeting for the student. The student was absent for greater than 50% of the school year and on or about January 10, 2014, School A initiated the truancy process. After 20 consecutive absences the student was withdrawn from school because of her attendance on or about March 5, 2014. The student reenrolled at School A on April 8, 2014. The school convened a meeting on April 8, 2014 and developed a truancy intervention plan.

DCPS filed a pre-hearing motion to dismiss and Petitioner filed an opposition. This Hearing Officer declined to rule on the motion as a pre-hearing matter and stated at the outset of the hearing that the motion would be decided after presentation of evidence and addressed in the HOD. This Hearing Officer concludes now that DCPS' motion is addressed in the findings of fact and conclusions of law and the decision on the merits thereby rendering the pre-hearing motion moot.

ISSUE: ⁴

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to conduct a MDR and a FBA and provide an alternative placement upon the student being removed from the school roster on March 5, 2014.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 26 and Respondent's Exhibits 1 through 7) that were all admitted into the record and are listed in Appendix A.⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁶

1. The student _____ is receiving special education and related services, pursuant to the IDEA with a classification of ED. (Petitioner's Exhibit 15-1)

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁵ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁶ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

2. During SY 2013-2014 the student attended a School A. DCPS is the LEA for School A. The student's October 3, 2013, IEP developed at School A required that she receive 25 hours per week of specialized instruction outside the general education setting, 120 minutes per month of speech/language services outside the general education setting and 160 minutes per month of behavioral supports outside of the general education setting. (Petitioner's Exhibit 15-1, 15-12)
3. The student's October 2013 IEP includes emotional, social and behavioral development goals that address her inattention and off task and impulsive behaviors that can be perceived by others as oppositional or uncooperative. The IEP does not mention truancy or non-attendance to class or school as a problem area for the student at the time the IEP was developed. During the student's October 2013 IEP meeting the student's parent participated by telephone and it was noted that the student has some attendance problems. (Parent's testimony, Petitioner's Exhibit 15-10, 15-11, 15-15, Respondent's Exhibit 4)
4. Whenever the student was absent School A telephoned the student's home to inform the parent the student was absent. The calls were made automatically through a computer system and would deliver the notification if the phone was answered or leave voicemail if no one answered. (Witness 1's testimony, Respondent's Exhibit 5-8, 5-9)
5. The student began attending School A at the start of SY 2013-2014 and attended the first ten school days of the without any absences. The student then had 9 unexcused absences between September 10, 2013, and September 30, 2013. The student had 4 unexcused absences during October 2013. The student had three unexcused absences in November 2013. The student had 4 consecutive unexcused absences the first week of December 2013. (Respondent's Exhibit 5-2, 5-3, 5-4)
6. The student missed days from school sometimes did not go to school because she did not like School A particularly its dress code and rules and regulations. The student was on occasion sent home from School A because of her behavior but the student is not sure how often. When she was sent home she was provided a street pass so that she would not be considered truant if she were stopped on way home by truancy officials. The student is uncertain of how many times she was provided a street pass by School A. (Student's testimony)
7. On December 20, 2013, the School A principal sent a letter to the student's parent stating the student had accumulated ten unexcused absences and notifying the parent the student was now considered chronically truant and pursuant to the District of Columbia ("D.C.") attendance laws the student was being referred to D.C. Child Family Services Agency ("CFSA") and both the student and the parent would be referred to "Court Social Services, as is required by [D.C.] attendance laws." The letter urged the parent to contact the school's attendance team immediately. (Petitioner's Exhibit 3)
8. The student's attended school the rest of December 2013 and during the first week of the second semester. However, starting on January 14, 2014, through the end of January

2014 the student accumulated 8 unexcused absences. On January 10, 2014, School A initiated a truancy referral for the student to D.C. Superior Court. The referral form indicated the student had been truant 21 days between August 26, 2013, and December 20, 2013. The form stated the interventions that had been attempted including telephone calls to the student's home, sending a certified letter to the student's home, referral for in school counseling and an attendance committee and referral to CFSA. (Witness 1's testimony, Respondent's Exhibits 5-1, 5-2, 7)

9. The student failed to attend school at all from January 31 2014, through March 5, 2014, and accumulated a total of additional 18 unexcused absences during that period. (Respondent's Exhibit 5-1)
10. On March 5, 2014, because the student had not attended school and had been referred to D.C. Superior Court for truancy, consistent with policy in the School A handbook the student was dropped from the School A roster. Although the student was officially dropped from the school roster because of her non-attendance the student's absences were not considered violations of the School A's code of conduct and she did not receive any disciplinary actions because of her truancy. (Witness 1's testimony, Respondent's Exhibit 6)
11. In February 2014 when the student was not attending school the School A special education coordinator spoke the student's parent about the student's non-attendance and the parent stated the student did not like School A was therefore not attending. When the student was dropped from the School A roster because of her non-attendance the student's parent simply needed to come to School A for the student to be re-enrolled. When the parent came to School A on April 7, 2014, the student was re-enrolled and the School A developed an a attendance behavior intervention plan ("BIP") for the student. The parent and student participated in creating the BIP for attendance. The student attended School A sporadically thereafter but did not complete the school year at School A. (Witness 2's testimony, Respondent's Exhibit 3)
12. The student's parent remembers that the student brought home a letter from School A stating they dropped her from the roster due to truancy. The parent asserts the school policy was not explained to her before the student was dropped from the roster. The student remembers coming to School A and not being able to attend because of her absences. The student's parent attempted to enroll the student in other schools but was unsuccessful. The parent then telephoned School A and was informed that the student could be reenrolled and the student's parent did so on April 7, 2014. After the student was reenrolled at School A she attended for approximately one week before the student's parent withdrew her and enrolled her in School B. (Parent's testimony)
13. During SY 2013-2014 the student thinks that she was suspended from School A twice but she is not sure when or for how long. The student's parent remembers the student being suspended from school for two days near the end of SY 2013-2014 because of an altercation with another student. (Student's testimony, Parents testimony)

CONCLUSIONS OF LAW:

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 a 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. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means 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 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 Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to conduct a MDR and a FBA and provide an alternative placement upon the student being removed from the school roster on March 5, 2014.

⁷ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student being dropped from the School A roster for truancy – her failure to attend school - was a removal or a change in placement for a violation of a code of student conduct that necessitated a MDR, a FBA or BIP pursuant to the requirements 34 C.F.R. § 300.530 et seq.⁸

⁸ 34 C.F.R. § 300.530: School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under Sec. 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must--

(i) Continue to receive educational services, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Sec. 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(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.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

The evidence in this case demonstrates that when the student was excessively truant School A notified the student's parent by phone calls and then by a letter warning her that the student was considered chronically truant and that the student was being referred to CFSA for her truancy. Following this notification the student began to attend school more regularly. However, in January 2014, the student absences resumed and the student was referred to D.C. Superior Court for truancy.

The evidence demonstrates that the parent had a conversation with the school staff about the student's truancy and the parent simply explained that the student did not like the school. Eventually, after the student had failed to attend school for the entire month of February 2014 she was dropped from the school roster for non-attendance. The evidence indicates that the parent could have come to the school to reenroll the student but only did so after she was unable to enroll the student anywhere else and then telephoned School A and the student was immediately re-enrolled and an attendance behavior intervention plan was developed. Nonetheless, after being re-enrolled the student still attended sporadically and within a week the parent enrolled the student in another school.

First, the evidence demonstrates that the student was not removed from school as is required in order for the protections pursuant to 34 C.F.R 300.530 et seq. to apply. Rather, the student failed to attend school of her own volition. The student acknowledged she simply did not like attending School A because of its rules and regulations including its dress code. The student did not attend school for the entire month of February 2014 after she had already been referred to DCPS Superior Court for truancy in January 2014.

Secondly, there was no evidence the student being dropped from the School A roster was in fact a change in placement. The student was simply told when she came to school she had been dropped from the roster because of her non-attendance. The evidence demonstrates

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- (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.
 - (g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--
 - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
 - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
 - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.
 - (h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504.
 - (i) Definitions. For purposes of this section, the following definitions apply:
 - (1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).
 - (2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
 - (3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
 - (4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

that had the parent simply called or come to the school as she did in early April 2014, the student would have been immediately reenrolled. The Hearing Officer concludes that under the facts of this case there was no change in placement.

Thirdly, there was insufficient evidence presented from which the Hearing Officer can conclude that the student's truancy was a violation of School A's student code of conduct. The evidence demonstrates that the student did not receive any disciplinary actions related to her absences. Although there was evidence that it is School A's policy to eventually drop a student from the school roster for failure to attend, there was insufficient evidence that the stated policy was related to a student code of conduct such that it would be considered a behavioral infraction as is alluded to in the regulations that require that a MDR, FBA, BIP be conducted pursuant to 34 C.F.R. 300.530 et seq.

Accordingly, this Hearing Officer concludes that Petitioner did not sustain the burden proof by a preponderance of the evidence that the student was denied a FAPE as result of being dropped from the School A roster on March 5, 2014, because of her non-attendance.

ORDER:

The due process complaint in this matter is hereby dismissed with prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the 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).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: November 6, 2014