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STUDENT HEARING OFFICE
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# DISTRICT OF COLUMBIA
# OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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| STUDENT,[1] through the Parent, | ) | |
| Petitioner, | ) | Date Issued: February 3, 2012 |
| v. | ) | Hearing Officer: Virginia A. Dietrich |
| District of Columbia Public Schools | ) | |
| Respondent. | ) | |

## HEARING OFFICER DETERMINATION

### Background

Petitioner, the grandmother and legal guardian of year old Student, filed a due process complaint notice on December 12, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a disability classification of Other Health Impairment ("OHI") that resulted from his Attention Deficit Hyperactivity Disorder ("ADHD") and Student had an Individualized Education Program ("IEP") that prescribed specialized instruction both inside and outside of the general education setting. At the time of the alleged violations, Student was attending a District of Columbia Public School ("DCPS") public charter school, having been voluntarily enrolled there by Petitioner. DCPS was the local education agency ("LEA") for the public charter school for special education matters.

Petitioner complained (1) that when Student was expelled from the public charter school in December 2011 for lighting off firecrackers in the cafeteria, the Manifestation Determination Review ("MDR") team erroneously concluded that Student's behavior was not a manifestation of his disability, (2) that DCPS failed to provide Student with an appropriate alternative educational setting when Student was expelled, (3) that the public charter school failed to provide Student with the specialized instruction and classroom aids and services required by his IEP since the

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

beginning of the 2011-2012 school year, and (4) that DCPS failed to review an independent vocational evaluation provided by Petitioner and revise Student's transition plan accordingly.

DCPS asserted that the MDR team decision that Student's behavior that led to expulsion was not a manifestation of his disability was a correct decision, that the public school placement provided by DCPS upon Student's expulsion from the public charter school was appropriate because Student's IEP could be implemented there, that the public charter school provided Student with all the services and classroom aides that were required by Student's IEP, and that DCPS never received a copy of the independent vocational evaluation in order to review it. DCPS asserted that it had not denied Student a FAPE.

## Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

## Procedural History

The due process complaint was filed on 12/12/11. This Hearing Officer was assigned to the case on 12/13/11. A resolution meeting took place on 01/04/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. Issues #1 and #2 of the complaint were allegations arising under the disciplinary provisions of the IDEA and required an expedited hearing within 20 school days of the filing of the complaint, with a final decision due 10 school days following the 20th school day. With respect to resolution of the disciplinary allegations, the due process hearing had to occur by 01/20/12 and the final decision was due by 02/07/12. Issues #3 and #4 of the complaint did not warrant an expedited hearing. With respect to Issues #3 and #4, the 30-day resolution period expired on 01/11/12, the 45-day timeline to issue a final decision began on 01/12/12, and the final decision was due by 02/25/12.

Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing by telephone.

Petitioner presented the following four witnesses: Petitioner; educational advocate; an expert in clinical and school psychology; and Admissions Coordinator at School. DCPS presented the following three witnesses: psychologist at the public charter school; special education coordinator ("SEC") at the public charter school; and a DCPS program manager.

Petitioner's disclosures dated 01/10/12, containing a witness list and Exhibits P-1 through P-13, were admitted into evidence without objection. DCPS' disclosures dated 01/12/12, containing a witness list and Exhibits DCPS-1 through DCPS-6, were admitted into evidence without objection.

The four issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether, at the Manifestation Determination Review ("MDR") on 12/05/11, DCPS failed to determine that Student's behavior of setting off firecrackers in the cafeteria was a manifestation of his disability of Other Health Impairment ("OHI").

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate alternate educational setting following the disciplinary action of Student being expelled for lighting off firecrackers in the cafeteria, when the designated alternate setting, School, could not meet Student's need for a setting with small groups and minimal distractions.

Issue #3 – Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP since the beginning of the 2011-2012 school year; specifically, (a) by failing to provide Student with 5 hours/week of specialized instruction outside of general education as was required by Student's IEP, and (b) by failing to provide Student with all or a majority of the following accommodations and/or supplemental aides and services required by Student's IEP: Reading 180, reducing the length of written assignments, graphic organizers, visual aides, study guides to help with tests, and calculators.

Issue #4 – Whether DCPS denied Student a FAPE by failing to convene a Multidisciplinary Team ("MDT") to review an independent vocational evaluation that was provided to DCPS in July 2011, and then develop an appropriate transition plan and transition goals based on the results of the independent vocational evaluation.

For relief, Petitioner requested a finding that Student's behavior that resulted in expulsion from school was a manifestation of his disability, that Student was denied a FAPE on each of the issues presented, that DCPS convene a MDT to review and revise Student's behavior plan, that DCPS appropriately revise Student's transition plan based on review of the independent vocational evaluation, that DCPS fund Student at School, and that Student receive an award of compensatory education in the form of independent tutoring for DCPS' failure to provide Student with specialized instruction and classroom aids and services since the beginning of the 2011-2012 school year.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

## Findings of Fact

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, age and in the grade, voluntarily enrolled in and attended a DCPS public charter school from the beginning of the 2011-2012 school year until he was expelled on or about 12/05/11 for lighting firecrackers in the school cafeteria. Student had attended the

public charter school for the past three years and was well known by the special education coordinator ("SEC") at the school. Student admitted that he brought firecrackers to school with the intention of lighting them off at the end of the day, Student discussed his plan with his three friends who all passed the lighter around several times among themselves while huddled together in a group, and the group strategically waited for 2-3 minutes until no adults were in the vicinity before lighting off the firecrackers. The entire incident was videotaped by surveillance cameras and watched by the team at the MDR meeting on 12/05/11. Student admitted that he knew what he was doing and that he might get caught.[2]

#2. Based on a review of Student's IEP, Student's most recent psychological evaluation, review of the surveillance videotape, the statements of Student, the input of the public charter school staff, and the input of Petitioner and Petitioner's advocate at the MDR meeting on 12/05/11, the decision that Student's behavior of lighting off the firecrackers in the cafeteria was not a manifestation of Student's OHI disability, was a correct one. The act of lighting off firecrackers on 12/01/11, committed by Student in cohort with his friends, was a deliberate and calculated act evidenced by forethought, premeditation and planning on the part of Student and was not the result of impulsivity and hyperactivity that are typical characteristics of OHI.[3] Student's behavior of lighting the firecrackers also did not occur as a result of the school's failure to implement Student's IEP.[4] Student's IEP was fully implemented at the public charter school.[5]

#3. The public charter school is its own local education agency ("LEA") except for special education matters, for which DCPS is the LEA.[6] At the MDR meeting on 12/05/11, when it was made clear that expulsion from the public charter school would take effect after final approval of the school principal, DCPS made Petitioner aware that Roosevelt High School would be the public location of services that would implement Student's IEP,[7] that a Prior Written Notice previously had been issued to School on 06/23/11,[8] and that the Prior Written Notice was still effective.[9] School could implement Student's IEP.[10]

#4. The lighting of the firecrackers caused significant disruption to the school's operation; it resulted in an evacuation of the entire school building and the intervention of the fire department. On or about 12/06/11, the principal of the school finalized the recommendation to expel Student from the public charter school.[11]

#5. After Student's expulsion from the public charter school, Petitioner opted to keep Student at home pending the outcome of the resolution meeting and the due process hearing,

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[2] P-6, SEC.
[3] SEC, psychologist at the public charter school.
[4] DCPS-4, SEC.
[5] SEC.
[6] DCPS program manager.
[7] P-1, DCPS program manager.
[8] DCPS-2.
[9] DCPS program manager.
[10] *Id.*
[11] SEC.

rather than send Student to School.[12] From 12/05/11 until the time that the resolution meeting took place, the public charter school provided Student with work packets that were completed by Student and returned to the school.[13]

#6. Student's IEP, dated 06/23/11, prescribed 11 hours/week of specialized instruction within the general education setting, 5 hours/week of specialized instruction outside of the general education setting, 60 minutes/week of behavioral support services outside of general education and classroom aids and services that consisted of: Read 180, reducing the length of written assignments, use of pre-writing graphic organizers, visual aids, study guides, modified assignments, peer tutor/buddy partner, calculation device, mnemonic devises, math formulas, a weekly homework sheet for all academic content areas, and an attendance sheet. Classroom accommodations included a location with minimal distractions and small group testing. The IEP also contained a Post-Secondary Transition Plan with long-range goals of Student attending college and obtaining full-time competitive employment. One specific transition plan goal was for Student to successfully complete a two semester vocational course, and Student was attending an electrical wiring class at the public charter school and passing the course with a grade of "C."[14]

#7. Student's IEP was fully implemented by the public charter school since the beginning of the 2011-2012 school year.[15]

#8. On 06/27/11, an independent vocational evaluation was completed.[16] On 07/07/11, Petitioner forwarded a copy of the completed independent vocational evaluation to the public charter school and to the Office of Special Education; however, Petitioner did not request that the school convene a meeting to review the evaluation and revise Student's IEP to reflect the results of the independent vocational evaluation.[17]

## 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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

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 State Education Agency; (c) include an appropriate

[12] Petitioner.
[13] *Id.*
[14] DCPS-1.
[15] SEC.
[16] P-2.
[17] P-3.

preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an IEP. 34 C.F.R. 300.17.

"Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

The first issue to be determined is whether, at the Manifestation Determination Review ("MDR") on 12/05/11, DCPS failed to determine that Student's behavior of setting off firecrackers in the cafeteria was a manifestation of his disability of Other Health Impairment ("OHI").

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 child's IEP team 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 (a) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (b) if the conduct in question was the direct result of the local education agency's ("LEA") failure to implement the IEP. 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 either condition described above has been met. 34 C.F.R. 300.530(e).

Student violated the code of student conduct by participating in the lighting of firecrackers in the school cafeteria. That conduct resulted in the total evacuation of the school building and required the services of the fire department. Student's behavior disrupted the entire school's safe learning environment, in violation of 5 D.C.M.R. E-2500.3. Expulsion from school was recommended and school officials were required to convene a MDR meeting to determine if Student's behavior was a manifestation of his disability or occurred as a result of the failure of the school system to provide special education services.

The SEC at the public charter school, who was in the hallway when the firecracker incident occurred, who attended the MDR meeting and heard Student's explanation of the incident, and who reviewed a videotape of Student participating in the lighting of the firecrackers, gave the most comprehensive and credible account of what happened, i.e., that Student's behavior that led up to the lighting of the firecracker incident was not impulsive, rash or lacking in forethought. Student brought the firecrackers to school with the intention of

lighting them off, he talked about it with three friends, looked for the most opportune time to light the firecrackers when school staff members were not around, and admitted that he knew what he was doing and what the consequences would be.

Based on a review of Student's IEP, Student's most recent psychological evaluation, review of the surveillance videotape, the statements of Student and school staff, and the input of Petitioner and Petitioner's advocate at the MDR meeting on 12/05/11, the decision that Student's behavior of lighting off the firecrackers in the cafeteria was not a manifestation of his disability, was a correct one. The testimony of Petitioner's expert witness, i.e., that Student's behavior was a manifestation of his disability, was not persuasive as it was based on a review of documents only and the document that the expert relied on most in drawing her conclusion that Student's behavior was a manifestation of his disability was the notes of the educational advocate, a person employed by Petitioner to advance her interests. The information relied on by the SEC, i.e., review of the surveillance videotape, Student's first hand account of what happened, the school's knowledge of Student in the school setting and review of Student's evaluations, made for a much more comprehensive analysis of the incident and reliable decision making process; therefore, the testimony of the SEC was the most persuasive and the conclusions reached by the SEC were given the most validity by the Hearing Officer. Petitioner failed to meet her burden of proof on this issue.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate alternate educational setting following the disciplinary action of Student being expelled for lighting off firecrackers in the cafeteria, when the designated alternate setting, School, could not meet Student's need for a setting with small groups and minimal distractions.

On or about 12/05/11, Student was expelled from the public charter school for violating the code of student conduct. For disciplinary changes of placement that 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, 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 that 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 set out in the child's IEP, although in an interim alternative educational setting. 34 C.F.R. 300.530(2)(c), 300.530(d).

The placement is based on the IEP and the placement is where the IEP is implemented. 34 C.F.R. 300.116. "The touchstone of 'educational placement' is not the location to which the student is assigned but rather the environment in which educational services are provided." *AW v. Fairfax County School Board*, 41 IDELR 119 (2004).

At the MDR meeting on 12/05/11, DCPS provided Student with a public school location of services/placement that could implement Student's IEP, i.e., School. Petitioner was made aware of that location of services at the MDR meeting on 12/05/11, and the

location of services had in fact been presented to Petitioner the previous June 2011 per a Prior Written Notice.

School was able to implement Student's IEP and was available as an appropriate alternate public location of services if Petitioner chose to enroll Student there. Petitioner failed to offer any evidence that all of Student's classroom instruction had to be provided in a small setting or that a small setting could not be provided at School. Petitioner also failed to present any reliable evidence that School could not provide instruction to Student in a classroom location with minimal distractions.

The Hearing Officer concludes that DCPS provided Student with an appropriate alternate educational placement following expulsion, but Petitioner opted not to enroll Student there. Petitioner opted to keep Student home from school with educational work packets provided by the public charter school, instead of sending him to School. It was Petitioner who unilaterally decided on the educational setting in which Student would receive his educational services during expulsion.

Petitioner failed to show that Student's IEP could not be implemented at School. Petitioner failed to meet her burden of proof that DCPS failed to provide Student with an appropriate alternate school placement that could provide services that would enable Student to access the general education curriculum following Student's expulsion from the public charter school in December 2011. See 34 C.F.R. 530(d)(i).

The third issue to be determined is whether DCPS denied Student a FAPE by failing to fully implement Student's IEP since the beginning of the 2011-2012 school year; specifically, (a) by failing to provide Student with 5 hours/week of specialized instruction outside of general education as was required by Student's IEP, and (b) by failing to provide Student with all or a majority of the following accommodations and/or supplemental aides and services required by Student's IEP: Reading 180, reducing the length of written assignments, graphic organizers, visual aides, study guides to help with tests, and calculators.

As soon as possible following development of the IEP, DCPS must ensure that special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Petitioner failed to meet her burden of proof on this issue. No weight was given to Petitioner's testimony that Student had not received specialized instruction outside of general education and had not received the aids and services prescribed by Student's 06/23/11 IEP, when the basis of Petitioner's assertions were conversations she had with Student. Petitioner testified that she never inquired with the teachers or the SEC about the school's alleged failure to provide Student with the required services, despite, by her account, conversations with the school staff at least twice a week.

Rather, great weight was given to the testimony of the SEC of the public charter school who knew Student and Student's needs well because he had attended the school for the past three years. The SEC had attended many MDT meetings on behalf of Student, was aware of the

services that the school was providing to Student and her testimony that Student's IEP was fully implemented was credible. There was no specific testimony by the SEC on whether or not the aids and services in Student's IEP had been provided or not. Petitioner's testimony on that point was not given any weight because she assumed that aids and services were not being provided because no one from the school told her that they were being provided. Even if the Hearing Officer were to find that the aids and services or specialized instruction outside of general education were not being provided to Student, which the Hearing Officer does not find, Petitioner failed to show the quantity of missed services and any harm incurred as a result.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to convene a Multidisciplinary Team ("MDT") to review an independent vocational evaluation that was provided to DCPS in July 2011, and then develop an appropriate transition plan and transition goals based on the results of the independent vocational evaluation.

Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation. 34 C.F.R. 300.303 Comments, page 46640, Federal Register Rules and Regulations. "Evaluation" means procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15.

As part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine the educational needs of the child. 34 C.F.R. 300.305(a). A public agency must ensure that a reevaluation of each child with a disability is conducted (1) if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) if the child's parent or teacher requests a reevaluation. A reevaluation (1) may occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. 300.303.

The evidence revealed that an independent vocational evaluation was provided to DCPS on 07/07/11; however, there was no evidence in the record that the independent vocational evaluation was accompanied by a request for DCPS to convene a MDT to formally review the evaluation and make changes to Student's IEP based on review of the evaluation. Petitioner failed to prove that any of the circumstances that mandated a reevaluation of Student's needs, per 34 C.F.R. 300.303, existed. Student's IEP had been updated on 06/23/11; therefore, an annual reevaluation was premature. Student had an IEP that required him to participate in a vocational program and he was doing so at the public charter school and passing the course with a "C." The transition plan portion of Student's IEP was being implemented.

At the time of the due process hearing, Student was years old and in the grade. Despite Student's interest in pursuing a vocational program in Culinary Arts, as expressed in the independent vocational evaluation, Student had plenty of time for a vocational course change if

he desired. There was no evidence that a vocational course change was necessary for Student's educational success or for Student to receive educational benefit from the curriculum. Petitioner failed to meet her burden of proof that DCPS violated the IDEA by failing to review the independent vocational evaluation. Student was not denied a FAPE.

## ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any of the issues that Student had been denied a FAPE.

All relief requested by Petitioner is **DENIED.**

**IT IS SO ORDERED.**

## 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: February 3, 2012

/s/ Virginia A. Dietrich
Hearing Officer