

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA  
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)  
SPECIAL EDUCATION PROGRAMS

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STUDENT HEARING OFFICE  
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on behalf of,

(DOB                      Student  
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Petitioner,

Case No.  
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing: April 14, 2009  
Decided: April 24, 2009

Respondent.

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## HEARING OFFICER DECISION

### I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on behalf of a        year old student (the "Student") who resides in the District of Columbia and currently attends                      School

The complaint is brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. The complaint alleges that Respondent DCPS denied the Student a free appropriate public education ("FAPE") by suspending him for more than 10 school days and failing to convene a manifestation determination meeting. Petitioner seeks compensatory education and other appropriate relief.

The procedural background of this case is somewhat complicated. *See Prehearing Order*, dated March 18, 2009. The complaint was originally filed on February 11, 2009, and DCPS filed a Notice of Insufficiency and Response to the complaint on February 25, 2009, immediately prior to the first prehearing conference. The Notice asserted, *inter alia*, that Petitioner did not provide sufficiently detailed information regarding the dates of the alleged suspensions. DCPS also asserted that the claims may be barred by the doctrine of *res judicata* to the extent they are based on occurrences that took place prior to Petitioner's earlier complaint filed 11/20/08, which resulted in an HOD dated 1/16/09.

At the February 25, 2009 prehearing conference ("PHC"), it was agreed and determined that: (a) the Due Process Complaint filed 2/11/09 did not meet the requirements of 34 C.F.R. 300.508(b) for the reasons stated in DCPS' Notice of Insufficiency, specifically with respect to the dates and other details of the Student's suspensions; (b) Petitioner would be permitted to amend the complaint by 2/26/09; (c) DCPS would respond to the amended complaint as soon as possible, but no later than 10 days from amendment; (d) the 45-day HOD timeline would be

recalculated from the date of the amendment; and (e) a further PHC would be held on 3/11/09. These items and directives were set forth in email correspondence from the Hearing Officer to both parties dated 2/26/09.

Petitioner then filed an Amended Complaint on February 26, 2009, and DCPS filed its Response on March 6. These pleadings were discussed, along with a status update, at a further prehearing conference on March 11. At the 3/11/09 PHC, DCPS reported that it was convening an MDT meeting to review a new independent evaluation and other existing data and to update the Student's individualized education program ("IEP"). DCPS further indicated that it intended to conduct a manifestation determination review at that time based on the parent's request.

Based on the developments discussed at the 3/11/09 PHC, it was agreed that the Due Process Hearing would be rescheduled to April 2, 2009, approximately 10 days prior to the end of the new 45-day timeline initiated by Petitioner's amended complaint. The parent elected for the hearing to be closed. Five-day disclosures were filed by both parties on or about March 27, 2009. Finally, on April 2, the parties reported that they had a meeting scheduled for April 3 to try to resolve the matters in the complaint, and therefore agreed to reschedule the hearing to April 14, 2009.

The Due Process Hearing convened on April 14, 2009. At the hearing, 19 documentary exhibits submitted by Petitioner (identified as -1" through -19") were admitted into evidence. DCPS presented one documentary exhibit (identified as "DCPS-1"). The parent-Petitioner and the Student testified on behalf of Petitioner. the Special Education Coordinator ("SEC") at testified for DCPS. Petitioner also testified in rebuttal. Representing the parties at hearing were Christopher West, Esq. (for Petitioner) and Laura George, Esq., Assistant Attorney General for the District of Columbia (for Respondent DCPS).

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

## **II. ISSUE(S) AND REQUESTED RELIEF**

As indicated in the March 18, 2009, Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following issues have been presented for determination:

- a. *Whether DCPS violated IDEA by suspending the Student for more than 10 school days and/or by failing to convene a manifestation determination meeting; and*
- b. *Whether such violation constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA, including compensatory education services.*

### III. FINDINGS OF FACT

1. The Student is a \_\_\_\_\_ year old resident of the District of Columbia whose date of birth is \_\_\_\_\_. He currently attends \_\_\_\_\_ School \_\_\_\_\_ where he is in the \_\_\_\_\_ grade for the 2008-2009 school year. See \_\_\_\_\_ 1; Petitioner Testimony.

2. The Student has been determined to be eligible for special education and related services as a child with a Specific Learning Disability ("SLD"), and he has a current IEP that provides 11 hours of services per week. \_\_\_\_\_ 11.

3. On January 5, 2009, the Student's MDT/IEP team met to review the Student's evaluations, including the results of an independent psychological evaluation.<sup>1</sup> \_\_\_\_\_ 9; Parent Testimony; SEC Testimony.

4. On January 16, 2009, an HOD was issued ordering DCPS to complete additional evaluations agreed to by the MDT/IEP team and to reconvene another meeting to review the results. See Case No. \_\_\_\_\_.

5. Subsequent to the 1/5/09 MDT meeting and the 1/16/09 HOD, the Student exhibited disruptive behaviors in the classroom setting. These recent incidents led to multiple suspensions for violations of student conduct rules, which together with previous suspensions, totaled more than ten (10) school days during the 2008-2009 school year. Specifically:

- a.. DCPS suspended the Student for approximately five (5) school days, from September 9 to 15, 2008, for walking the hallways and disrespect toward staff;
- b. DCPS suspended the Student for approximately four (4) school days, from November 11 to 14, 2008, for being out of the classroom and walking the hallways;
- c. DCPS suspended the Student for approximately four (4) school days, from December 16, 2008 to January 5, 2009, for being disorderly in the girls' locker room; and
- d. DCPS suspended the Student for approximately five (5) school days, from February 12 to 18, 2009, for disobedience and walking the hallways.

See \_\_\_\_\_ 19, p.4; Parent Testimony; *see also* SEC Testimony.<sup>2</sup>

6. DCPS did not provide the parent with written notices regarding the above suspensions. See Parent Testimony; \_\_\_\_\_ 19, ¶17.

7. On March 25, 2009, following the amended complaint and prehearing conferences in this case, DCPS convened a meeting of the Student's MDT/IEP team to review evaluations (including a comprehensive psychological) pursuant to the earlier 1/16/09 HOD.

\_\_\_\_\_ 17; \_\_\_\_\_ 18. The team decided to do further testing, including speech/language and a functional behavior assessment. \_\_\_\_\_ 18; Parent Testimony; SEC Testimony.

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<sup>1</sup> This meeting was convened pursuant to an agreed order set forth in a September 3, 2008, HOD requiring DCPS to fund an independent psycho-educational evaluation, and then to convene an MDT/IEP team meeting at within 20 school days after receiving the results.

<sup>2</sup> DCPS disputed the accuracy of Petitioner's factual statements regarding the Student's suspensions, but it produced no documents evidencing these events, and the SEC had no specific contrary recollection of events.

8. On April 3, 2009, DCPS convened another meeting of the Student's MDT/IEP team to discuss the further evaluations and any necessary adjustments in his IEP. *See* -18. The parent did not attend this meeting in person, but the Student reported for speech and language testing at Dunbar that same day. *Id.*; Parent Testimony; SEC Testimony.

9. DCPS states that it also conducted a manifestation determination at the same 4/3/09 meeting, although it did not issue any prior notice to the parent regarding such action.<sup>3</sup> *See* SEC Testimony. According to the testimony provided by SEC, the discussion and determination as to manifestation occurred via telephone conference between the SEC and Petitioner. *Id.* The DCPS school psychologist was not present and did not participate in the teleconference, but the SEC consulted with the psychologist prior to the call. SEC Testimony (cross examination). Petitioner recalls having a telephone conversation with the SEC for approximately one hour that day, but does not recall the subjects discussed. Parent Testimony.

10. According to the SEC's testimony,<sup>4</sup> DCPS determined that the conduct in question was not a manifestation of the Student's disability. The SEC determined that walking the hallways and being disorderly in the girls' locker room were not caused by or directly related to the Student's current disability classification of LD. *See* SEC Testimony. However, DCPS has decided to conduct an FBA and develop a BIP to be incorporated into the Student's IEP in any event. *Id.*

11. At the time of the hearing, DCPS was in the process of issuing an invitation for another meeting of the MDT/IEP team, which it was scheduling to take place on or about April 17, 2009. This meeting is for the purpose of (a) reviewing the speech/language evaluation results, (b) reviewing the FBA, and (c) developing a BIP. SEC Testimony.

#### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

##### **A. Burden of Proof**

1. The burden of proof in a special education due process hearing generally is on the party seeking relief, *i.e.*, Petitioner. DCMR 5-3030.3; *see also* *Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006).

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

3. In reviewing a decision with respect to a manifestation determination, however, "the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability." DCMR 5-2510.14.

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<sup>3</sup> *See, e.g.,* -17; -18; DCPS-1. However, DCPS counsel did inform Petitioner's counsel, both at the 3/11/09 prehearing conference and by subsequent email, of DCPS' intention to complete a manifestation determination at the 4/3/09 meeting.

<sup>4</sup> DCPS was unable to produce any notice or other documentary evidence of the manifestation determination.

**B. Alleged Violations/Denial of FAPE by DCPS**

**(1) *Whether DCPS violated IDEA by suspending the Student for more than 10 school days and/or by failing to convene a manifestation determination meeting.***

4. For the reasons discussed below, the Hearing Officer concludes that Petitioner has carried her burden of proving that DCPS (a) removed the Student from his current placement for more than 10 school days, and (b) failed to convene a timely manifestation determination meeting, with proper notice to the parent, as required by IDEA. However, as discussed further under Issue (2) below, the Hearing Officer concludes that DCPS has not denied the Student a FAPE. Petitioner has demonstrated at most only a procedural violation of IDEA which does not entitle Petitioner to compensatory education or other relief at this time.<sup>5</sup>

5. With respect to the governing provisions of IDEA and its implementing rules, Section 300.530(b) provides that school personnel may “remove” a child with a disability who violates a code of student conduct for not more than 10 consecutive school days, as long as those removals do not constitute a “change of placement” under Section 300.536. 34 C.F.R. §300.530(b). Section 300.536, in turn, provides that a “change of placement” occurs if either (1) the removal is for more than 10 consecutive school days, or (2) the child is subject to a “series of removals that constitute a pattern,” determined on a case-by-case basis consistent with the factors spelled out in the rule. 34 C.F.R. §300.536.

6. IDEA further provides that within 10 school days of any decision to change the placement due to violations of a code of student conduct, the LEA must then convene a meeting of the IEP team to make a “manifestation determination” as provided in Section 300.530 (e). The IEP team is to determine whether the conduct in question either (1) was “caused by, or had a direct and substantial relationship to, the child’s disability,” or (2) was the “direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. §300.530(e); *see* 20 U.S.C. §1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child’s disability, then the IEP team generally must (1) conduct a functional behavior assessment (“FBA”) and implement a behavioral intervention plan (“BIP”) for the child, and (2) return the child to the placement from which the child was removed. 34 C.F.R. §300.530(f); *see* 20 U.S.C. §1415(k)(1)(F).

7. Here, the evidence shows that the Student was subject to a series of removals totaling more than 10 days in the aggregate that appears to constitute a “pattern” within the meaning of Section 300.536. The child’s behavior in the various incidents appears to be substantially similar, and additional factors such as the length of each removal and proximity of the removals to one another further indicate a pattern. *See* 34 C.F.R. §300.536 (a) (2). Accordingly, DCPS was required to convene an MDT/IEP team meeting for the purpose of making a manifestation determination within 10 school days. *Id.* § 300.530(e).

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<sup>5</sup> DCPS argues that Petitioner’s claim regarding such violation “should be barred by the doctrine of res judicata because they could have and should have been raised in the prior complaint and hearing” addressed by the 1/16/09 HOD. DCPS’ Response, filed March 9, 2009, at 1. However, based on the facts adduced at this hearing, it appears that Petitioner would not have had a claim to assert in the prior case since the suspensions had not yet totaled 10 school days at that time.

8. DCPS did not purport to convene a manifestation determination review (“MDR”) under Section 300.530(e) until April 3, 2009, nearly two months after the most recent removal decision on February 12. This was untimely under the IDEA.

9. In addition, DCPS’ manifestation determination was procedurally improper under IDEA for the following reasons:

a. The determination was not made jointly by all “relevant members of the child’s IEP Team (as determined by the parent and the LEA)” pursuant to 34 C.F.R. Section 300.530(e)(1), in that (i) the school psychologist did not participate in the meeting/conference call with the parent, but rather was only consulted off-line by the SEC, and (ii) the parent was not included in determining the relevant members of the team for this purpose; and

b. DCPS did not provide prior written notice to the parent of the manifestation determination (or of the individual suspension actions underlying that determination) pursuant to 34 C.F.R. Section 300.503 and DCMR 5-2510.7(a).

**(2) *Whether such violation constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA, including compensatory education services.***

10. Under IDEA, “a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. §300.513(a)(1). “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” *Id.* § 300.513 (a)(2). *See also Lesesne v. DC*, 447 F.3d 828, 834 (D.C. Cir. 2006); 20 U.S.C. §1415(f)(E).

11. In this case, Petitioner has failed to show by a preponderance of the evidence that any statutory violations constitute a substantive deprivation of FAPE. FAPE is not defined as a potential maximizing education. Generally speaking, a school has met its obligation to provide a FAPE if the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. *See Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). At most, Petitioner has shown procedural violations with respect to the required manifestation determination.

12. With respect to these procedural violations, Petitioner has not shown by a preponderance of the evidence that DCPS’ procedural inadequacies met either of the three tests specified in Section 300.513 (a)(2). The procedural inadequacies did not (a) impede the Student’s right to a FAPE, (b) significantly impede the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or (c) cause a deprivation of educational benefit to the Student, for the reasons set forth below.

13. First, there is no showing that the manifestation determination was wrong on the merits. DCPS appears to have reasonably concluded that the conduct in question was not caused by, or had a direct and substantial relationship to, the Student’s learning disability. Moreover, while Petitioner’s counsel argued that the Student’s disability was really broader than LD in light of the social/emotional goals incorporated in the IEP -11), Petitioner presented no evidence in this hearing to support a contrary determination by the Hearing Officer that the Student’s

conduct was a manifestation of his disability. *See, e.g., District of Columbia v. Doe*, 573 F. Supp. 2d 57 (D.D.C. 2008).

14. Second, Petitioner has not shown how prior notice to the parent or participation by other relevant team members (including the school psychologist) would have enabled the parent to participate more substantially in the decision-making process. Indeed, the absence of any evidence adduced by Petitioner at hearing to support a contrary manifestation determination suggests that the procedural inadequacies did not have such an effect.

15. Finally, there has been no showing that the procedural violations caused a deprivation of educational benefit or that the Student was otherwise harmed as a result. There is no dispute that DCPS has already taken or is taking the actions that would be required by IDEA if it determined the conduct *was* a manifestation of the Student's disability – *i.e.*, (1) conducting an FBA and developing a BIP, and (2) returning the child to the placement from which he was removed. 34 C.F.R. §300.530(f). The Student is not currently suspended, and Petitioner conceded at hearing that any current failure by the Student to attend school on a regular basis is due to truancy issues, rather than any action by DCPS.

### C. Relief

16. Even in the absence of a denial of FAPE, the IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23. *See also* 34 C.F.R. § 300.513 (a) (3) (“Nothing in [Section 300.513(a)] shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.”).

17. At closing, Petitioner's counsel stated that the primary relief sought by Petitioner was an order requiring DCPS to convene a manifestation determination meeting, which Petitioner contends has not yet been held, at least in a procedurally proper manner. For the reasons noted in Part B (2) above, the Hearing Officer concludes that no real purpose would be served by ordering such relief in the circumstances of this case. Moreover, the Hearing Officer finds that no other equitable relief is necessary or appropriate, based on the record developed in this proceeding and the procedural violation(s) adjudicated herein.

## V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Petitioner is not entitled to any of the relief requested in her Amended Due Process Complaint filed February 26, 2009;
2. The Amended Due Process Complaint shall be, and hereby is, **DISMISSED**, with prejudice; and
3. This case shall be, and hereby is, **CLOSED**.

Dated: April 24, 2009

  
/s/  
Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).