

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

Student
(DOB) STARS

Petitioner,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: May 11, 2009

Decided: May 21, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
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HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed April 8, 2009, on behalf of a -year old student (the "Student") who resides in the District of Columbia and currently attends

Petitioner was represented by Roberta Gambale, Esq. of James E. Brown & Associates, PLLC, and Respondent District of Columbia Public Schools ("DCPS") was represented by Laura George, Esq., Assistant Attorney General for the District of Columbia.

The complaint alleges that DCPS failed to comply with procedures regarding discipline for the Student required under the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. Specifically, Petitioner alleges that DCPS suspended the Student for more than ten school days without convening a manifestation determination review meeting, while the Student was in the process of being evaluated for special education services.

DCPS filed a Response to the Due Process Complaint on April 15, 2009, which asserted that the requested relief had no legal basis. Petitioner then filed a Motion for Judgment as a Matter of Law and/or on the Pleadings on April 17, 2009, which DCPS opposed on or about April 23, 2009. A Prehearing Conference was held on or about April 22, 2009, and the Hearing Officer took Petitioner's motion under advisement. Petitioner filed her five-day disclosures on May 1, 2009, and DCPS filed its five-day disclosures on May 4, 2009.

The Due Process Hearing convened on May 11, 2009. At the hearing, 17 documentary exhibits submitted by Petitioner (identified as "-1" through "-17") and one documentary exhibit submitted by DCPS (identified as "DCPS-1") were admitted into evidence. The parent-Petitioner was the only witness who testified. Petitioner requested that the hearing be closed.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As discussed at the Prehearing Conference and at the outset of the Due Process Hearing, the following issues have been presented for determination:

- a. *Whether DCPS failed to comply with IDEA procedural requirements by suspending the Student for more than ten (10) school days without convening a manifestation determination review meeting; and*
- b. *Whether such violation constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA, including compensatory education services.*

Petitioner seeks a finding that DCPS has, through its actions, denied the Student a free appropriate public education ("FAPE"). Petitioner also claims entitlement to compensatory education in the form of one-on-one tutoring, as well as allowing the Student to make up any work missed as a result of the allegedly improper suspensions.

III. FINDINGS OF FACT

1. The Student is now a -year old resident of the District of Columbia, whose date of birth is He currently attends where he is in the grade for the 2008-2009 school year -2; *Parent Testimony*.

2. On or about August 13, 2008, a written request for initial evaluations was submitted to on behalf of the Student. *See* -6, p. 3 ¶ 4.

3. On or about December 17, 2008, Petitioner filed a prior due process complaint alleging that DCPS failed to complete the initial evaluations in a timely manner (Case No. *See* -6.

4. On or about December 24, 2008, DCPS authorized Petitioner to obtain independent evaluations of the Student, at DCPS expense. -7.

5. On or about January 26, 2009, a Hearing Officer Decision was issued ordering DCPS to convene an MDT/IEP team meeting within 20 school days of receiving the results of the independent evaluations and determine the Student's eligibility for special education and related services. -6.

6. Petitioner suspects that the Student may have an emotional disturbance behavior problem that impacts his ability to learn, based on his history of suspensions and discipline actions at school. Petitioner also suspects that the Student may have a learning disability based on his poor academic performance. *Parent Testimony*.

7. Subsequent to the 1/26/09 HOD, the Student engaged in disruptive behavior in school. These recent incidents led to multiple suspensions for violations of student conduct rules, totaling more than 20 school days during the 2008-2009 school year. According to the complaint, testimony and documentary evidence, the suspensions included the following:

- (a.) in October 2008, DCPS suspended the Student for a total of approximately four (4) school days (*see* -2; *Parent Testimony*);
- (b.) in January 2009, DCPS suspended the Student for 10 school days (*see* -15);
- (c.) in February 2009, DCPS suspended twice the Student for at least two (2) school days (*see* -2; -16; *Parent Testimony*); and
- (c.) in March 2009, DCPS suspended the Student for at least five (5) school days (*see* -2; -17; *Parent Testimony*).

8. While the record is somewhat unsettled regarding the specific dates and lengths of each suspension, it appears that by January 2009 (or certainly no later than March 2009, as originally alleged in the complaint), the Student had been suspended for more than 10 school days in the aggregate over the course of the 2008-2009 school year.

9. On or about March 16, 2009, Petitioner requested that DCPS convene a Manifestation Determination Review meeting to address whether the behavior exhibited by the Student was a result of the Student's suspected disability because the Student was in the process of being evaluated for special education services. -12.

10. DCPS failed to convene a Manifestation Determination Review meeting with respect to the Student's conduct.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing generally is on the party seeking relief, *i.e.*, Petitioner. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006).

2. 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 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008). In reviewing a decision with respect to a manifestation determination, however, "the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability." DCMR 5-2510.14.

B. Alleged Violations/Denial of FAPE by DCPS

3. For the reasons discussed below, the Hearing Officer concludes that Petitioner has shown that DCPS (a) removed the Student from his current placement for more than 10 school days, and (b) failed to convene a timely manifestation determination meeting, with proper notice to the parent, as required by IDEA. Petitioner has therefore carried her burden of proof under Issue (1) below.

4. However, as discussed under Issue (2) below, the Hearing Officer concludes that DCPS has not denied the Student a FAPE. Petitioner has demonstrated at most only a procedural

violation of IDEA which does not entitle Petitioner to compensatory education or other relief at this time.

(1) Whether DCPS failed to comply with IDEA procedural requirements by suspending the Student for more than ten (10) school days without convening a manifestation determination review meeting.

5. Section 300.530(b) provides that school personnel may “remove” a child with a disability who violates a code of student conduct for not more than 10 consecutive school days, as long as those removals do not constitute a “change of placement” under Section 300.536. See 34 C.F.R. §300.530(b). Section 300.536, in turn, provides that a “change of placement” occurs if either (1) the removal is for more than 10 consecutive school days, or (2) the child is subject to a “series of removals that constitute a pattern,” determined on a case-by-case basis consistent with the factors spelled out in the rule. 34 C.F.R. §300.536.

6. IDEA further provides that within 10 school days of any decision to change the placement due to violations of a code of student conduct, the LEA must then convene a meeting of the IEP team to make a “manifestation determination” as provided in Section 300.530 (e). The IEP team is to determine whether the conduct in question either (1) was “caused by, or had a direct and substantial relationship to, the child’s disability,” or (2) was the “direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. §300.530(e); see 20 U.S.C. §1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child’s disability, then the IEP team generally must (1) conduct a functional behavior assessment (“FBA”) and implement a behavioral intervention plan (“BIP”) for the child, and (2) return the child to the placement from which the child was removed. 34 C.F.R. §300.530(f); see 20 U.S.C. §1415(k)(1)(F).

7. In this case, the evidence shows that the Student was subject to a series of removals totaling more than 10 days in the aggregate that appears to constitute a “pattern” within the meaning of Section 300.536.¹ The child’s behavior in the various incidents appears to be substantially similar, and additional factors such as the length of each removal and proximity of the removals to one another further indicate a pattern. See 34 C.F.R. §300.536 (a) (2).

8. Accordingly, DCPS was required to convene an MDT/IEP team meeting for the purpose of making a manifestation determination review (“MDR”) within 10 school days after the suspensions aggregated more than 10 school days within the current 2008-2009 school year. See *id.* § 300.530(e). The relevant MDR deadline would appear to be *January 26, 2009*, 10 school days after the decision by DCPS to suspend the Student for 10 school days (*i.e.*, 1/9/09 through 1/26/09), which thereby constituted a change of placement within the meaning of IDEA.

9. Because DCPS did not convene an MDR meeting by January 26, 2009, DCPS was in violation of 34 C.F.R. §300.530(e).

10. DCPS argues that “DCPS cannot conduct a meaningful manifestation determination review if there is no determination regarding [the Student’s] eligibility or even an

¹ According to Petitioner’s complaint and testimony, there was also a single suspension of 11 school days on or about March 13, 2009 (for marijuana usage), but it appears that the Student was returned to school prior to the end of 10 school days once the parent submitted evidence of a negative drug test. See *Parent Testimony*. No documentation of this suspension has been submitted.

evaluation suggesting what his disability might be.”² However, the IDEA expressly provides that a “child who has not been determined to be eligible for special education and related services under [IDEA, Part B] and who has engaged in behavior that violated a code of conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this subsection) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.” 34 C.F.R. §300.534(a). Paragraph (b) of that section goes on to provide that a “public agency must be deemed to have [such] knowledge ...if...[t]he parent of the child requested an evaluation of the child pursuant to [IDEA].” *Id.* § 300.534(b)(2). Because the parent had requested an evaluation of the Student in August 2008, which was still pending completion as of January 26, 2009,³ this provision applies in this case and entitles Petitioner to assert the protections of Section 300.530(e).

(2) *Whether such violation constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA, including compensatory education services.*

11. Under IDEA, “a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. §300.513(a)(1). “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” *Id.* § 300.513(a)(2). *See also Lesesne v. DC*, 447 F.3d 828, 834 (D.C. Cir. 2006); 20 U.S.C. §1415(f)(E).

12. In this case, Petitioner has failed to show by a preponderance of the evidence that the violation found above constitutes a substantive deprivation of FAPE. At most, Petitioner has shown a procedural violation with respect to the required manifestation determination review.

13. With respect to this procedural violation, Petitioner has not shown by a preponderance of the evidence that DCPS’ procedural inadequacies met either of the three tests specified in 34 C.F.R. Section 300.513 (a)(2). The procedural inadequacies did not (a) impede the Student’s right to a FAPE, (b) significantly impede the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or (c) cause a deprivation of educational benefit to the Student. Nor has Petitioner demonstrated that the procedural violation has actually caused any other substantive harm to the Student.⁴

14. For example, by the time an MDR meeting was required in this case, DCPS had already authorized Petitioner to obtain an independent FBA, at DCPS expense (on 12/24/08), and an FBA has now been completed. In addition, the Student had already returned to the placement

² DCPS’ Response, filed April 16, 2009, at p. 1; DCPS’ Opposition to Petitioner’s Motion for Summary Judgment, filed April 23, 2009, at p. 2.

³ Evaluations of the Student were thereafter completed on February 27 (comprehensive psychological), April 1 (speech and language), and April 2 (FBA), and were provided to DCPS on or about April 14, 2009. *See* ¶9–13. The parties stipulated at hearing that an MDT/Eligibility meeting is scheduled for May 21, 2009.

⁴ While the Student has missed a significant amount of school due to the series of suspensions, ¶2; *Parent Testimony*, Petitioner has not shown with any specificity how such absences have negatively impacted his education.

from which he had been removed. Finally, no special education services were missed since the Student has not yet been determined eligible.

15. With respect to compensatory education, since DCPS has not denied a FAPE to the Student with respect to the matter addressed herein, the Hearing Officer concludes that Petitioner is not entitled to an award of compensatory education services for such violation. In any event, Petitioner has not shown by a preponderance of the evidence that the specific compensatory education relief requested (*i.e.*, one-on-one tutoring) would be "reasonably calculated to provide the educational benefits that likely would have accrued" from any special education services the Student missed as a result of the suspensions. *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

V. ORDER

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

1. Petitioner is not entitled to any of the relief requested in her Due Process Complaint filed April 8, 2009;
2. The Due Process Complaint shall be, and hereby is, **DISMISSED**, with prejudice;
3. Petitioner's Motion for Judgment as a Matter of Law and/or on the Pleadings shall be, and hereby is, **DISMISSED** as moot; and
3. This case shall be, and hereby is, **CLOSED**.

Dated: May 21, 2009


/s/ _____
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).