

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: April 20, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0084

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: April 10, 2017

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice and request for expedited hearing filed by Petitioner, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner asserts that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not following the IDEA's procedures for disciplining children with suspected disabilities. The parent also alleges that CITY SCHOOL 2 violated the IDEA's prohibition against requiring a child to take prescribed medications as a condition to attending school.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 23, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on March 24, 2017. The parties met for a resolution session on April 6, 2017 but were unable to reach an agreement. The expedited due process hearing was scheduled by email without convening a prehearing conference. My final decision in this case is due within 10 school days of the hearing date, by May 1, 2017.

The expedited due process hearing was held before the undersigned impartial hearing officer on April 10, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

The Petitioner (MOTHER) testified and called as additional witnesses CFS SOCIAL WORKER, COMMUNITY-BASED INTERVENTIONIST (CBI) and LAW FIRM ADMINISTRATOR. DCPS called as witnesses LEA Representative and PRINCIPAL. Petitioner's Exhibits P-1 through P-30 were admitted into evidence, except for Exhibit P-18 to which DCPS' objection was sustained. Exhibit P-2 was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-5 were admitted into evidence without objection. Counsel for the respective parties made opening statements and closing arguments. Neither party requested leave to file a post-hearing written memorandum.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The issues to be resolved in this case, and relief requested are:

A. Whether DCPS constructively or otherwise suspended Student for a period of time exceeding ten days in the 2016-2017 school year without complying with the requirements for disciplining a child with a disability set forth in 34 CFR § 300.530 and

B. Whether City School 2 has required that the parent medicate her child in violation of the IDEA's prohibition against requirement of taking prescribed medications as a condition to attend school.

For relief, the parent requests that the hearing officer order DCPS to conduct an expedited comprehensive psychological evaluation and a functional behavioral assessment (FBA) and convene a meeting to determine whether the student is eligible for special education services under the classification of Learning Disability (LD), Other Health Impairment (OHI) or Emotional Disturbance (ED); order DCPS to immediately allow Student to return to school and to refrain from further suspending either formally or informally sending the student home early for behavior issues, or requiring medication as a condition of attendance for the remainder of the school year. The Petitioner reserved seeking compensatory education for Student, pending the requested eligibility determination and development of an initial IEP.

FINDINGS OF FACT

After considering all of the evidence received at the April 10, 2017 due process hearing in this case, as well as the argument of counsel, this hearing officer's Findings of Fact are as follows:

1. Student is an age resident of the District of Columbia, where ■■■■ resides with Mother. Student is currently enrolled GRADE in City School 2. Testimony of Mother.

2. DCPS is currently evaluating Student for special education eligibility. [REDACTED] evaluation will include a comprehensive psychological and a functional behavioral assessment (FBA). These assessments are due to be completed shortly after the DCPS' 2017 spring break. Testimony of LEA Representative.

3. Student transferred to City School 2 at the beginning of the 2016-2017 school year. Previously Student attended CITY SCHOOL 1. In 2014, Student was evaluated by Early Stages assessment center in the District because of behavior problems and [REDACTED] was provided a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973). Student has never been determined eligible for special education under the IDEA. Testimony of Mother.²

4. CFS Social Worker has provided services to Student and [REDACTED] family since January 29, 2017. CFS Social Worker sees Student at home and at school. DCPS Community Connections Behavioral Health has diagnosed Student with Disruptive Mood Dysregulation Disorder. Testimony of CFS Social Worker.

5. In the 2016-2017 school year, City School 2 staff have repeatedly contacted Mother in response to safety incidents at school when, due to Student's behaviors, the school officials felt that Student or other children were not safe. These incidents included Student's being physically aggressive, climbing on top of tables, and throwing things. When these "crisis" incidents occurred, the school would contact Mother to take student home. Although Mother described these occurrences as "suspensions," they were not were not considered disciplinary removals, but were responses to safety concerns. Testimony of LEA Representative, Testimony of Principal, Testimony of CFS

² Petitioner's Counsel asserted on the record that this case is not a "Child-Find" case. In this case, Petitioner has not asserted a child-find claim on behalf of Student. See 34 CFR § 300.111.

Social Worker. Mother has been called to pick up Student at school sometimes 2-3 times per week. Testimony of Mother.

6. Student was disciplined with out-of-school suspensions following incidents in November 2016 and on March 7, 2017. Exhibit P-19. The total days of out-of-school suspensions of Student for the 2016-2017 school year has been 4 days. Testimony of LEA Representative, Testimony of Principal. Following a major behavior incident at school on March 7, 2017, Student was suspended from school for 2 days. Mother kept Student home for the following week. Testimony of Principal.

7. On the day of the March 7, 2017 incident, COMMUNITY IN SCHOOLS (CIS) SOCIAL WORKER and CFS Social Worker met with Principal. CFS Social Worker testified that Principal stated that Student would have to be medicated for ■ safety before ■ would be allowed to return to school. In her testimony, Principal denied having such a conversation. Student was allowed to return to school, without having been placed on medications. Testimony of Mother. CFS Social Worker and Principal both appeared to be credible witnesses but neither witness' version of the March 7, 2017 conversation was corroborated by probative evidence. Therefore, I make the Finding of Fact that Petitioner has not met her burden of persuasion that Principal stated that Student would not be allowed to return to school unless ■ were medicated.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, the Conclusions of Law of this hearing officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District.

Analysis

A.

Did DCPS constructively or otherwise suspend Student for a period of time exceeding ten days in the 2016-2017 school year without complying with the requirements for disciplining a child with a disability set forth in 34 CFR § 300.530, *et seq.*?

The Petitioner contends that by repeatedly calling Mother to pick up Student from School after ■■■ "crisis" behaviors, City School 2 "constructively" suspended Student on those occasions and was required to comply with the IDEA's discipline procedures, including convening a multidisciplinary team to determine whether Student's conduct was a manifestation of an IDEA disability. DCPS maintains that Student has only been suspended for 4 days in the 2016-2017 school year and that the other times when the school requested Mother to take Student home were on account of safety concerns and were not disciplinary removals.

Prior to suspending a student with a disability for 10 or more days in the same school year for violation of a code of student conduct, the school must conduct a

manifestation determination review (MDR) during which the student’s parents and educators consider the relevant information in the student’s file, as well as information provided by teacher observations and the parents, to determine whether the conduct at issue “was caused by, or had a direct and substantial relationship to, the child’s disability” or “was the direct result of the local educational agency’s failure to implement the IEP.” 20 U.S.C. § 1415(k)(1)(E).³ A child who has not been determined to be eligible for special education and who has engaged in behavior that violated a code of student conduct, is entitled to the same the protections, if the public agency is deemed to have had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. *See* 34 CFR § 300.534.

In *M.N. v. Rolla Pub. Sch. Dist. 31*, 2012 WL 2049818 (W.D.Mo. June 6, 2012), the court explained that there are two criteria for when a school must conduct a manifestation determination to determine if behavior resulted from the child’s disability, namely where a child with a disability suffers (1) a change of placement for (2) a disciplinary reason. “The first issue in deciding whether a manifestation determination is

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FN8. Section 1415(k)(1)(E) provides in full:

Except as provided in subparagraph (B), 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

Id.

required is determining whether the disabled child has suffered a change of placement. . . . After establishing the removal was a change of educational placement, the second criteria for requiring a manifestation determination is whether the change of placement was for a disciplinary reason. IDEA clearly states that a manifestation determination must take place if there is a decision to “change the placement of a child with a disability **because of a violation of a code of student conduct.**” *M.N., supra*, citing 34 C.F.R. § 300.530(e) (emphasis in original).

For purposes of this analysis, I assume, without making a finding, that at all times concerned DCPS had knowledge that Student is a child with a disability and also that Student has been sent home often enough in the current school year to have “suffered a change of placement.” However, Petitioner has not established the second criterion for requiring an MDR, namely that the change of placement was for a disciplinary reason, *i.e.*, because of a violation of a code of student conduct. To the contrary, the hearing evidence established that this school year, except for 4 days of out-of-school suspensions, City School 2 has only sent Student home out of concerns for Student’s safety and that of other children.

Petitioner’s Counsel attempts to get around the IDEA’s explicit language that the removal from school be “because of a violation of a code of student conduct” by arguing that the school’s sending Student home so often for safety reasons constituted a constructive suspension for more than 10 days. In *Big Beaver Falls Area Sch. Dist. v. Jackson By & Through Nesmith*, 624 A.2d 806 (Pa. Cmwlth. 1993), a decision cited by counsel, the student was repeatedly disciplined with out-of-school and in-school suspensions (ISS) for disruptive and problematic behaviors. On the in-school suspension days, the student elected to remain at home, apparently with the knowledge of school

officials. The Commonwealth Court of Pennsylvania held that by continuing to assign the student to ISS, when the school should have known that ■ would be excluded from school, and not just from regular classes, the disciplines could be considered a *de facto* or constructive suspension, because these actions resulted in a substantial interference with the student's rights to a FAPE under the IDEA. *See id.* at 808-09. Petitioner's Counsel argues that in the present case, City School 2's sending Student home for safety reasons was likewise a *de facto* or constructive suspension.

This argument is not persuasive. In *Big Beaver Falls*, the court was explicit that the school "discipline[d]" Student for ■ disruptive and problematic behaviors – whether with in-school or out-of-school suspensions. *See id.*, 624 A.2d at 807. In the present case, the evidence is that this school year, Student has not been removed for disciplinary reasons, except for 4 days of out-of-school suspensions. I conclude that because Student has not been removed from school for more than 10 school days for code of conduct violations, the IDEA's discipline safeguards for children with disabilities, including conducting a manifestation determination review, were not implicated.

B.

Did City School 2 require that the parent medicate her child in violation of the IDEA's prohibition against a requirement of taking prescribed medications as a condition to attend school?

The IDEA prohibits school personnel from requiring parents to obtain prescription medications for a child as a condition of attending school. *See* 20 U.S.C. 1412(a)(25). Petitioner alleges that the principal at City School 2 violated this prohibition by stating, after the March 7, 2017 discipline incident, that Student would not be allowed to return to school until ■ was medicated. However, in her testimony at the due process hearing, Principal denied requiring that Student be medicated and it is not

disputed that after the March 7, 2017 out-of-school suspension, Student was allowed to return to school, without obtaining prescribed medications. I find that Petitioner has not met her burden of persuasion on this claim.

ORDER

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

ORDERED:

All relief requested by the Petitioner herein is denied, without prejudice to the parent's right to have DCPS complete its evaluation of Student for eligibility for special education and related services in conformity with the requirements of the IDEA and District law and regulations.

Date: April 20, 2017

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).

cc: Counsel of Record
Office of Dispute Resolution
OSSE Division of Specialized Education
DCPS Resolution Team