District of Columbia

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Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Local Educational Agency ("LEA") Respondent. Case # 2017-0167-B Date Issued: August 17, 2017	CORRECTED HEARING OFFICER'S DETERMINATION ON EXPEDITED ISSUE ONLY [2] Hearing Date: July 17, 2017 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

[2] This "Corrected" HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, August 17, 2017, remains unchanged, as does the applicable appeal date.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on July 17, 2017, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[3] The student resides in the District of Columbia and is a child with a disability pursuant to IDEA.

The student currently attends a District of Columbia Public Schools ("DCPS") school ("School A") and DCPS is the student's local educational agency ("LEA"). The student began attending School A at the start of school year ("SY") 2016-2017.

The student's current individualized education program ("IEP") was developed on February 13, 2017. The student's parent ("Petitioner") filed the current due process complaint on June 20, 2017, alleging, inter alia, that DCPS denied the student a FAPE by conducting an invalid manifestation determination review ("MDR") on June 5, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on June 28, 2017, and issued a pre-hearing order ("PHO") on July 3, 2017, outlining, inter alia, the issues to be adjudicated.

The issues alleged in the complaint were bifurcated and a hearing was conducted on July 17, 2017, on the single issue regarding the MDR. That issue is subject to an expedited hearing pursuant to 34 C.F.R. § 300.530 et seq. and is to be held within twenty (20) school days of the complaint being filed. The Hearing Officer's Determination ("HOD") on that single issue is due ten (10) school days after the hearing, which is the first school day of SY 2017-2018: August 21, 2017. The other issues alleged in the complaint will be adjudicated in a hearing to be convened on August 21, 2017.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer find that DCPS has denied the student a FAPE, void the June 5, 2017, MDR and order DCPS to expunge the suspension that led to the MDR from the student's educational record or determine that the student's conduct was a manifestation of disability. Petitioner also requests that DCPS provide the student with compensatory education.

[3] The student's current age and grade are in indicated in Appendix B.

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on June 30, 2017. The LEA denies that there has been any failure to provide the student with a FAPE. In its response, DCPS asserts, inter alia, that the MDR was held and each question required to be addressed, was addressed at the meeting. The team determined that the student's behaviors were not a manifestation of disability, but were socially maladaptive and pre-meditated. The team determined that the student was aware of actions and their consequences, and had the ability to refrain.

ISSUE: [4]

The issue adjudicated is:

Whether DCPS denied the student a FAPE by conducting an invalid MDR on June 5, 2017, because (a) the student's parent(s) were not involved, (b) School A failed to address each question IDEA requires be addressed during a MDR, and (c) School A failed to determine the student's conduct was a manifestation of her disability.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 10 and Respondent's Exhibits 1 through 8) that were admitted into the record and are listed in Appendix A.[5] Witnesses' identifying information is listed in Appendix B.[6]

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to conduct an appropriate MDR. The Hearing Officer concludes the MDR was invalid because the student's parent(s) did not participate in the MDR after DCPS had been notified of Petitioner's request that the MDR be rescheduled and that Petitioner had obtained new counsel. Because the MDR was invalid, the Hearing Officer did not reach a conclusion on the merits of whether the MDR determination was incorrect and/or whether the MDR addressed all required questions. The Hearing Officer grants Petitioner's request that the MDR determination be vacated and orders DCPS to reconvene the MDR with Petitioner present and make a valid determination regarding the alleged incident and whether the student's conduct

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[4] The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

[5] Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

[6] Petitioner presented three witnesses: Petitioner (the student's father), an independent clinical psychologist, and a supervising attorney from the legal clinic that previously represented Petitioner. Respondent presented two witnesses: A DCPS school psychologist and the School A special education coordinator.

was a manifestation of disability and otherwise fulfill the requirements of 34 C.F.R. § 300.530 et seq.

The Hearing Officer concludes the student is entitled to compensatory education for the three (3) days was suspended. The Hearing Officer grants Petitioner fifteen (15) hours of independent tutoring as compensatory education for the services the student missed during three-day suspension.

FINDINGS OF FACT: [7]

1. The student was a [ ] grader at School A when began attending at the start of SY 2016-2017. (Stipulation)

2. The student has a disability classification of emotional disability ("ED"). (Stipulation)

3. Prior to attending School A the student attended School B. (Stipulation)

4. At School B, the student had an individualized educational program ("IEP") that was developed on June 14, 2016, that prescribed that receive 6 hours of specialized instruction per week inside general education and 60 minutes per week of behavior support services outside general education. (Stipulation)

5. On February 1, 2017, the student engaged in conduct at School A that resulted in suspension from school for twenty-five (25) days. (Petitioner's Exhibit 4-7, 4-8)

6. On February 13, 2017, School A convened an IEP review meeting and changed the student's IEP to require that receive 15 hours of specialized instruction per week outside general education and 120 minutes per month of behavior support services. (Stipulation)

7. On the same day, School A convened a MDR and determined the student's behavior that led to the suspension was not a manifestation of disability. (Stipulation)

8. Petitioner challenged the suspension through a hearing before the Office of Administrative Hearings ("OAH") and challenged the MDR determination in a due process complaint. (Stipulation)

9. On March 27, 2017, OAH upheld the long-term suspension and credited the student for the two (2) days was out of school toward the 25-day suspension. (Stipulation)

[7] The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

10. On April 10, 2017, a HOD was issued on Petitioner's due process complaint setting aside the decision of the February 13, 2017, MDR team. (Stipulation)

11. On May 30, 2017, the student engaged in conduct outside of school just prior to the start of the school day for which was suspended from school for three (3) days, beginning on May 31, 2017, and ending on June 2, 2017. (Respondent's Exhibit 3-1)

12. On May 30, 2017, Petitioner (the student's father) received a call from School A to inform him that the student was involved in a fight and would have to leave the school, so he went to pick the student up from school. During the student's three-day suspension did not attend school and was provided no educational services. (Father's testimony)

13. On June 1, 2016, Petitioner's previous attorney emailed School A stating that the student was entitled to a MDR regarding the suspension for the May 30, 2017, incident, and asking to be informed when the MDR would be convened. (Respondent's Exhibit 4-3)

14. On June 1, 2016, School A sent a prior written notice ("PWN") to Petitioner informing him because the proposed number of days of out school suspension would surpass ten days in the SY 2016-2017 a MDR would be convened on June 5, 2017, at 10:30 a.m. at School A. (Respondent's Exhibit 5-1)

15. Petitioner received an email from DCPS informing him that a MDR would be held on June 5, 2017. Petitioner was represented at the time by a local university legal clinic. Petitioner's attorney at the clinic later informed him that she would no longer be representing him and she would find Petitioner replacement counsel. The attorney also informed Petitioner that she would make arrangements so that he would not have to attend the June 5, 2017, MDR meeting. On June 2, 2017, Petitioner's attorney told him there would be no MDR on June 5, 2017. Based on his attorney's representations, Petitioner presumed the MDR would be rescheduled. Petitioner did not hear from his attorney or DCPS prior to, or on June 5, 2017, informing him that the MDR meeting was still scheduled for June 5, 2017. (Father's testimony)

16. On June 1, 2017, at 9:43 a.m., School A's special education coordinator sent an email to Petitioner's attorney requesting that she confirm the proposed date and time for the MDR. (Petitioner's Exhibit 9-10)

17. On June 1, 2017, at 4:39 p.m. School A's special education coordinator sent an email to Petitioner's attorney and copied among others, the DCPS attorney, with a copy of PWN, requesting that Petitioner's attorney confirm the MDR for June 5, 2017, at 10:30 a.m., and stating that the DCPS attorney would respond to any future emails prior to the MDR. (Petitioner's Exhibit 9-7)

18. On June 1, 2017, at 5:18 p.m. Petitioner's attorney sent an email to DCPS's attorney requesting that the DCPS provide documents related to the MDR and stating that she would no longer be representing Petitioner, but two of her colleagues would continue to

represent Petitioner and would respond regarding their availability for the MDR. (Petitioner's Exhibit 9-6, 9-7)

19. On June 1, 2017, at 5:27 p.m. Petitioner's attorney sent an email to DCPS's attorney requesting that the DCPS provide documents and stating that the MDR had not yet been confirmed. (Petitioner's Exhibit 9-6)

20. On June 1, 2017, at 5:28 p.m. DCPS's attorney responded with an email to Petitioner's attorney stating that DCPS would provide documents that would be discussed at the MDR within twenty-four (24) hours before the MDR meeting. (Petitioner's Exhibit 9-6)

21. On June 2, 2017, at 2:14 p.m. one of Petitioner's remaining attorneys at the legal clinic sent an email to DCPS' attorney informing him that the Petitioner and her attorney would not be able to participate in the MDR on June 5, 2017, and asking that School A propose additional dates and time for the MDR to be held. The email also noted that Petitioner would no longer be represented by the law clinic and requested that any further communication be provided to Petitioner's new counsel who was copied on the email. (Witness 1's testimony, Petitioner's Exhibit 9-5)

22. The legal clinic attorney did not hear from DCPS' attorney in response to the email he sent on June 2, 2017. After sending the June 2, 2017, email to the DCPS attorney, the law clinic attorney did not telephone the DCPS attorney or School A to ensure the email was received or to cancel the June 5, 2017, MDR meeting. The law clinic attorney did not inform Petitioners that they should not attend the MDR scheduled for June 5, 2017. (Witness 1's testimony)

23. School A held a MDR on June 5, 2017, for the May 30, 2017, incident. The MDR determined that the May 30, 2017, incident was not a manifestation of the student's disability. (Stipulation)

24. The MDR was held as scheduled at 10:30 a.m., on June 5, 2017. Neither Petitioner, nor his counsel was present at the June 5, 2017, MDR. There was no communication from anyone to the School A SEC to indicate that neither Petitioner, nor his counsel, would be attending the June 5, 2017, MDR, or to request that the meeting be rescheduled. Because the special education coordinator had not been informed that Petitioner would not be attending the MDR, the MDR proceeded as originally planned. (Witness 4's testimony)

25. The MDR team included a School A special education teacher, a general education teacher, social worker, the SEC and a school psychologist. (Respondents Exhibit 6-1)

26. During the MDR the SEC shared with the team that on May 30, 2017, he received information that the student had been in a fight in an alley across the street from the school just prior to the start of the school day and a video of the fight had been posted on Instagram. The team reviewed the video of the fight and concluded that the student had snuck up from behind and punched another student while the other student was walking through the alley headed to school. (Witness 4's testimony, Respondent's Exhibit 6-2)

27. The video did not show that the student came up from behind the other student. Other School A students who witnessed the fight told a School A behavioral technician that the student's actions were unprovoked and approached from behind and hit the other student. The behavior technician reported what he was told by the other students to the School A psychologist. (Witness 3's testimony)

28. During the MDR the DCPS school psychologist reviewed the student's most recent psychological evaluation and shared data from that evaluation including the student's disability classification. The team reviewed the student's IEP and concluded the IEP was appropriate and was being implemented and behavior interventions were being provided to the student consistent with IEP. The team concluded the student's disability did not impair ability to control behavior of fighting, and that the attack on the other student appeared to be unprovoked and not related to an impulsive act or related to the student responding inappropriately under normal circumstances. (Respondent's Exhibit 6-2, 6-3)

29. The MDR team noted that the video showed the student was being encouraged by friends around in the alley to continue to hit the other student. The team concluded the student's behaviors were more aligned with the student following socially maladaptive behaviors including the following: "dislikes school, except as a social outlet, rebels against rules and structure, accepted by a small delinquent social-cultural subgroup, inflated self-concept; independent, underdeveloped conscience; blames others; excessive bravado." (Witness 3's testimony, Respondent's Exhibit 6-3, 6-4)

30. The DCPS school psychologist, who was qualified as an expert witness, opined that the student's behavior of fighting was not a manifestation of the student's disability because the student fighting the other child was reported as being an unprovoked incident and was more akin to maladaptive behavior. The School A psychologist believes that premeditation is a factor in social maladjustment, rather than a function of the student's ED disability.[8] The School A psychologist did not talk to the student about the May 30, 2017, incident. (Witness 3's testimony)

31. During the MDR the LEA team reviewed all relevant information in the student's file, including the child's IEP, any teacher observations, but did not consider any relevant information provided by the parent(s) because the student's parent(s) was not present. The team, nonetheless, determined that the student's conduct of fighting another student in the alley before school was not caused by, and did not have a direct and substantial relationship to, the student's disability. The team also determined that School A was implementing the student's IEP and that the student's conduct in fighting on May 30,

[8] Petitioner presented an expert witness, who conducted the student's most recent psychological evaluation and has provided the student clinical therapy services from June 2016 to December 2016. The witness disagreed with the MDR's determination that student's May 30, 2017, conduct was not a manifestation of disability. This witness acknowledged that although engaging in fighting might otherwise be considered maladaptive behavior, because of the student's past trauma, in her opinion any fighting that student might engage in with another student, regardless of the circumstances, would be a manifestation of the student's ED disability.

2017, was not a result of the School A's failure to implement the IEP. (Witness 3's testimony, Witness 4's testimony)

32. On June 5, 2017, at 1:28 p.m., Petitioner's new attorney sent an email to DCPS's attorney stating that she now represented Petitioner and all correspondence regarding the student should be sent to her. (Petitioner's Exhibit 9-3)

33. On June 12, 2017, at 8:11 a.m., Petitioner's new attorney sent an email to School A pointing out that on June 2, 2017, Petitioner's prior counsel requested that the MDR be rescheduled and inquired as to when the MDR would be convened. (Petitioner's Exhibit 9-2)

34. On June 12, 2017, at 8:15 a.m., School A's SEC informed Petitioner's new counsel that DCPS's attorney did not receive the email requesting that the MDR be rescheduled until after the MDR was already held on June 5, 2017. The SEC provided Petitioner's counsel copies of the notes from the MDR. (Petitioner's Exhibit 9-1, 9-2)

35. On June 12, 2017, at 8:39 a.m. Petitioner's new attorney sent a return email stating that Petitioner disagreed with the conclusions of the MDR and requesting additional documents. (Witness 4's testimony, Petitioner's Exhibit 9-1)

36. In her June 12, 2017 email, Petitioner's counsel did not request that the MDR be reconvened. Although there was no time to reconvene a MDR prior to the end of the school year, the School A SEC was not opposed to convening another MDR meeting so that the student's parent(s) could participate. However, there was no such request for a meeting made by Petitioner's new attorney. Petitioner filed his complaint on June 20, 2017. At the resolution meeting for the complaint, DCPS offered to reconvene the MDR as a part of the settlement offer. Petitioner did not agree to the proposed settlement offer. (Witness 4's testimony)

37. Petitioner engaged in mediation along with the parent(s) of the other student involved in the May 30, 2017, incident to discuss ways to resolve the dispute between the students. (Father's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

34 C.F.R. § 300.17 provides:
A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent shall hold the burden of persuasion on issue #1(c). [9] Petitioner has the burden of persuasion on the other components of that issue: #1(a) and 1(b). The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by conducting an invalid MDR on June 5, 2017, because (a) the student's parent(s) were not involved, (b) School A failed to address each question IDEA requires be addressed in a MDR, (c) School A failed to determine the student's conduct was a manifestation of disability.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS conducted an invalid MDR on June 5, 2017, because the MDR was held without the student's parent(s) present. As a result of the Hearing Officer's conclusion that the MDR was invalid, the Hearing Officer concluded it was unnecessary to determine the other two elements of the issue as to whether School A addressed each question IDEA requires be addressed in a MDR and whether School A incorrectly determined the student's behavior was not a manifestation of disability.

The IDEA prohibits the punishment of a student with a disability for misbehavior that is a manifestation of the disability. Prior to suspending a student with a disability for more than 10 school days, the school must conduct a 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

[9] 5B DCMR 2510.16 provides: In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability.

direct and substantial relationship to, the child's disability " or was the direct result of the LEAs failure to implement the IEP. If the student's behavior is determined to be a manifestation of [redacted] disability the student must be restored to [redacted] regular education program. If not, then the school may discipline the student as it would any other nondisabled student provided the student continues to receive FAPE. [10] See *Jackson v. Northwest Local School District U.S. District Court*, Southern District of Ohio, August 3, 2010, 55 IDELR 71

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[10] 34 C.F.R.§ 300.530 provides in pertinent part:

> (b) (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.
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> (c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.
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> (d) Services. (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must— (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting. (3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.
>
> (e) Manifestation determination provides: (1) 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 LEA's failure to implement the IEP. (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.
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> (f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must— (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

District of Columbia regulations reiterate and expound upon the requirements regarding an MDR. 5B DCMR §2510.12 provides:

> In carrying out a review, the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team:
>
> (a) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including:

Petitioner alleged that DCPS denied the student a FAPE by failing to comply with the procedures set forth in 34 C.F.R.§ 300.530 et seq. As noted above, Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

The evidence in this case demonstrates that the student was suspended for three (3) days for an incident that allegedly occurred on May 30, 2017. Because the proposed number of days of out-of-school suspension would surpass ten (10) days in SY 2016-2017, and would constitute a change of placement pursuant to IDEA, on June 1, 2017, School A sent Petitioner a PWN informing Petitioner that the student was being suspended for the May 30, 2017, alleged conduct and that a MDR would be convened on June 5, 2017.

It is clear from the evidence that Petitioner and his attorney at the time were aware of the student's suspension and the scheduled date and time for the MDR that IDEA requires be convened within ten (10) days of the student's suspension (change of placement). Because the student was suspended on May 30, 2017, School A was required to convene the MDR by June 9, 2017. The MDR was scheduled for June 5, 2017, within the required ten-day time frame.

However, the evidence also demonstrates that on June 2, 2017, the attorney for Petitioner emailed the attorney for DCPS and requested that the MDR be rescheduled and that Petitioner had new counsel who should be notified of a new date for the MDR. Petitioner relied upon his attorney's representation that the meeting would be rescheduled and there would be no MDR on June 5, 2017, and therefore did not attend.

The Hearing Officer concludes that under these circumstances, Petitioner reasonably assumed that the MDR was going to be rescheduled. No one contacted Petitioner to tell him that the MDR would move forward as initially planned on June 5, 2017. Although the School A SEC

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(1) Evaluation and diagnostic and results, or other relevant information supplied by the parents of the child;
(2) Observations of the child;
(3) The child's IEP and placement; and
(4) Any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel; and

(b) Then determines that:

(1) In relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
(2) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
(3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

was not aware of the request that the MDR be rescheduled, that request was made to DCPS through its attorney. The SEC's June 1, 2017, email clearly stated that the DCPS attorney would respond to any future emails prior to the MDR. The evidence demonstrates that the DCPS attorney was notified of the request that the MDR be rescheduled, but that request was not passed on to the School A SEC.

Albeit reasonable for the School A SEC to proceed with the MDR, given IDEA's requirement that the MDR be conducted within ten days, in this instance, the Hearing Officer concludes that DCPS was on notice prior to June 5, 2017, of Petitioner's request that the MDR be rescheduled. This evidence supports a conclusion that the results of the MDR should, therefore, not stand because the student's parent(s) did not participate.

Because the MDR was convened without the parent(s) present, the team assembled to review the incident that was the subject of the MDR was missing a necessary party. Not only did the Petitioner miss the opportunity to hear the comments being made about the student and the effects of the student's disability, the Petitioner was not given the opportunity to provide necessary parental insight into the student's behavior and motivations. It is possible that insight provided by the parent(s) may have spurred a discussion that could have caused the team to conclude that the student's behavior was a manifestation of disability.

34 C.F.R. § 300.530 et seq. requires in pertinent part, that "…the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by parents…" The LEA held a MDR without Petitioner. This resulted in a situation where Petitioner was denied the opportunity to provide information and/or the participation of individuals whom Petitioner may have deemed important to the student's MDR. The Hearing Officer concludes, therefore, that DCPS convening the MDR without the parent present, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE.

Although there was evidence presented regarding the student's conduct of May 30, 2017, and whether the MDR, when it convened on June 5, 2017, considered all questions it was to consider, because the Hearing Officer has concluded the MDR was invalid due to lack of parental participation, the Hearing Officer sees no need to go further. Because I have determined that the composition of the MDR was improper, thereby invalidating its determination, it is unnecessary to reach the question of whether the student's conduct was a manifestation of disability.

Failing to comply with the requirement that the parent be present deprives the student of the full and complete consideration required under the IDEA before removal but also deprives parents of meaningful participants in the MDR process. See *School Board of the City of Norfolk, v. Daphne Brown* 769 F. Supp. 2d. 928, U.S. District Court, Eastern District of Virginia, December 13, 2010.

Petitioner has requested that the MDR determination be voided and the alleged May 30, 2017, incident and resulting suspension be expunged from the student's record. I do not conclude that this is a reasonable course of action and appropriate relief under these circumstances. Rather, I

conclude that the MDR should be voided and I direct DCPS to reconvene the MDR and allow the parent(s) the participation in the MDR that they would have been provided had the request for the MDR to be rescheduled been conveyed to the School A SEC and granted. Accordingly, the MDR findings are vacated and the MDR shall be rescheduled to a date and time agreed to by Petitioner.

Because during the three-day suspension the student received no educational services, is entitled to compensation for missed services. Irrespective of whether conduct was or was not a manifestation of disability, pursuant to 34 C.F.R. 300.530 (d), should have continued to be provided educational services and was not.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The Hearing Officer concludes the student is entitled to compensatory education for the three (3) days was suspended. In this instance, Petitioner did not present evidence regarding compensatory education. Nonetheless, absent evidence as to the amount and form of compensatory education that is appropriate, the Hearing Officer grants Petitioner a nominal amount of independent tutoring, which seems appropriate under the circumstances given that to award no compensatory education would be inequitable. [11]

[11] Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting Reid, 401 F.3d at 524, 527).

ORDER: [12]

1. The June 5, 2017, MDR findings and determination with regard to the student are hereby voided and vacated.

2. DCPS shall within ten (10) school days of the issuance of this order convene the MDR with Petitioner present and make a valid determination regarding the alleged May 30, 2017, incident and whether the student's conduct was a manifestation of disability and otherwise fulfill the requirements of 34 C.F.R. § 300.530 et seq.

3. DCPS shall, within fifteen (15) school days of the issuance of this Order, authorize and fund fifteen (15) hours of independent tutoring to the student at the OSSE prescribed rate.

4. All other relief requested by Petitioner with regard to the June 5, 2017, MDR is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: August 17, 2017

Copies to: Counsel for Petitioner
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
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[12] Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.