



## Jurisdiction

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## Background

Petitioner is a \_\_\_\_\_ year-old student attending \_\_\_\_\_

On July 27, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) initiate a Student Support Team ("SST") at \_\_\_\_\_ during the 2008-2009 school year, (2) timely complete childfind procedures, (3) provide an appropriate placement, and (4) conduct manifestation determinations. In a Prehearing Order issued on August 30, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure timely to complete childfind procedures

Petitioner alleges that her mother made an oral request in April 2009 that Petitioner be evaluated to determine her eligibility for special education services, and her attorney made a written request in May 2009. DCPS convened a Multidisciplinary Team ("MDT") in June 2009, but Petitioner has not been evaluated, and there has been no determination of her eligibility.

DCPS asserts that Petitioner's mother has not provided consent to evaluate Petitioner.

- DCPS' alleged failure to conduct manifestation determinations

Petitioner alleges that Petitioner was suspended for extensive periods of time during the 2008-2009 school year without benefit of a manifestation determination. DCPS asserts that Petitioner's non-disabled status precluded the necessity of manifestation determinations. The Hearing Officer will adjudicate this issue pursuant to 34 C.F.R. Section 300.534.

- The *Complaint* also alleges DCPS' failure to (1) provide an appropriate placement, and (2) initiate a SST at Walker-Jones for Petitioner. Since Petitioner has not yet been identified as a child with a disability, DCPS

is not obligated to provide special education services to Petitioner.<sup>2</sup> Therefore, the placement allegation is premature and will not be adjudicated. SSTs provide intervention services to general education students. Thus, the services provided by SSTs are not required by or subject to IDEIA.

The due process hearing was convened and completed on September 9, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.

### **Record**

*Due Process Complaint Notice* dated July 27, 2009  
*District of Columbia Public School's Response to Petitioner's Due Process* dated August 18, 2009  
Prehearing Order dated August 30, 2009  
*DCPS' Five-Day Disclosure* dated September 2, 2009 (Exhibit Nos. 1-4)  
*Petitioner's Five-Day Disclosure* dated September 2, 2009 (Exhibit Nos. 1-7)  
Attendance Sheet and CD-Rom of hearing dated September 9, 2009

### **Witnesses for Petitioner**

Petitioner's Mother  
Day Wall, Senior Family Counselor,  
Social Worker,

### **Witnesses for DCPS**

Vice-Principal,  
Special Education Coordinator,

### **Findings of Fact**

1. Petitioner is a                    year-old student attending
2. Petitioner attended  
("IDEA") during the 2007-2008 school year and the beginning of the 2008-2009 school year. She was expelled from                    in the fall of 2008 for fighting with a teacher and a security guard. Petitioner enrolled at                    in November 2008.<sup>4</sup>

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<sup>2</sup> 34 C.F.R. §300.101(a)(1); 34 C.F.R. §300.107(a) and (b).

<sup>3</sup> Testimony of Petitioner's mother.

<sup>4</sup> *Id.*

3. On January 15, 2009, Petitioner was suspended for one calendar week for “verbal offences to a teacher, erratic behavior, threw pretzels at a teacher, constant classroom disturbances and she threw pretzel at a teacher”.<sup>5</sup>

4. On January 29, 2009, Petitioner was suspended for five days for “Extremely disrespectful to Administration, staff, etc., verbally cursing at teacher, “F” you – in cafeteria.”<sup>6</sup>

5. On February 18, 2009, Petitioner was suspended for five days for “failure to follow directions... cursing, calling Vice-Principal a boy... cursing staff in the office.”<sup>7</sup>

6. Petitioner was suspended for 25 days in March and sent to She was also suspended the last two weeks of the 2008-2009 school year.<sup>8</sup>

7. DCPS convened a Multidisciplinary Team (“MDT”) meeting on June 10, 2009 to discuss initiating childfind provisions. Petitioner’s mother declined to provide written consent to have Petitioner evaluated upon the advice of her attorney, who requested that DCPS authorize independent evaluations.<sup>9</sup>

## Conclusions of Law

### *Childfind Violations*

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.<sup>10</sup> No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.<sup>11</sup> The results of the evaluations must be given considerable weight in determining the child’s eligibility for services and in the development of the child’s IEP.<sup>12</sup> Under local law, “DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment.”<sup>13</sup>

During the hearing, Petitioner’s counsel argued and solicited testimony to establish that DCPS was on notice early in the 2008-2009 school year that Petitioner

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<sup>5</sup> Petitioner’s Exhibit (“P.Exh.”) No. 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Testimony of Ms. Whitehead.

<sup>10</sup> 34 C.F.R. §300.304(c)(4).

<sup>11</sup> 34 C.F.R. §300.304(b)(2).

<sup>12</sup> 34 C.F.R. §300.305(a).

<sup>13</sup> D.C. Code §38-2561.02(a). 5 D.C.M.R. §3004 (a) and (b)(1) provides that a referral for evaluations may be initiated in writing by the parent.

required special education services. However, as noted above, based on the allegations in the *Complaint* and assertions at the prehearing conference, the Hearing Officer limited the issues to be adjudicated to an oral request for evaluations by the parent in April 2009 and a written request by Petitioner's counsel in May 2009. 5 D.C.M.R. §3004 (a) and (b)(1) provides that a referral for evaluations may be initiated in writing by the parent. Petitioner's mother testified that she made an oral request for evaluations, but this allegation was not corroborated by any other evidence. Petitioner's counsel failed to introduce the written request that she referred to in the prehearing conference. Therefore, Petitioner failed to offer credible evidence that Petitioner's representatives requested that Petitioner be evaluated prior to the MDT meeting on June 10, 2009. At the meeting on June 10<sup>th</sup>, Petitioner's mother declined to provide written consent for Petitioner to be evaluated upon advice of counsel. Petitioner's counsel made this strategic decision in an effort to secure authorization for independent evaluations.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed timely to complete childfind proceedings. Neither Petitioner's mother nor Petitioner's counsel ever made a referral for evaluations pursuant to 5 D.C.M.R. §3004 (a) and (b)(1). When DCPS offered to evaluate Petitioner at the June 10<sup>th</sup> MDT meeting, Petitioner's representatives failed to provide written consent to evaluate.

#### ***Manifestation Determination***

Petitioner has not been identified as a child with a disability. In fact, DCPS has determined that Petitioner is not eligible for special education services. 34 C.F.R. Section 300.534, provides protection in disciplinary proceedings for children not yet identified with disabilities:

- (a) A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
- (b) An LEA must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred
  - (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

- (2) The parent of the child requested an evaluation of the child pursuant to §§300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency in accordance with the agency's established child find or special education referral system.

Manifestation determinations are required only for suspensions that will be for more than ten school days and will not constitute a change of placement under 34 C.F.R. Section 300.536.<sup>14</sup> That section includes within the definition of a "change of placement" "a series of removals that constitute a pattern because the series of removals total more than 10 school days in a school year."<sup>15</sup>

Petitioner, who has not been identified as a disabled child, may assert the protections provided for disabled students only if DCPS had knowledge that he was a child with a disability before the behavior that precipitated the disciplinary action occurred. The Hearing Officer has already ruled that Petitioner did not plead that DCPS was on notice prior to April 2009 that Petitioner was a child with a disability. Moreover, Petitioner's made no written request for evaluations prior to the June 10<sup>th</sup> MDT meeting. Therefore, Petitioner would be entitled to manifestation determinations only if her numerous suspensions evinced a disability. However, if lengthy suspensions alone justified manifestation determinations, the regulations would not have required the LEA to have "knowledge" of the student's disability; the regulations would have stipulated that a disability was established after a specified suspension duration. Since the regulations failed to make this stipulation, the Hearing Officer will not presume that a suspension, even of indefinite duration, is necessarily evidence of a disability.

The Hearing Officer concludes that Petitioner has failed to provide credible proof that DCPS had knowledge that Petitioner was a child with a disability prior to any of the suspensions acknowledged above. Therefore, Petitioner failed to establish an entitlement to manifestation determinations.

### **ORDER**

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearings, and the representations of the parties' counsel at the hearing, this 18<sup>th</sup> day of September 2009, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

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<sup>14</sup> 34 C.F.R. Section 300.530(e)(1).

<sup>15</sup> 34 C.F.R. Section 300.536(b)(1).

**IT IS FURTHER ORDERED**, that this Order is effective immediately.

**Notice of Right to Appeal Hearing Officer's Decision and Order**

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/

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Terry Michael Banks  
Hearing Officer

Date: September 18, 2009