

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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PETITIONER, on behalf of
[STUDENT],¹

Date Issued: December 29, 2010

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: December 17, 2010

Respondent.

Student Hearing Office, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

BACKGROUND

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In his Due Process Complaint, the Petitioner alleges that District of Columbia Public Schools ("DCPS") violated the IDEA by not convening a Manifestation Determination Review ("MDR"), when DCPS suspended Student for

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Personal identification information is provided in Appendix A.

more than 10 school days following an August 2010 disciplinary incident. In addition, Petitioner alleges that DCPS has failed to develop a Behavior Intervention Plan ("BIP") for the Student. Petitioner seeks an order requiring DCPS to convene an MDR meeting and to prepare a BIP, and an award of compensatory education.

The Student, an AGE adolescent, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Specific Learning Disability ("SLD"). The Petitioner's Due Process Complaint, filed on November 1, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 2, 2010. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

The due process hearing was held before the undersigned Impartial Hearing Officer on December 17, 2010 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner and the Student appeared in person and were represented by counsel. Respondent DCPS was represented by counsel. The Petitioner called as his only witness PSYCHOLOGIST, who testified by telephone. DCPS called no witnesses. Petitioner Exhibits P-1 through P-22 and DCPS Exhibits R-1, R-5, R-6, and R-7 were admitted into evidence without objection. DCPS did not offer Exhibits R-2, R-3 and R-4, which it had included in its prehearing disclosure.

ISSUES

1. Whether DCPS violated the IDEA by not convening a Manifestation Determination Review ("MDR") when it suspended Student for more than 10 school days after an August 2010 disciplinary incident.

2. Whether DCPS denied the Student a Free Appropriate Public Education (“FAPE”) by failing to develop a Behavior Intervention Plan (“BIP”) for her.

3. Whether Student is entitled to an award of compensatory education.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia.
2. Student’s DCPS attendance records for the 2009-2010 and 2010-2011 school years show well over 100 days of disciplinary suspensions and numerous additional unexcused absences. Exhibit P-12
3. Psychologist completed a Comprehensive Psychological Evaluation of Student on April 4, 2010. In her report, Psychologist recommended, *inter alia*, that Student should receive a Functional Behavioral Assessment, based upon which a BIP should be developed. Exhibit P-12
4. Psychologist completed a Functional Behavioral Assessment of Student on April 20, 2010. Exhibit P-13
5. DCPS has never developed a BIP for Student.
6. Petitioner filed two prior complaints for due process in June 2010, in which he alleged, *inter alia*, that DCPS had denied a FAPE to Student by its failure to identify her as a child with a disability. Exhibit R-6
7. In a Hearing Officer Determination dated September 6, 2010, Impartial Hearing Officer Virginia A. Dietrich determined, *inter alia*, that Student was eligible for special education services under the disability classification Specific Learning Disability. Exhibit R-6

8. Hearing Officer Dietrich also determined, *inter alia*, that DCPS had denied Student a FAPE by failing to convene an MDR meeting when Student was suspended from MIDDLE SCHOOL on March 24, 2010. Exhibit R-6

9. Student was last found eligible for specialized instruction and related services on November 4, 2010 as a qualified child with a Specific Learning Disability. Exhibit P-9

10. Student is enrolled in GRADE at SENIOR HIGH SCHOOL ("SHS") for the 2010-2011 school year. Exhibit P-9

11. On September 17, 2010, following a fighting incident in August 2010, DCPS ordered Student suspended from SHS from September 1, 2010 to February 24, 2010. She was to serve the off-site suspension at OFF-SITE SCHOOL. Exhibit P-15

12. DCPS did not schedule or conduct a Manifestation Determination Review (MDR) meeting to determine if the Student's August misconduct was caused by or had a relationship to her disability, or was a result of any failure by DCPS to implement her IEP. Stipulation by DCPS Counsel Prior to the due process hearing, DCPS curtailed the Student's off-site suspension and she returned to classes at SHS. Exhibit P-16

13. On November 22, 2010, DCPS issued a Letter of Invitation ("LOI") to Petitioner to attend an MDR meeting. Exhibit P-17 Petitioner and/or his attorney was unavailable for the three dates proposed by DCPS. Exhibit P-18 During the due process hearing on December 17, 2010, Petitioner, Petitioner's attorney and DCPS agreed to convene an MDR on January 7, 2011.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as

well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. FAILURE TO CONDUCT AN MDR

At the hearing, DCPS did not dispute that it had failed to conduct an MDR following the August 2010 disciplinary incident. The IDEA and D.C. Regulations require that within 10 school days of any decision to change the placement of a child with a disability, including removal of the child for more than 10 consecutive school days, the LEA, the parent and relevant members of the child's IEP Team must conduct an MDR. *See* 34 CFR §§ 300.530(e), 300.536(a)(1); D.C. Regs tit. 5-B, § 2510.9. Impartial Hearing Officer Dietrich issued a Hearing Officer Determination on September 6, 2010 that Student was a child with a disability. The Student's suspension to Off-Site School was a change of placement. Therefore, at the time DCPS expelled Student from SHS on September 17, 2010, she was entitled to the protections afforded students with disabilities under 34 CFR § 530, *et seq.*, including an MDR. The Petitioner has met his burden of proving that, by failing to conduct an MDR when it suspended Student for more than 10 school days in September 2010, DCPS violated the IDEA and the D.C. Regulations.

2. FAILURE TO DEVELOP A BIP

The IDEA requires in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). In her April 4, 2010 Comprehensive Psychological Evaluation, Psychologist noted that Student had problems with disciplinary suspensions as well as frequent absences from her classes and reported that Student was at risk for further misconduct without intervention.

Psychologist recommended that a BIP be completed for Student to pinpoint exactly how Student's behaviors would be handled when they occurred. In her testimony at the due process hearing, Psychologist opined that with her frequent suspensions, Student was missing out on education and social relationships at school. She opined that Student cannot be successful in school without a BIP. The Student's Multidisciplinary Team ("MDT Team") met on November 5, 2010. Although the team agreed that Student would receive Behavioral Support Services for 45 minutes per week, the team did not develop a BIP. I find that the evidence establishes that Student's behaviors impede her learning and, consequently, pursuant to 34 CFR § 300.324(a)(2)(i), that DCPS must develop and implement a BIP directed at producing positive changes in Student's behavior.

In addition, the IDEA requires that if the MDR Team makes the determination that the misconduct of a child with a disability was a manifestation of the child's disability, the IEP Team must 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. *See* 34 CFR § 300.530(f)(1). In this case, prior to the due process hearing, DCPS curtailed the Student's suspension and returned her to her IEP placement, without conducting an MDR. There has been no determination that the August 2010 fighting incident was, or was not, a manifestation of Student's disability. In my Order herein, I will require that if the MDR team determines that Student's August 2010 disciplinary incident, which resulted in her suspension, was a manifestation of her SLD disability, DCPS shall engage Psychologist to update Student's FBA, which shall be used to develop and implement the BIP.

3. COMPENSATORY EDUCATION

It is undisputed that DCPS violated the IDEA, 20 U.S.C. § 1415(k), by its failure to conduct an MDR at the time it ordered Student's suspension on September 17, 2010. Under 34 CFR § 300.532(b), if there has been a violation of the MDR requirement, the Hearing Officer may return the child to the placement from which she was removed. In this case, before the hearing, DCPS already curtailed Student's suspension and returned her to her IEP placement. As a further remedy, Petitioner seeks an award of compensatory education for the Student.

The IDEA gives courts "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir.2005). The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 [D.D.C. 2006]; *Reid*, 401 F.3d at 527.)

The record in this case contains no evidence of Student's unique educational needs to allow the Hearing Officer to craft a compensatory education award that is reasonably calculated to place Student in the position she would have been in but for the denial of FAPE. *See Mary Mcleod Bethune Day Academy v. Bland*, 534 F.Supp.2d 109, 117 (D.D.C. 2008). At the hearing in this case, the Petitioner's only witness was Psychologist, who assessed Student in April 2010. Petitioner offered no factual evidence to show (a) that the August 2010 disciplinary incident was

a manifestation of Student's disability, (b) how long the Student was actually suspended,² (c) what position Student would have occupied had DCPS conducted an MDR or developed a BIP, or (d) what if any educational benefits the Student lost due to DCPS's failure to conduct the MDR or develop a BIP. Petitioner cites *Henry v. District of Columbia*, Civil Action No. 09-1626 (D.D.C. Nov. 12, 2010) for the statement that, "Under the IDEA, if a disabled student is denied special education services, he is entitled to compensatory education." Petitioner contends that the *Henry* decision holds that a compensatory education award is automatic if there has been a denial of services. However, as U.S. District Judge Walton noted in *Henry*, "the task of 'designing [the student's] remedy will require a fact-specific exercise of discretion by either the district court or a hearing officer.'" *Id.* (quoting *Reid, supra*, 401 F.3d at 524). Here the record contains no facts upon which to design a compensatory education remedy. Therefore, any such award would be arbitrary and speculative, not an "individually-tailored approach to meet the student's unique prospective needs." *See Mary Mcleod Bethune Day Academy, supra*. The Petitioner's request for compensatory education must be denied.

SUMMARY

In summary, I find that Petitioner has met his burden of proof to establish that DCPS violated the IDEA by not conducting an MDR when it suspended Student in September 2010. In addition, Petitioner has established that the IDEA mandates that Student's IEP team develop an appropriate BIP to address Student's problem behaviors. The Petitioner's request for compensatory education fails for lack of relevant evidence.

² The record indicates that by November 3, 2010, Student's MDT Team had decided to end her suspension at Off-Site School and return her to her "Home School." *See* Petitioner's Exhibit 16.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

Within 10 school days of this Order, DCPS shall conduct a Manifestation Determination Review to determine if the Student's conduct which led to her September 2010 suspension was caused by or had a direct and substantial relationship to her disability or was the direct result of the LEA's failure to implement her IEP. If the determination is in the affirmative, DCPS shall promptly arrange for Psychologist to update her April 2010 FBA. Within 20 school days of this Order, DCPS shall develop and implement a BIP for Student. All other relief requested by the Petitioner in his Complaint for Due Process is denied.

Date: December 29, 2010



Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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