

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

PETITIONER, on behalf of STUDENT, ¹)	Date Issued: October 20, 2017
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2017-0254
)	
PUBLIC CHARTER SCHOOL,)	Hearing Date: October 17, 2017
)	
Respondent.)	Office of Dispute Resolution, Room 2006 Washington, D.C.
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for an expedited hearing upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or FATHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In his Due Process Complaint, Petitioner alleges that Respondent Public Charter School (PCS) denied Student a free appropriate public education (FAPE) by expelling Student at the beginning of the 2017-2018 school year in violation of the IDEA's provisions concerning disciplining students with disabilities.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 18, 2017, named PCS as respondent. On

¹ Personal identification information is provided in Appendix A.

September 26, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. Pursuant to the IDEA, the expedited due process hearing was originally set for October 10, 2017, within 20 school days of the filing of the due process complaint. Due to a medical emergency, by agreement of counsel, the hearing was postponed to October 17, 2017, one day after the 20 school days deadline. This Hearing Officer Determination must be issued within 10 school days after the hearing. *See* 34 CFR § 532(c)(2).

The hearing was convened before me on October 17, 2017 at the Office of Dispute Resolution 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 and was represented by PETITIONER'S COUNSEL. PCS was represented by PRINCIPAL and by PCS' COUNSEL.

Father testified and called EDUCATIONAL ADVOCATE as his only witness. PCS called Principal, STAFF MEMBER 1, STAFF MEMBER 2, STAFF MEMBER 3, STAFF MEMBER 4 and STAFF MEMBER 5 as witnesses. Petitioner's Exhibits P-1 through P-6 and PCS' Exhibits R-1 and through R-2 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing 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 determined in this case are:

- Did PCS violate applicable law and deny Student a FAPE by expelling Student on or about August 25, 2017 without adhering to the IDEA’s safeguards pertaining to disciplining students with disabilities (34 CFR § 300.530 *et seq.*)?
- Did PCS fail to comply with the IDEA’s requirement to provide the parent a copy of its procedural safeguards notice when it allegedly expelled Student?

For relief, Petitioner requests: (1) that the hearing officer order PCS to allow the student to remain in the LEA; (2) that the hearing officer order PCS to comply with the disciplinary procedures of the IDEA; (3) that the hearing officer order PCS to provide the student with compensatory education for the period of time that the student has been out of school without any services; (4) that the hearing officer order PCS to conduct a reevaluation of the student in all areas of suspected disabilities and (5) that the hearing officer order PCS to reconvene Student’s Multidisciplinary/Individualized Education Program (MDT/IEP) team within 20 days after the completion all of the evaluations to make the necessary adjustments to the student’s IEP and to issue a notice of an appropriate location of services for the student.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE youth, resides with Father in the District of Columbia.

Testimony of Father.

2. Student is eligible for special education and related services as a student with a Specific Learning Disability. Exhibit P-1.
3. Father enrolled Student in PCS at the beginning of the 2016-2017 school year. Student’s October 7, 2016 PCS IEP provided for Student to receive 10 hours per

week of Specialized Instruction and 120 minutes per month of Occupational Therapy in the general education setting. Testimony of Father, Exhibit P-1.

4. Student started off slowly, academically, at PCS. Student turned around right at the end of the 2016-2017 school year and pulled on through. Student was able to pass to the next GRADE. Testimony of Father.

5. Student returned to PCS around mid-August for the 2017-2018 school year. Testimony of Father.

6. On August 24, 2017 in the afternoon, Principal and Staff Member 2 visited Student's classroom at PCS for an observation. Principal allegedly noticed the smell of marijuana and saw another student ("Student 2") passing marijuana to Student. Principal and Staff Member 2 called Student and Student 2 out of the classroom and searched their backpacks. They allegedly found a BB gun in Student's backpack and marijuana in both student's backpacks. Principal contacted Father and Student 2's parent and asked them to come in to discuss the incident. Testimony of Principal.

7. That afternoon, Father went to PCS as requested. When he arrived, Principal was meeting with Student 2's parent. Father met with Staff Member 2, PCS' executive director. Student and Staff Member 1 were present at the meeting. The BB gun, allegedly found in Student's backpack, was on a table. Student denied that the BB gun belonged to Student and said another student had placed the marijuana in his backpack. Staff Member 2 instructed Father to take Student home and that Student should not to return to school the next day, until Father heard from Principal. Testimony of Father. At the meeting, Staff Member 2 told Father that there could be a full range of consequences for the alleged offenses and that expulsion could be possible. Testimony of Staff Member 2.

8. No procedural safeguards notice or other written notice concerning the incident or Student's suspension was provided to Father. Testimony of Father.
Testimony of Staff Member 2.

9. On the afternoon of August 25, 2017, PCS's leadership team, including Staff Member 1, Staff Member 2, Principal, and Staff Member 3, met for a regular weekly meeting. The leadership team discussed the August 24, 2017 incident involving Student and Student 2. They discussed the range of possible disciplinary consequences. The team did not decide what discipline would be imposed. It was left that Principal would talk with Father before a final decision would be made. Testimony of Staff Members 1, 2 and 3, Testimony of Principal.

10. On August 25, 2017, after the leadership team meeting, Principal telephoned Father. Principal and Father disagree about what was said and there were no other reported witnesses. Father testified that Principal said that he didn't "think" that Student would be allowed to be at PCS anymore and referred to an incident the prior school year when Student had allegedly been caught using a school computer to access an internet site concerning a infamous high school shooting. Testimony of Father. According to Principal, he first asked Father if he had any information about the August 24, 2017 incident. Then he told Father that the leadership team had met and had not made a discipline decision. Principal told Father that Student was still suspended, that discipline could be a long-term suspension and that there was a possibility that Student would not be allowed to come back to school. Principal testified that it was Father who mentioned the prior school year internet issue. Testimony of Principal. Father got mad during the telephone conversation and hung up on Principal. Testimony of Father.

11. On the morning of August 28, 2017, Father and Student went to PCS. Father went to the reception desk and told Staff Member 5 that he had come in to withdraw Student. Father did not say why he was withdrawing Student from PCS, but he did say that he had talked to Principal and it had been a heated conversation.

Testimony of Staff Member 5. At request of Staff Member 5, Staff Member 4 generated a withdrawal form on her computer with Student's name and date of birth. Staff Member 4 asked Father what school Student would be enrolling in. When Father said he was not sure, Staff Member 4 asked Father to write "not sure" on the withdrawal form. Testimony of Staff Member 4.

12. The withdrawal form is titled STUDENT WITHDRAWAL/ENROLLMENT VERIFICATION. The form states, "I, [Father's name] (Parent/Guardian) am withdrawing [Student] from [PCS] for the following reason:" The line for the reason was not filled in. Exhibit R-1. Father wrote his name in the space provided, wrote "Not sure" for next school of attendance, and signed and dated the form. Father took a copy of the signed form with him. Testimony of Father.

13. Father testified that no one told him that the form he signed on August 28, 2017 was a withdrawal form and that Staff Member 5 had given him the form because he asked for Student's transcript. I did not find this testimony credible. Father filled in his name on the form and signed and dated it. Father is a retired police officer and currently works as a court security officer. There is no doubt about his ability to read the form. Moreover, Staff Member 5 testified, credibly, that when Father arrived at the school on August 28, 2017, he stated that they needed to do the withdrawal papers, and he specifically said "withdrawal." Testimony of Staff Member 5. I find it more likely than not that on August 28, 2017, Father knowingly executed the form, Exhibit R-1,

withdrawing Student from PCS.

14. Principal learned later that Father had withdrawn Student from PCS. Principal understood that it was unnecessary to proceed with the discipline process for Student after Student had been withdrawn from the school. In Principal's experience, it was not unusual for a parent of a student facing discipline proceedings to withdraw the student from the school. Principal had no further direct communications with Father after the withdrawal. Testimony of Principal.

15. On approximately September 11, 2017, Father returned to PCS to see if he could get Student back in school. Testimony of Father. Also on that day, PCS' Counsel wrote Father's former attorney, by email, that Father had withdrawn Student from PCS and that Student could reapply for enrollment, but Student would need to go through the application/wait list process because all of the spots at PCS had been filled by other students. Testimony of Principal, Exhibit P-5. See 5E DCMR § 915.3, *et seq.*²

16. Father applied to several schools for Student. Student was turned down by two schools. City School informed Father it had a spot for Student and Father enrolled Student there around September 27, 2017. Student is now attending City School. Testimony of Father.

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:

² "If a public charter school has more applications to enroll in the school from students who are residents of the District of Columbia than there are available spaces, students shall be admitted using a random selection process." 5E DCMR § 915.3

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. *See* D.C. Code § 38-2571.03(6). In this case, there is no dispute about the appropriateness of Student's IEP or placement. Therefore, Petitioner must bear the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence.

Analysis

- Did PCS violate applicable law and deny Student a FAPE by expelling Student on or about August 25, 2017, without adhering to the IDEA's safeguards for disciplining students with disabilities (34 CFR § 300.530 *et seq.*)?
- Did PCS fail to comply with the IDEA's requirement to provide the parent a copy of its procedural safeguards notice when it allegedly expelled Student?

Student, who is a student with a disability, was involved in an incident at PCS on Thursday, August 24, 2017, when a BB gun and marijuana were alleged discovered in Student's backpack. Student was immediately suspended from school and Student's father was informed that Student should not return until Principal contacted Father. Father withdrew Student from PCS on Monday, August 28, 2017.

The IDEA and the D.C. Municipal Regulations (DCMR) protect disabled students

from being removed from the classroom because of their disabilities. The DCMR, consistent with IDEA regulations, require that if a disciplinary action is contemplated for a behavior of a student with a disability, or if a proposed disciplinary action involves removal of a student with a disability from his or her current placement for more than ten consecutive school days, the local education agency (LEA) must ensure that:

(a) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and of all procedural safeguards accorded by law; and

(b) Immediately, if possible, but in no case later than ten (10) school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

5B DCMR § 2510.8. *See, also*, 34 CFR §§ 300.530, 300.536. PCS is an "LEA Charter," *i.e.*, it serves as its own local education agency for purposes of part B of the IDEA. *See* 5E DCMR § 923.3. Therefore, with respect to students enrolled in PCS, the charter school is responsible for meeting the IDEA and related DCMR requirements applicable to an LEA. Counsel for the parties stipulated at the beginning of the October 17, 2017 due process hearing that none of the IDEA or DCMR safeguards for disciplining students with disabilities was implemented following Student's August 24, 2017 alleged code of conduct violation.

The crux of the dispute in this case is whether PCS was required to afford Student the discipline safeguards mandated by the IDEA and the DCMR following the August 24, 2017 incident, including a Manifestation Determination Review and notification of procedural safeguards. *See* 34 CFR § 300.530(e), (h). The IDEA permits students with disabilities to be removed from their current educational placement for up to 10 school days without triggering the Act's discipline safeguards. *See* Department of Education,

Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46579, 46714-15 (August 14, 2006).³ Father alleges that in an August 25, 2017 telephone call, before Father withdrew Student from PCS, Principal told him that Student would not be allowed to come back to the charter school. PCS denies that Principal told Father that Student could not return and maintains that when Principal and Father spoke on August 25, 2017, the school had not yet decided what discipline would be imposed. PCS alleges that Father voluntarily withdrew Student from PCS before a discipline decision was made. As the Petitioner, Father had the burden of persuasion on this issue.

In his testimony, Father stated that in his telephone conversation with Principal, Principal told him that he did not “think” that Student would be allowed to be at PCS anymore. Principal rebutted Father’s testimony and insisted that he only told Father that possible sanctions could range from short term suspension to Student’s not being allowed to come back. Principal stated that after he told Father that, Father got upset and there was no further opportunity to dialog. Father acknowledged in his testimony that he “got mad” in the telephone conversation and hung up on Principal.

No one else heard the telephone conversation between Father and Principal. Father’s version of what was said was uncorroborated. Principal’s testimony was buttressed, indirectly, by the testimony of Staff Members 1, 2 and 3. These witnesses attended a school leadership meeting on August 25, 2017, before Principal telephoned

³ “[A] school may order a change in placement for a child who violates a code of student conduct to an appropriate interim educational setting, another setting, or suspension, for 10 consecutive school days or less, to the same extent that it would apply such a discipline measure to a child without a disability.”

Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46714-15 (August 14, 2006).

Father. They all confirmed that Student's alleged misconduct was discussed at the meeting and that no discipline decision had been made. It was left that Principal was to talk to Father to get more information about the incident.

Except for Father's uncorroborated testimony that Principal told him that he did not think Student could come back to school, there was no evidence that a decision was made either by the school or by Principal, individually, to expel Student or to suspend Student for more than 10 days. I conclude that Father has not carried his burden of persuasion that Student was expelled from PCS or that before he withdrew Student, PCS staff had made a decision to expel Student or to impose a disciplinary suspension for more than 10 days. Therefore the IDEA and DCMR safeguards for disciplining students with disabilities were not applicable.

ORDER

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

All relief requested by Petitioner in this case is denied.

Date: October 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).