

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

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: December 6, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2017-0304

v.

Hearing Date: December 1, 2017

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2003  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (MOTHER), 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. Petitioner's due process complaint included alleged violations of the IDEA's procedures for disciplining a student with a disability as well as other alleged denials of a free appropriate public education (FAPE) to Student. In order to meet the IDEA's requirement to hold a hearing on the disciplinary issue within 20 school days, *see* 34 CFR

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<sup>1</sup> Personal identification information is provided in Appendix A.

§ 500.532(c)(2), I bifurcated the case. This decision addresses only the disciplinary issue alleged by Petitioner.

For her disciplinary issue, Petitioner alleges that PUBLIC CHARTER SCHOOL (PCS) did not comply with the IDEA's disciplinary regulations when PCS allegedly forced Student out of the charter school near the end of the 2015-2016 school year. The due process hearing on the disciplinary issue was held on December 1, 2017. A hearing on the remaining complaint issues (Case No. 2017-0304-B) is set for January 17, 2018.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on November 8, 2017, named DCPS and PCS as respondents. The undersigned hearing officer was appointed on November 9, 2017. On November 20, 2017, after DCPS confirmed that it was the local education agency (LEA) for PCS for the 2015-2016 school year, I granted Petitioner's unopposed motion to dismiss PCS as a respondent. The parties met for a resolution session meeting on November 20, 2017. No agreement was reached. My final decision in the disciplinary part of this case is due within 10 school days of the hearing date, by December 15, 2017.

The expedited due process hearing was held before the undersigned impartial hearing officer on December 1, 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 PCS' HEAD OF SCHOOL and by DCPS' COUNSEL.

Mother testified and called no other witnesses. DCPS called Head of School as its only witness. Petitioner's Exhibits P-1 and P-4 were admitted into evidence. Exhibit P-1 was admitted over DCPS' objection. DCPS' objections to Exhibits P-5, P-6 and P-7 were

sustained. Petitioner withdrew Exhibits P-2 and P-3. DCPS' only exhibit, Exhibit R-1, was admitted into evidence without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made closing arguments. There was no request to file written closings.

### **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 issue to be resolved in this expedited part of the case is:

Whether PCS failed to comply with the IDEA disciplinary regulations when allegedly forcing the student out of the charter school during the 2015-2016 school year.

The parent requested for relief, both for the disciplinary claims and for the remaining claims in the bifurcated, non-discipline, part of the case, that DCPS be ordered to fund an Independent Educational Evaluation (IEE) comprehensive psychological evaluation of Student, that DCPS be ordered to conduct a functional behavioral assessment (FBA) of Student, that DCPS be ordered to convene a multidisciplinary team (MDT) meeting to review the evaluations and to revise Student's Individualized Education Program (IEP) and that DCPS be ordered to provide an appropriate educational placement. The Petitioner requested that she be allowed to reserve discussion of compensatory education until the requested evaluations would be completed and Student had been provided an appropriate IEP.

### **FINDINGS OF FACT**

After considering all of the evidence received at the December 1, 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, an AGE resident of the District of Columbia, resides with Mother. Testimony of Mother. Student is eligible for special education and related services under the IDEA disability classification Specific Learning Disability (SLD). Exhibit P-4.
2. For the 2013-2014 and 2014-2015 school years, Student attended CITY SCHOOL 1. Mother enrolled Student in Public Charter School for the 2015-2016 school year. Student is currently enrolled in CITY SCHOOL 2. Testimony of Mother.
3. DCPS was the local education agency for PCS for the 2015-2016 school year. Representation of Counsel, Hearing Officer Notice.
4. From the first quarter of the 2015-2016 school year at Public Charter School, Student had poor school attendance. The school's attendance monitor was tasked with keeping an eye on Student's attendance. At times, Student's attendance would improve. Then Student would be chronically absent. Testimony of Head of School. For the 2015-2016 school year, Student had some 54 reported unexcused school absences in addition to a number of unexcused tardies. Exhibit R-1.
5. At some point after May 13, 2016, Mother withdrew Student from PCS. The circumstances of the withdrawal are in dispute. Mother testified that a dean at PCS told her that they were putting Student out of school because Student had so many absences. Mother testified that the school indicated that it would make a truancy referral for Student to the District of Columbia courts. Testimony of Mother. Head of School testified that it was "impossible" that Mother would have been told not to bring Student back to school and that his understanding was that there had been a conversation with staff about Mother's being liable for Student's attendance and Mother decided to transfer Student to City School 2. Head of School testified that, "We don't expel kids for

attendance.” Testimony of Head of School.

### **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. On the sole issue in this part of the case, Petitioner must bear the burden of persuasion, which shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### **Analysis**

Did PCS fail to comply with the IDEA disciplinary regulations when allegedly forcing the student out of the charter school during the 2015-2016 school year?

The IDEA prohibits the punishment of a student with a disability for misbehavior that is a manifestation of the disability. Prior to expelling a student, or to suspending a student with a disability for more than 10 school days, because of a violation of a code of student conduct, the school must conduct a “manifestation determination” 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).<sup>2</sup> If the student’s behavior is determined to be a manifestation of his or her disability, the student must be restored to the student’s regular education program. *See* 20 U.S.C. § 1415(k)(1)(F). If not, then the school may discipline the student as it would any other non-disabled student, provided that the student continues to receive FAPE. 20 U.S.C. §§ 1415(k)(1)(C), 1415(k)(5)(D)(i). *See Jackson v. Northwest Local Sch. Dist.*, 2010 WL 3452333, at 9 (S.D. Ohio Aug. 3, 2010), *report and recommendation adopted*, 2010 WL 3474970 (S.D. Ohio Sept. 1, 2010).

In this case, it is undisputed that Mother withdrew Student from PCS near the end of the 2015-2016 school year and that at the time of the withdrawal, PCS did not conduct an MDR meeting or otherwise implement the IDEA’s procedures for disciplining a student with a disability. What is disputed is whether Student’s withdrawal from PCS

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<sup>2</sup> 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.*

resulted from an expulsion for poor attendance or from a decision by Mother to withdraw Student because of the possibility of a court truancy referral.

No evidence was offered that Student was ever formally expelled from PCS. Petitioner's Counsel argues that Student was "constructively" expelled. What would constitute a constructive expulsion for purposes of the IDEA's disciplinary procedures is not evident from the IDEA and there are very few judicial decisions on point. In *Bitsilly ex rel. Denet-Yazzie v. Bureau of Indian Affairs*, 253 F.Supp.2d 1257 (D.N.M. 2003), the plaintiff alleged that school authorities informed the student's guardians that he was wasting the school's time and he would be expelled indefinitely if they did not withdraw him. The Court held that the plaintiffs' complaint, including the constructive expulsion allegation, stated a claim for substantive deprivations of FAPE. *Id.* at 1262.

At the due process hearing, Mother testified that a dean at PCS told her that they were putting Student out of school because Student had so many absences. Head of School denied this and testified that it was "impossible" that Mother would have been told not to bring Student back to school. Head of School testified to his understanding that there had been a conversation between Mother and school staff about Mother's being "liable" for Student's attendance and Mother then decided to transfer Student to City School 2.

The IDEA's discipline safeguards for children with disabilities are only "triggered" if a student is expelled or removed from school for more than 10 school days for a code of conduct violation. In this case, Petitioner had the burden of persuasion to establish that Student was constructively expelled from PCS. Mother's assertion that Student was put out of school was not corroborated by any other witness or by written evidence. While I found Mother and Head of School to be equally credible witnesses,

Mother did confirm that at the time she withdrew Student from PCS, she had been alerted that a truancy referral for Student could be made. That tends to support Head of School's account of what happened. This is a close case, but weighing the sparse evidence, I find that Mother has not met her burden of persuasion that Student's withdrawal from PCS at the end of the 2015-2016 school year was due to an expulsion or constructive expulsion for a violation of a code of student conduct.<sup>3</sup> Therefore, the IDEA's disciplinary procedures were not applicable to Student's withdrawal from PCS.

ORDER

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

ORDERED:

1. Petitioner's claim that Student was forced out of Public Charter School, in violation of the requirements of the IDEA or District law, for disciplining a student with a disability is dismissed with prejudice and
2. All relief requested by the Petitioner herein is denied without prejudice to Petitioner's right to seek appropriate relief for the non-discipline claims pending in Case No. 2017-0304-B.

Date: December 6, 2017

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

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<sup>3</sup> In closing argument, Petitioner's Counsel asserted that, in its answer to the due process complaint, DCPS did not dispute that Student had been expelled. This is incorrect. In its response, DCPS alleged that "according to records, the student was not suspended or expelled. When threatening [*sic*] with truancy the Petitioner removed the student." See *DCPS' Amended Response to Petitioner's Due Process Complaint*, Nov. 17, 2017.

**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