

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

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

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year-old male, who attends _____ grade at a DCPS middle school.

On December 16, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to review Student's IEP upon Parent's request, failed to provide access to Student's records, failed to convene a manifestation meeting, and failed to provide an interim alternative placement. As relief for these alleged denials of FAPE, Petitioner requested a finding in its favor, funding of an independent psychiatric evaluation and an independent functional behavior assessment ("FBA"), an IEP meeting to review the evaluations, and either a discussion and determination of compensatory education at the ordered IEP meeting or funding of an independent evaluation to determine appropriate compensatory education.

On December 27, 2011, DCPS filed its Response to the Complaint, asserting therein that IDEA does not require that an IEP meeting be held upon parental request, IDEA does not require that Petitioner be provided with a copy of Student's educational records and DCPS is willing to provide access to Student's records as required by IDEA, a manifestation determination meeting was held for Student's October 2011 suspension but not for his November 2011 suspension, and no interim alternative placement was necessary in November 2011 because Student was not suspended for 10 days.

The parties concluded the Resolution Meeting process by failing to reach agreement on January 6, 2012, but the parties did not elect to shorten the 30-day resolution session. This is an

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expedited case. The due process hearing was scheduled for January 13, 2012, and the HOD due date is 10 school days later, or January 30, 2012.

On January 10, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. DCPS asserted, based upon newly obtained information, that Student was never suspended in November 2011. Petitioner sought to challenge the appropriateness of the manifestation meeting held in October 2011, but upon DCPS's objection, the hearing officer ruled that the claim was beyond the scope of the Complaint and could not be adjudicated due to DCPS's failure to consent to same. The hearing officer issued the Prehearing Order on January 11, 2012.

By their respective disclosure letters dated January 10, 2012, Petitioner disclosed nineteen documents (Petitioner's Exhibits 1 – 19) and DCPS disclosed twelve documents (Respondent's Exhibits 1 - 12).

The hearing officer convened the expedited due process hearing on January 13, 2012.¹ Both parties' disclosed documents were admitted into the record without objection, and Petitioner withdrew its claims for failure to review Student's IEP upon Parent's request and failure to provide access to Student's records. Thereafter, the hearing officer received opening statements and testimonial evidence from Petitioner. After DCPS declined to present testimonial evidence and rested on the record, the hearing officer received closing statements and concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS violate IDEA by failing to convene a manifestation determination review ("MDR") in connection with Student's alleged November 2011 suspension?
2. Did DCPS violate IDEA by failing to provide an interim alternative placement for Student's alleged November 2011 suspension?

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

FINDINGS OF FACT²

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

1. Student's primary disability is Other Health Impairment, and his current IEP is dated September 20, 2011.³
2. Student currently attends _____ grade at a DCPS middle school.⁴
3. Student has a March 24, 2011 behavior intervention plan ("BIP"), which was developed at his current DCPS middle school during SY 2010/11.⁵
4. Student was suspended for 10 school days from October 20, 2011 through November 2, 2011 for pulling a fire alarm. Student was also suspended for 6 school days from November 10 – 18, 2011 for fighting another male student in his class. Therefore, as of November 18, 2011, Student had been suspended for a total 16 days during the current school year."⁶
5. A manifestation determination review was held on October 24, 2011 in connection with Student's October 20 – November 2, 2011 suspension, and the meeting attendees determined that Student's behavior that resulted in the suspension was not a manifestation of his disability. Parent received an October 20, 2011 phone call from Student's current DCPS middle school about the MDR, and the school's staff also sent Parent a written letter of invitation to the MDR on October 20, 2011. However, the letter did not include Parent's apartment number, and Parent did not receive the letter. As a result, Parent did not attend the meeting.⁷
6. DCPS did not conduct a manifestation determination review in connection with Student's November 10 – 18, 2011 suspension.
7. DCPS provided Parent with a thick packet of work for Student to complete during his suspension from October 20 – November 2, 2011. The packet covered all of Student's subjects. However, Student did not receive a packet of work to complete during his November 10 – 18 suspension, and he was not assigned to attend another school during that suspension. As a result, Student simply stayed home with Parent.⁸

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Petitioner's Exhibit 6; Respondent's Exhibit 8.

⁴ Testimony of Parent.

⁵ Petitioner's Exhibit 5; Respondent's Exhibit 4.

⁶ Testimony of Parent; Petitioner's Exhibits 12-13; Respondent's Exhibit 9.

⁷ Testimony of Parent; Respondent's Exhibits 5-7; Petitioner's Exhibit 9.

⁸ Testimony of Parent.

8. DCPS did not provide Student with an interim alternative placement during his November 10-18, 2011 suspension.
9. Student did not receive any counseling services during either of his suspensions.⁹
10. Student's most recent FBA was conducted in July 2010 by an independent evaluator.¹⁰

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments 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 Convene a Manifestation Meeting for the November 10-18 Suspension

School personnel may remove a child with a disability who violates a code of student conduct from his current placement to suspension for not more than 10 consecutive school days, 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 § 300.536. 34 C.F.R. § 300.530(b)(1). A change of placement occurs if the removal is for more than 10 consecutive school days; or the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than 10 school days in a year, because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and 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 C.F.R. § 300.536(a)(1)-(2). The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, but this determination is subject to review through due process and judicial proceedings. 34 C.F.R. § 300.536(b)(1)-(2).

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 must review all relevant information in the student's file and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the child's IEP. 34 C.F.R. § 300.530(e)(1)(i)-(ii).

If there is a determination that the behavior was a manifestation of the child's disability, the IEP team must either conduct an FBA, unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or if a BIP has already been developed, review the BIP and modify it, as necessary, to address the behavior; and return the child to the placement from which he was removed, unless the parent and the LEA

⁹ Testimony of Parent.

¹⁰ Respondent's Exhibit 12.

agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f)(1)-(2).

In the instant case, Petitioner asserts that DCPS violated IDEA by failing to conduct an MDR in connection with Student's November 10-18, 2011 suspension. DCPS insists that there was no November 2011 suspension. Alternatively, DCPS argues that even if there was a second suspension in November, Student has not suffered any harm and the relief requested is unwarranted.

DCPS has refused to acknowledge that Student was actually suspended on November 10-18, 2011 suspension. Therefore, DCPS has not yet made a determination of whether Student's suspensions in October and November 2011 subjected him to a series of removals that constitute a pattern, and therefore, a change of placement, which triggered DCPS's obligation to conduct an MDR in connection with the November 2011 suspension.

Moreover, after a review of the documentary and testimonial evidence presented in this case, the hearing officer has determined that the evidence is insufficient to permit the hearing officer to determine whether Student's behavior that led to the October 20th suspension was substantially similar to Student's behavior that led to the November 10th suspension. The evidence of record merely indicates that one suspension was for pulling a fire alarm and the other was for fighting. Although at first blush these two events sound dissimilar, depending on exactly what took place before and during the incidents, it is possible that Student's behaviors during and leading up to the two incidents events could have been substantially similar. As Petitioner presented absolutely no evidence concerning the circumstances surrounding each incident, the hearing officer is unable to determine whether the series of removals at issue constituted a change of placement under 34 C.F.R. § 300.536(a)(1)-(2) that triggered DCPS's obligation to conduct an MDR in connection with Student's November 10th suspension. *See, e.g., Joshua S. v. School Board of Indian River County and Wheeler*, 37 IDELR 218 (S.D. Fla. 2002) (series of suspensions totaling more than 10 days did not constitute significant change in placement so school district did not have to conduct MDR after each suspension).

Under these circumstances, the hearing officer has determined that Petitioner failed to meet its burden of proof on this claim. Nevertheless, the hearing officer will order DCPS to convene a meeting with the Parent and the relevant members of Student's IEP team to examine the circumstances surrounding Student's October 20th and November 10th suspensions, as well as such additional factors as the length of each suspension, the total amount of time Student was suspended, and the proximity of the suspensions to one another, and determine whether those suspensions constituted a change of placement. If it is determined that there was a change of placement, then DCPS shall also conduct a manifestation determination review during the meeting; and if it is determined that Student's behavior was a manifestation of his disability, then DCPS shall review and modify Student's BIP, as necessary, to address the behavior. *See* 34 C.F.R. § 300.513(b) (Fact that hearing officer decision must be based on either substantive grounds or procedural violation that resulted in actual denial of FAPE does not preclude hearing officer from ordering LEA to comply with the procedural requirements under 34 C.F.R. §§ 300.500 - 300.536); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (a State's due process hearing system must provide a hearing officer with the authority to grant the relief necessary,

under the particular facts and circumstances of each case, to ensure that a child receives the FAPE to which the child is entitled).

2. Failure to Provide an Interim Alternative Placement

School personnel may remove a child with a disability who violates a code of 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 34 C.F.R. § 300.536). 34 C.F.R. § 300.530(b).

A child with a disability who is removed from the child's current placement pursuant to 34 C.F.R. § 300.530(c), governing disciplinary changes in placement that would exceed 10 consecutive school days where the behavior is determined not to be a manifestation of the child's disability, or 34 C.F.R. § 300.530(g), governing removals to an interim alternative educational setting for not more than 45 days under special circumstances, must continue to receive educational services, although in another setting, and must receive, as appropriate, a functional behavior assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1).

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 or not more than 10 consecutive school days and is not a change of placement under 34 C.F.R. § 300.536, school personnel, in consultation with at least one of the school's teachers, determine the extent to which services are needed 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. 34 C.F.R. § 300.530(d)(4). On the other hand, if the removal is a change of placement under 34 C.F.R. § 300.536, the child's IEP team determines appropriate services for the child. 34 C.F.R. § 300.530(d)(5).

In the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to provide him with an interim alternative placement. However, the governing regulations do not require the provision of an alternative educational setting under the circumstances of this case. *See* 34 C.F.R. § 300.530(b) (emphasis added) (child with a disability who violates code of conduct may be removed to "an appropriate interim alternative educational setting, another setting, *or suspension*"). Instead, under the applicable regulations, because Student was removed for 10 consecutive school days on November 20th, during his subsequent suspension on November 10th, he was entitled to continue receiving educational services to the extent determined necessary by either school personnel and one of his teachers or his IEP team, depending upon whether or not he had been subjected to a change of placement. The evidence in this case reveals that Student did not even receive a packet of work to complete during his November 10th suspension. As a result, the hearing officer will order DCPS to ensure that determinations are made concerning (1) to what extent Student was entitled to continue receiving educational services during his November 10th suspension; and (2) what, if any, compensatory education Student is entitled to

receive as a result of DCPS's failure to provide him with such educational services, thereafter making an award to Student any such compensatory education services. The hearing officer will require DCPS to make these determinations and any award at the meeting it will be ordered to hold in connection with subsection (a), above. See *Letter to Armstrong, supra* (hearing officer must have authority to grant the relief necessary to ensure child receives FAPE).

ORDER

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

1. Within ten calendar days of the issuance of this Order, DCPS shall convene a meeting with Parent and the relevant members of Student's IEP team to examine the circumstances surrounding Student's October 20th and November 10th suspensions, as well as such additional factors as the length of each suspension, the total amount of time Student was suspended, and the proximity of the suspensions to one another, and determine whether those suspensions constituted a change of placement. If it is determined that there was a change of placement, then DCPS shall also conduct a manifestation determination review during the meeting; and if it is determined that Student's behavior was a manifestation of his disability, then DCPS shall review and modify Student's BIP, as necessary, to address the behavior. If the team determines that Student was not subjected to a change of placement, then DCPS's shall have no further obligations under this paragraph.
2. At the meeting held pursuant to Paragraph 1, above, DCPS shall also ensure that the meeting participants (1) determine to what extent Student was entitled to continue receiving educational services during his November 10th suspension; (2) determine what, if any, compensatory education Student is entitled to receive as a result of DCPS's failure to provide him with such educational services, and (3) award Student any such compensatory education services.
3. All other requests for relief in Petitioner's December 16, 2011 Complaint are **DENIED**.

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).

Date: 1/26/2012

/s/ Kimm Massey

Kim Massey, Esq.
Hearing Officer