DISTRICT OF COLUMBIA

Office of the State Superintendent of Education

Office of Review & Compliance

Student Hearing Office

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OSSE
STUDENT HEARING OFFICE
2009 APR 27 AM 11: 03

Confidential

STUDENT[1], by and through parent, Petitioner, *vs.* District of Columbia Public Schools, Respondent.	**HEARING OFFICER'S DETERMINATION** Counsel for Petitioner/Parent: Christopher West, Esq. Asst. Attorney General for DCPS: Daniel Kim, Esq. Impartial Hearing Officer H. St. Clair, Esq.

[1] Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

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BACKGROUND

A manifestation determination review (MDR) for the student convened at the school on March 5, 2009 during which it was decided that the behavior of the student that was the subject of the pertinent disciplinary action was not related to his disability. During the course of the MDR, the parent understood the MDR decision to the effect the student would not be allowed to attend the same school for the 2009-10 School Year.

On March 18, 2009, Counsel for the Parent filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Parent complained DCPS had conducted an inappropriate MDR on March 5, 2009 and, for relief, requested an Order setting aside the decision of the March 5, 2009 MDR and compensatory education.

The Student Hearing Office, OSSE, scheduled a hearing in this matter for 9:00 A.M., Wednesday, April 22, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 7B, Washington, D.C. 20003. The hearing convened as scheduled.

JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

ISSUES:

1. **Was the March 5, 2009 MDR decision inappropriate?**
2. **Should compensatory education be awarded?**

FINDINGS of FACT

By facsimile dated April 15, 2009, the parent disclosed 5 witnesses and 23 documents.

By facsimile dated April 14, 2009, DCPS disclosed 14 witnesses and 6 documents.

The documents were admitted into the record and are referenced/footnoted herein where relevant.

At the conclusion of the Parent's case, DCPS rested on the record.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. The December 15, 2008 IEP disability coded the student Emotionally Disturbed (ED) with 4.5 hours of special education services in a 0-20% Out of General Education Setting.[2]

2. According to the Parent's recollection, the student was suspended during the 2008-09 School Year:

   a. 1 day on September 20, 2008 (The Parent could not remember the reason.);
   b. 2 days on November 20, 2008 for possession of an electronic devise;
   c. 1 day on December 1, 2008 for leaving class;
   d. 4 days on December 8, 2008 for leaving class;
   e. 1 day on December 13, 2008 (The Parent could not remember the reason); and
   f. 5 days on February 19, 2009 for fighting for a possible total of 13 schooldays, not consecutive schooldays.

3. The Educational Advocate testified that she attended the March 5, 2009 MDR meeting and that only the February 19, 2009 5-day suspension was was discussed; no other incident involving the student was discussed. The MDR determined that the behavior that formed the basis of the 5-day suspension was not a manifestation of the student's disability.

CONCLUSIONS of LAW

DCPS is required to make FAPE available to all children with disabilities within the jurisdiction of the District of Columbia: *IDEIA 2004* requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 21, determine eligibility for special education services and, if eligible, provide same through an appropriate IEP and Placement.

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a).

District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by preponderance.

[2] Parent Document No 14

ONE

The March 5, 2009 MDR was inappropriate.

This matter was resolved within the confines of regulation 34 CFR 300.530.

Regulation 34 CFR 300.530(e) requires an MDR within 10 schooldays of a decision of school personnel to effectuate a **change in/of placement** of a child with a disability.

Regulation 34 CFR 300.536 (a) defines two **changes in/of placement**. The first is removal of the child with a disability from his or her current placement **for more than ten (10) consecutive schooldays.** From the record, it appeared that DCPS convened the March 9, 2009 MDR under this definition of **change in/of placement,** the wrong one: the precipitating suspension was for 5 consecutive schooldays, not the required 10+ consecutive schooldays.

From the Parent's testimony, apparently, the second definition of **change in/of placement** should have been applied, one for more than 10 schooldays in a school year, and the MDR should have first determined that the multiple suspensions constituted a **change in/of placement** because the suspensions totaled more than 10 schooldays for the school year, were for similar misbehavior and evidenced a pattern of removal and were problematic for other factors as determined by the MDR. The problem under this approach was that the March 9, 2009 MDR did not discuss any of the student's suspensions prior to the February 19, 2009 5-day suspension.

TWO

At this stage, compensatory education would be premature.

At the next MDR, if the decision is that the 13 schooldays during which the student was suspended to date did not constitute a **change in/of placement,** one of the student's teacher could determine his alternative services under 34 CFR 300.530(d)(4), services much less than special education and related services or services less than those that would afford the student access to the general education curriculum.

SUMMARY of the DECISION

As to issue 1 in this matter, the Parent met her burden.

In consideration of the foregoing, the hearing officer made the following

ORDER

1. The March 5, 2009 MDR is set-aside in its entirety.

2. Within 20 days hereof, DCPS will reconvene the MDR and, as provided in 34 CFR 300.536, determine whether the schooldays of suspension during the 2008-09 School Year constituted a **change in/of placement** for the student. The MDR will then determine if the behavior was related to the student's disability.

Dated this 27th day of April, 2009

H. St. Clair, Esq., Hearing Officer

This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.