

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

2011 SEP 20 AM 10:12

OSSE
STUDENT HEARING OFFICE

PETITIONERS, on behalf of
[STUDENT],¹

Date Issued: September 27, 2011

Petitioners,

Hearing Officer: Peter B. Vaden

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This expedited hearing came to be heard upon the Administrative Due Process Complaint Notice filed by GRANDMOTHER and FATHER (the "Petitioners"), 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 of the District of Columbia Municipal Regulations ("D.C. Regs."). In their Due Process Complaint, the Petitioners appeal a Manifestation Determination Review ("MDR") determination that Student's August 23, 2011 school misconduct was not a manifestation of his disability.

¹ Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. The Petitioners' Due Process Complaint, filed on September 1, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 9, 2011, after the hearing officer originally appointed was unable to accept the assignment. The parties met for a resolution session on September 12, 2011, but did not reach an agreement. On September 13, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

Contemporaneous with filing their due process complaint on September 1, 2011, Petitioners filed a Motion for Stay Put Protection under 20 U.S.C. § 1415(j). On September 13, 2011, the Hearing Officer denied the motion for stay put, after determining that § 1415(j) expressly excepts MDR appeals and is not applicable to this proceeding.

The due process hearing was held before the undersigned Impartial Hearing Officer on September 21, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Grandmother appeared in person and was represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

Grandmother testified and called as witnesses EDUCATIONAL ADVOCATE, Student, and PSYCHOLOGIST. DCPS called as witnesses DCPCS SOCIAL WORKER and SPED COORDINATOR. Petitioners' Exhibits P-1 and P-3 through P-21 were received into evidence without objection. Exhibit P-2 and pages P-3-1 and P-3-2 of Exhibit P-3 were withdrawn. DCPS Exhibits R-1 through R-7 were received into evidence without objection.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(k) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

1. DID DCPS ERR IN ITS MANIFESTATION REVIEW DETERMINATION THAT STUDENT'S AUGUST 23, 2011 MISCONDUCT WAS NOT A MANIFESTATION OF HIS DISABILITY; and
2. DID DCPS FAIL TO FOLLOW THE IDEA'S INTERIM PLACEMENT REQUIREMENTS REGARDING SERVICES TO A CHILD WITH A DISABILITY REMOVED FROM HIS CURRENT PLACEMENT FOR MORE THAN 10 SCHOOL DAYS?

Petitioners request that Student be returned to his current placement at DCPCS.

FINDINGS OF FACT

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

1. Student is an AGE adolescent. Student resides with Grandmother and Father in the District of Columbia. Testimony of Grandmother.
2. Student is eligible for special education and related services under the Primary Disability classification, Other Health Impairment ("OHI"). Exhibit P-9.
3. Student has been enrolled in DCPCS since the 2009-2010 school year. Exhibit P-11. In prior years, Student had attended a Head Start program and five other schools in the District of Columbia. Student was expelled from several of these schools for behavior problems. Testimony of Grandmother.
4. In an August 25, 2008 Comprehensive Psychological Evaluation report requested by DCPS, EVALUATOR diagnosed Student with Depressive Disorder (NOS), Disruptive Behavior Disorder (NOS), ADHD (By History), Mood Disorder (NOS) (By History), and

Oppositional Defiant Disorder (“ODD”) (By History). In the report’s section on Social, Emotional and Psychological Functioning, Evaluator reported that “[D]ata gathered from the present evaluation and information provide by [Student’s] grandmother are consistent with his clinical history and a diagnosis of Depressive Disorder Not Otherwise Specified and Disruptive Behavior Disorder Not Otherwise Specified. Test data suggest that [Student] experiences notable symptoms of depression marked by feeling of sadness, eating and sleep disturbance, irritability/anger, and poor self-concept. He also appears to experience some degree of worry. Behaviorally, [Student’s] difficulties are clinically significant and include symptoms of aggression, anger outbursts and violating and disobeying rules. . . . Although [Student] has been previously diagnosed with ADHD, he did not display any difficulties with attention, distractibility, impulsivity, or hyperactivity. In fact, [Student] was more focused, attentive, and diligent during the five hour testing period than most other children his age. Consequently, that diagnosis could not be confirmed. . . . Although some of [Student’s] behavioral issues are related to his underlying mood difficulties, his chronic history of anger outbursts and aggression are severe enough to warrant a diagnosis of Disruptive Behavior Disorder NOS. His grandmother’s ratings on the BASC-2 measure and his own self-ratings on the Beck Disruptive Behavior Inventory evidenced his conduct challenges. His T-score of 65 on the Conduct Problems scale of the BASC-2 fell in the Clinically Significant range and suggested that he often disobeys, and sometimes breaks the rules, lies, and sneaks around. His Aggression scale score fell in the At Risk range and indicated that he sometimes teases, bullies, and hits others, and loses his temper easily. [Student’s] self-rated score of 60 on the Beck fell in the Moderately Elevated range suggesting that he frequently tells lies, swears, break rules, argues with adults, thinks of running away from home, and feels that others get him into trouble. . . . [Student’s] life experiences of

having to deal with a mother whom he feels does not care, a father who is physically punitive and unsupportive, and a grandmother who is too overwhelmed with other issues leave [Student] feeling quite sad, unloved, defective, and extremely angry. As a result, he is easily set off and is ready to explode at any minute.” Exhibit P-14.

5. In the Emotional, Social and Behavioral Development Area of Concern in Student’s December 15, 2010 IEP at DCPCS, the IEP team reported that “At times, [Student] becomes frustrated, angry, or upset and struggles to manage these feelings while maintaining appropriate behavior. When this happens, [Student] refuses to follow directions, and has left the designated area without permission in order to remove himself from the situation and from his current environment, even leaving the building. [Student] has also demonstrated rare aggressive behavior when he has become angry with a peer.” One of his IEP Annual Goals was to learn anger management strategies to help reduce frequency of anger, and to improve self control when angry or upset. Exhibit P-9.

6. Student’s December 15, 2010 IEP provided for 3 hours per week of Specialized Instruction Outside General Education and 1 hour per week of Behavioral Support Services. Exhibit P-9.

7. Student and the DCPCS school social worker agreed on a behavior plan which included four levels of strategies Student could use in order to maintain calm in the face of frustration and demonstrate self control even when angry. The plan was attached to the December 15, 2010 IEP. Exhibit P-9.

8. On August 23, 2011, the first day of school at DCPCS for the 2011-2012 school year, Student was involved in an incident involving serious, violent aggressive behavior toward a classmate and the injury of a staff member who intervened. In a morning class, Student

discovered that another student had allegedly taken his mechanical pencil. He first asked his teacher to tell the classmate to return the pencil. The teacher told Student they would discuss it after class. A few minutes later, Student walked over to the classmate's desk and demanded that he return the pencil. A scuffled followed, which resulted in the students' each other and Student's placing his classmate in a Teachers and staff intervened and succeeded in separating the students. The classmate got out of the room and one of the staff members, ASSISTANT PRINCIPAL, attempted to restrain Student, who was trying to get out of the room to pursue the classmate. Attempting to get away, Student Assistant Principal Student continued to attempt to force his way out of the classroom, but SPED Director and another teacher succeeded in After several minutes, Student calmed down and Social Worker began to talk with him about the incident. DCPCS telephoned Grandmother and had her come to school to pick up Student. Exhibit P-5.

9. DCPCS determined that Student had broken school rules against

Student was temporarily pending an hearing. Exhibit P-7.

10. DCPCS convened an MDR meeting on August 29, 2011. Grandmother and Father attended. The team discussed the incident and concluded that Student's getting up out of his seat and demanding that he get his pencil back was impulsive and a manifestation of an OHI-ADHD disability. However, the team concluded that Student's physical aggression towards Assistant Principal, a teacher and SPED Director was not a manifestation of an OHI-ADHD disability. Exhibit P-6.

11. At the August 29, 2011 MDR meeting, the MDR team reviewed Student's IEP, but did not review his special education evaluations. Social Worker and SPED Director believed that Student's disability was OHI-ADHD, although his IEP does not specify whether Student's

Other Health Impairment is limited to, or includes, ADHD. Social Worker understood that the MDR team was only to consider Student's primary disability specified on his IEP (OHI). The team did not consider Student's disorders diagnosed in the August 25, 2009 comprehensive psychological evaluation, including Depressive Disorder (NOS) and Disruptive Behavior Disorder (NOS). The MDR team was not informed that Student had been from several other schools for behavior issues. Testimony of SPED Director, Testimony of Social Worker.

12. On August 30, 2011, DCPCS notified Grandmother and Father that Student was being expelled from DCPCS and that, as of that date, he was no longer a DCPCS student. The August 30, 2011 notice informed Grandmother and Father that by D.C. law, they had 10 days to provide DCPCS with proof of enrollment in another educational program. Failure to provide such proof would require that DCPCS contact D.C. Child and Family Services. Exhibit P-4. When DCPCS expelled Student, neither the school nor DCPS offered any alternative educational setting for Student. Testimony of Grandmother.

13. There was no meeting of Student's IEP team to determine an interim alternative educational setting for services after Student was expelled from DCPCS. Testimony of Grandmother. At the resolution meeting on September 12, 2011, DCPS informed Grandmother that Student could enroll at NEIGHBORHOOD MIDDLE SCHOOL. Testimony of Grandmother.

14. Pending the outcome of this MDR appeal, Grandmother has not enrolled Student at another school. Testimony of Grandmother.

CONCLUSIONS OF LAW

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

DISCUSSION

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. DID DCPS ERR IN ITS MANIFESTATION REVIEW DETERMINATION THAT STUDENT'S AUGUST 23, 2011 MISCONDUCT WAS NOT A MANIFESTATION OF HIS DISABILITY?

The U.S. Department of Education IDEA regulations provide that 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 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.

34 C.F.R. § 300.530(e). If, the parents disagree with the manifestation determination, they may appeal the decision by requesting a due process hearing. 34 C.F.R. § 300.532(a)

The Petitioners in this case contend that the MDR team at DCPCS erred in finding that Student's conduct on August 23, 2011 was neither caused by nor had a direct and substantial relationship to, the child's disability. I agree. The MDR team at DCPS made several errors that make its determination invalid. First, in reaching its determination, the team failed to consider all relevant information in Student's file. Most significantly, the team did not consider Student's most recent Comprehensive Psychological Evaluation (Exhibit P-14), which documents Student's diagnoses of Depressive Disorder NOS and Disruptive Behavior Disorder NOS and his history of aggression, anger outbursts and violating and disobeying rules.

Second, a reading of Student's December 15, 2010 IEP (and the Comprehensive Psychological Evaluation) leaves no doubt that Student's disability includes anger and self-control issues, physical aggression, conflicts, behavior choices, etc. Yet the MDR team only considered whether Student's misconduct was a manifestation of an ADHD disability, even though nothing in the IEP indicates that Student's OHI disability is ADHD-related.

Finally, the MDR team agreed that during the August 23, 2011 incident, Student's getting up out of his seat and demanding that he get his pencil back was impulsive and a manifestation of an OHI-ADHD disability. However, the team concluded that Student's physical aggression during the same incident towards Assistant Principal, a teacher and SPED Director was not a manifestation of his disability. This analysis cannot be supported. If, as the MDR team found, the beginning of Student's conduct, when Student got out of his seat and allegedly confronted and assaulted his classmate, was a manifestation of his disability, Student's ensuing struggle with the school staff during the same incident must also have had a direct and substantial relationship to the same disability. For these reasons, I find that Student's MDR team erred in

determining that his August 23, 2011 conduct was neither caused by, nor had a direct and substantial relationship to Student's disability.

2. DID DCPS FAIL TO FOLLOW THE IDEA'S INTERIM PLACEMENT REQUIREMENTS REGARDING SERVICES TO A CHILD WITH A DISABILITY REMOVED FROM HIS CURRENT PLACEMENT FOR MORE THAN 10 SCHOOL DAYS?

The IDEA requires that when a child with a disability is removed from the child's current placement in excess of 10 consecutive school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the child must continue to receive educational services 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. 34 C.F.R. § 300.530(c), (d). The child's IEP Team determines the interim alternative educational setting for services. 34 C.F.R. § 300.531. In this case, when DCPCS expelled Student on August 30, 2011, neither DCPCS nor DCPS made timely arrangements for Student to continue to receive educational services. Neither was Student's IEP Team convened to determine an interim alternative educational setting for Student. DCPS' unilateral statement at the September 12, 2011 resolution session that Student could enroll in Neighborhood Middle School clearly did not meet the requirements of 34 C.F.R. §§ 300.530(c) and 300.531.

REMEDY

The only relief requested by Petitioners is that the Hearing Officer order DCPCS to re-enroll Student. Under 34 C.F.R. § 300.532(B), the hearing officer has authority to return the child with a disability to the placement from which the child was removed, if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability. In this case, I find that Student's August 23, 2011

behavior was a manifestation of his disability and that DCPS failed to comply with the alternative interim educational setting requirements of § 300.530(c). Accordingly I find it is appropriate to return Student immediately to DCPCS.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED: that DCPS immediately return Student to his placement at DCPCS.

Date: September 27, 2011

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).