

**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
2012 MAY -7 PM 3:51

STUDENT,¹

Petitioner,

Date Issued: May 7, 2012

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the “Petitioner” or “Student”), an adult student, under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”) and Title 5-B, § 2510 of the D.C. Regs. In her Due Process Complaint, Petitioner, alleges that DCPS denied her a free appropriate public education (“FAPE”) by not timely convening a Manifestation Determination Review following a March 29, 2012 disciplinary suspension; by failing to provide

¹ Personal identification information is provided in Appendix A.

a procedural safeguards notice, by failing to conduct a Functional Behavioral Assessment and by failing to provide education services during the suspension.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 11, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on April 13, 2012. The record does not establish that the parties met for a resolution session. The 20 school-day period for holding the due process hearing in this expedited case began on April 11, 2012. The 10 day deadline for issuance of this HOD began on May 3, 2012. On April 23, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on May 3, 2012 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 appeared in person, accompanied by GRANDMOTHER, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called Grandmother as witness. DCPS called no witnesses. Petitioner's Exhibits, P-1 through P-9, were admitted into evidence without objection. DCPS' Exhibits R-1 through R-5, with the exception of Exhibit R-4, were admitted into evidence without objection. Exhibit R-4 was withdrawn by DCPS. Counsel for both parties made opening and closing statements.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. §§ 1415(f), 1415(k)(3) and D.C. Regs. tits. 5-B, § 2510 and 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY NOT CONVENING A MANIFESTATION DETERMINATION REVIEW UNTIL AFTER STUDENT'S MARCH 29, 2012 DISCIPLINARY REMOVAL HAD ALREADY BEGUN;
- WHETHER, IN CONNECTION WITH A MARCH 29, 2012 DISCIPLINARY REMOVAL, DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE A PROCEDURAL SAFEGUARDS NOTICE;
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO CONTINUE TO PROVIDE EDUCATION SERVICES AFTER STUDENT'S MARCH 29, 2012 REMOVAL; AND
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO CONDUCT A FUNCTIONAL BEHAVIORAL ASSESSMENT OR TO DEVELOP A BEHAVIOR INTERVENTION PLAN AFTER STUDENT'S MARCH 29, 2012 OUT-OF SCHOOL SUSPENSION.

For relief, Petitioner seeks an order that DCPS be prohibited from suspending her in the future without first convening a Manifestation Determination Review (“MDR”); that DCPS provide specialized instruction to Student during the period of any future suspensions; that DCPS fund an independent Functional Behavioral Assessment (“FBA”) and Behavior Intervention Plan (“BIP”) for Student; and that DCPS provide 1:1 tutoring to Student to assist her to make up work missed during the March 29 2012 suspension period.

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, an AGE adult, resides in the District of Columbia, where she lives with Grandmother. Testimony of Grandmother.
2. Student was last determined eligible for special education and related services on May 17, 2011 under the primary disability classification Emotional Disturbance (“ED”).

Exhibit P-9. In a June 20, 2010 psycho-educational evaluation, LICENSED PSYCHOLOGIST reported that Student's full-scale IQ score was in the borderline range. Her achievement testing scores indicated Word Reading and Numerical Operations were in the extremely low range and Spelling was in the borderline range. Personality testing did not reveal significant symptoms of a mood disorder. Exhibit P-8.

3. Since fall 2011, Student has been enrolled in DC HIGH SCHOOL ("DCHS"), where she is currently in the GRADE. Before enrolling at DCHS, Student attended VIRGINIA NONPUBLIC SCHOOL. From June 2010 to January 2011, Petitioner was a resident-student at GEORGIA RESIDENTIAL FACILITY. From January 2010 to June 2010, she was a resident-student at PENNSYLVANIA RESIDENTIAL FACILITY. Testimony of Grandmother.

4. Under Student's June 13, 2011 IEP, she is placed in a general education setting at DCHS. The IEP provides that she will receive 6.5 hours per week of Specialized Instruction, 1 hour per week of Behavioral Support Services and 1 hour per week of Speech-Language Pathology, all outside of general education. Exhibit P-9.

5. DCPS last conducted an FBA of Student in fall 2008. Exhibit P-6.

6. During the 2011-2012 school year, Student has been disciplined with off-site (out-of-school) suspensions on four occasions, as follows: November 9, 2011 (2 days), December 9, 2011 (4 days), January 31, 2012 (3 days), and March 29, 2012 (5 days). Exhibits P-3. The actual periods of removal for the December 2011 incident was 5 days and for the January 2012 incident was 4 days. Exhibit P-5.

7. Student's removal for the March 2012 incident began on March 29, 2012. She missed school, due to the suspension, on March 29, March 30, April 10 and April 11, 2012. Exhibit P-5. I take Hearing Officer notice that DCHS was closed for DCPS spring break from

April 2 through April 9, 2012.

8. For the four out-of school suspensions during the 2011-2012 school year, a DCHS administrator sent Grandmother a Notice of Final Disciplinary Action giving notice that the school was imposing an “Off-site Short-Term Suspension.” The school provided a notice of student rights, applicable to non-disabled students, upon the imposition of disciplinary suspensions and expulsions. Exhibit P-3. DCPS did not provide IDEA procedural safeguards notices in connection with these suspensions. Testimony of Grandmother.

9. On April 11, 2012, DCPS convened Student’s IEP team for an MDR meeting. The team determined that Student’s conduct during the March 29, 2012 incident was caused by, or had a direct and substantial relationship to, Student’s disability.² The IEP team concluded that Student’s March 29, 2012 behavior was a manifestation of her disability. Exhibit R-2. There was no discussion at the April 11, 2012 IEP team meeting of updating Student’s 2008 FBA or developing a current BIP. Testimony of Grandmother. Student was returned to her placement at DCHS on April 12, 2012. Stipulation of the Parties (See Prehearing Order, April 23, 2012.)

10. At the April 11, 2012 IEP meeting, DCHS provided a packet of make-up work for some of Student’s classes missed after the March 29, 2012 suspension. Testimony of Grandmother. DCPS provided no other educational services to Student during the March-April 2012 four-day removal from school. Testimony of Grandmother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing

² The April 11, 2012 MDR determination form also indicates that the IEP team determined that Student’s conduct in question was a direct result of DCPS’ failure to implement Student’s IEP. *See Exhibit R-2*. Petitioner has not sought any relief in response to this apparent failure-to-implement determination.

Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

1. DID DCPS DENY STUDENT A FAPE BY CONVENING THE APRIL 11, 2012 MANIFESTATION DETERMINATION REVIEW AFTER STUDENT'S DISCIPLINARY REMOVAL HAD ALREADY BEGUN?

Petitioner contends that under the IDEA, after a student with a disability has been removed from school for 10 days in the same school year, a Local Education Agency (“LEA”) may not implement any further disciplinary suspensions until the LEA has conducted an MDR determination. She argues that DCPS violated the IDEA’s MDR requirements, because even though Student has already been suspended for 11 days during the 2010-2012 school year, after the March 29, 2012 incident, DCHS immediately implemented Student’s suspension – before the IEP team met to conduct the MDR determination. I am not persuaded by Petitioner’s interpretation of the IDEA’s timeline for conducting the MDR.

Under the IDEA, an LEA is required to convene a child’s IEP team for an MDR determination “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.” 34 CFR § 300.530(e). For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs, *inter alia*, if—

The child has been subjected to a series of removals that constitute a pattern—

- (i) Because the series of removals total more than 10 school days in a school year;
- (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- (iii) 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 CFR § 300.536(a)(2). The LEA determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. 34 CFR § 300.536(b).

During the 2011-2012 school year, before the March 29, 2012 discipline incident, DCHS had imposed three separate out-of-school suspensions on Student, totaling 11 school days.³ Implicitly, DCHS determined that this series of removals constituted a “pattern” change of placement, because, following its decision to impose a further 5-day suspension after the March 29, 2012 incident, DCHS convened Student’s IEP team for an MDR determination. DCHS convened the MDR meeting on April 11, 2012, within three school days of its March 29, 2012 decision to suspend Student. (DCPS schools were closed for spring break from April 2 through April 9, 2012.)

Petitioner’s argument that an LEA is required to convene the MDT meeting before implementing further removals, when there has been a series of removals totaling more than 10 school days in the same school year, is contrary to the plain language of 34 CFR § 300.530(e), which only requires the LEA to hold the MDR meeting within 10 school days of the decision to change the placement of the child. I find that after the March 29, 2011 decision to suspend Student, DCHS convened the MDR meeting well within the 10 school-day period specified in 34

³ Whether DCPS was required to convene an MDR meeting after Student’s February 2012 suspension, which resulted in a cumulative 11 school days of suspensions for the current school year, is not an issue before the Hearing Officer. *See* Prehearing Order, April 23, 2012.

CFR § 300.530(e). The timing of the meeting complied with the IDEA. DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY NOT PROVIDING A NOTICE OF PROCEDURAL SAFEGUARDS IN CONNECTION WITH THE MARCH 29, 2012 DISCIPLINARY SUSPENSION?

Petitioner alleges that DCPS denied her a FAPE by failing to provide an IDEA mandated procedural safeguards notice, when, on March 29, 2012, DCHS decided to suspend Student for five days. The IDEA requires that, on the date on which the decision is made to make a removal of a student, that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents a procedural safeguards notice. 34 CFR § 300.530(h). The notice must include a full explanation of all of the procedural safeguards available under the IDEA Discipline Procedures, 34 CFR §§ 300.530 through 300.536, relating to, due process proceedings. *See* 34 CFR § 300.504(c).⁴ The purpose of the notice is to provide sufficient

⁴ *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under § 300.148, §§ 300.151 through 300.153, § 300.300, §§ 300.502 through 300.503, §§300.505 through 300.518, §§ 300.530 through 300.536 and §§ 300.610 through 300.625 relating to—

- (1) Independent educational evaluations;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to education records;
- (5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—
 - (i) The time period in which to file a complaint;
 - (ii) The opportunity for the agency to resolve the complaint; and
 - (iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- (6) The availability of mediation;
- (7) The child's placement during the pendency of any due process complaint;
- (8) Procedures for students who are subject to placement in an interim alternative educational setting;
- (9) Requirements for unilateral placement by parents of children in private schools at public

information to protect the parents' rights under the IDEA and to "enable . . . parents to make an informed decision whether to challenge the DCPS' determination and to prepare for meaningful participation in a due process hearing on their challenge." *Shaw v. District of Columbia*, 238 F.Supp.2d 127, 138 (D.D.C., 2002), quoting *Kroot v. District of Columbia*, 800 F.Supp. 976, 982 (D.D.C. 1992).

In the present case, DCPS did not provide an IDEA procedural safeguards notice after DCHS' March 29, 2012 decision to remove Student.⁵ However, Student, nonetheless, promptly filed her request for an expedited due process hearing after the suspension was imposed and was represented by counsel at the hearing. I find that, in this case, DCPS' failure to provide the procedural safeguards notice in no way affected Petitioner's "primary procedural protection." *See Shaw, supra*. I conclude, therefore, that DCPS' omission to provide Student with the procedural safeguards notice did not result in denial of FAPE. *Id. See, also, Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (IDEA claim is viable only if procedural violations affected the student's substantive rights.) DCPS prevails on this issue.

3. DID DCPS DENY STUDENT A FAPE TO FAILING TO CONTINUE TO PROVIDE EDUCATION SERVICES AFTER STUDENT'S MARCH 29, 2012 REMOVAL?

expense;

(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in the State);

(12) Civil actions, including the time period in which to file those actions; and

(13) Attorneys' fees.

34 CFR § 300.504(c).

⁵ At some point during the school year, DCPS did provide Grandmother a notice of Parent/Guardian and Student Rights, required by the D.C. Regs. when a disciplinary suspension is imposed on a non-disabled student. *See Exhibit P-3*.

Petitioner contends that DCPS denied her a FAPE because she did not continue to receive educational services during the four school days she was suspended following the March 29, 2012 disciplinary incident. The IDEA requires that a child, who is removed for more than 10 school days in the same school year, must continue to receive educational services to enable the child to continue to participate in the general education curriculum. *See Analysis and Comments*, Federal Register Vol. 71, No. 156 (August 14, 2006) ("*Analysis and Comments*") at page 46717; 34 CFR § 300.530(d). The extent to which educational services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. *Analysis and Comments*, page 46717. For relatively brief periods of removal, appropriate school personnel, in consultation with at least one of the teachers of a child, should determine how best to address the child's needs. *Analysis and Comments*, page 46718. When DCHS suspended Student on March 29, 2012, the only educational service it provided was a packet of make-up work for Student. This packet was provided on April 11, 2012, after the suspension had been revoked, and did not include material from all of Student's classes.

Petitioner did not offer any evidence at the hearing of what, if any, educational deficit occurred as a result of Student's not continuing to receive educational services during the four-day suspension. Assuming there was such a deficit, no evidence was offered as to what type and amount of services, if any, could reasonably compensate Student. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 113 (D.D.C. 2010) (The question is the extent of the deficit and what type and amount of services, if any, could reasonably compensate for such deficit.) Considering the short duration of Student's removal, the fact that the days of suspension were divided, two days before and two days after, DCPS' spring break, and that DCPS promptly

returned Student to her classes following the April 11, 2012 MDR meeting, this may be a situation where Student was denied a FAPE but is not entitled to an award of compensatory education. *Cf. Gill, supra*, at 113. Notwithstanding, I find it appropriate to order DCPS to convene Student's IEP team to determine if there was any educational deficit as a result of DCHS' four-day suspension of Student and what, if any, services are needed to compensate Student for such deficit. Petitioner prevails on this issue.

4. DID DCPS DENY STUDENT A FAPE BY NOT CONDUCTING A FUNCTIONAL BEHAVIORAL ASSESSMENT AND NOT DEVELOPING A BEHAVIOR INTERVENTION PLAN AFTER STUDENT'S MARCH 29, 2012 SUSPENSION?

The IDEA requires that a child with a disability receive, as appropriate, a Functional Behavioral Assessment, and Behavior Intervention Plan and modifications, that are designed to address the child's behavior if the child's behavior that gave rise to a disciplinary removal is a manifestation of the child's disability. *See* 20 U.S.C. § 1415(k)(1)(F); 34 CFR § 300.530(f). At the April 11, 2011 MDR meeting, the IEP team decided that Student's behavior was a manifestation of her disability. However, instead of offering to conduct a new FBA, DCPS provided Grandmother a copy of a 2008 FBA, made when Student was enrolled at a nonpublic therapeutic day school in Virginia. Considering the passage of time and the change in Student's placement to a predominantly general education setting in a District public high school, I find that the 2008 FBA cannot reasonably be considered current or valid. *Cf. Analysis and Comments, supra*, 71 F.R. 46721. (IEP team should consider a previously conducted FBA that is valid and relevant when making a manifestation determination.) Therefore, I will order DCPS to conduct a new FBA and to develop a BIP that is designed to address Student's behaviors that gave rise to the series of disciplinary removals during the 2011-2012 school year.⁶ Pursuant to

⁶ An adult student has the right to an independent educational evaluation at the public expense if the student disagrees with an evaluation obtained by the public agency. *See* 34 CFR.

34 CFR § 300.300(c), DCPS must obtain Student's informed consent before conducting the FBA. Petitioner prevails on this issue.

ORDER

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

1. Within 10 school days of the entry of this order, DCPS shall convene Student's IEP team to determine if there was any educational deficit as a result of DCHS' March 29, 2012 suspension of Student, and what, if any, services are needed to compensate Student for such deficit. DCPS shall promptly implement such services which are determined to be needed by the IEP team;
2. Within 10 school days of this order, DCPS shall initiate a Functional Behavioral Assessment of Student to ascertain the causes of Student's behaviors which are interfering with her education and that of other Students, and shall promptly convene Student's IEP Team to develop and implement an appropriate Behavior Intervention Plan to address Student's problem behaviors; and
3. All other relief requested by Petitioner herein is denied.

SO ORDERED.

Date: May 7, 2012

s/ Peter B. Vaden
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).

Part 300.503 (b). In this case, the evidence does not establish that Student disagreed with the 2008 FBA or, prior to filing her due process complaint, requested DCPS to conduct a new FBA. At the due process hearing, when queried as to whether she would consent to a new FBA, Student was, at first, reluctant. However, she ultimately said that she would consent. Because the record does not establish that Student disagreed with the existing FBA, I will not order DCPS to fund an independent FBA.