DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: October 11, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0627

Hearing Date: October 3, 2012

Student Hearing Office, Room 2004
Washington, D.C.

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard, for an expedited due process hearing, upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "Mother"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-B, Chapter 5-B25 and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her due process complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by not conducting a timely manifestation determination review after an August 31, 2012 disciplinary

[1] Personal identification information is provided in Appendix A.

removal, by failing to ensure that Student had a timely triennial special education reevaluation, and by not including a behavior intervention plan in Student's most recent IEP.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's due process complaint, filed on September 10, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 11, 2012. On September 20, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties met for a resolution session on September 26, 2012, but did not come to an agreement. Pursuant to 34 CFR § 300.532(c)(2), the Hearing Officer must make a determination within 10 school days after the hearing date.

The due process hearing was held before the undersigned Impartial Hearing Officer on October 3, 2012 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. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called EDUCATIONAL ADVOCATE as her only witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-34 were admitted into evidence without objection, with the exceptions of Exhibits P-11, P-18, P-20, P-25, and P-29 through P-32. Exhibits P-20, P-29, P-30 and P-31 were admitted over DCPS' objections. DCPS' objections to Exhibits P-11, P-18 and P-25 were sustained. Exhibit P-32 was withdrawn. DCPS' Exhibits R-1 through R-9 were admitted without objection. Exhibit R-10 was admitted over the Petitioner's objection.

Counsel for Petitioner made an opening statement. Counsel for DCPS elected not to make an opening statement. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing brief.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-B, § 2510 and tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO CONDUCT A TIMELY MANIFESTATION DETERMINATION REVIEW AND/OR TO PROVIDE AN ALTERNATIVE INTERIM EDUCATION SETTING FOR STUDENT FOLLOWING HIS SUSPENSION FROM DC-PCS ON OR ABOUT AUGUST 31, 2012;[2]

- WHETHER DCPS HAS DENIED STUDENT A FAPE BY NOT CONDUCTING A TIMELY TRIENNIAL SPECIAL EDUCATION REEVALUATION; and

- WHETHER DC-PCS' MOST RECENT IEP FOR STUDENT IS INAPPROPRIATE BECAUSE IT LACKS A BEHAVIOR INTERVENTION PLAN TO ADDRESS STUDENT'S TRUANCY ISSUES.[3]

Petitioner seeks an order for DCPS to conduct a complete educational reevaluation, social history and functional behavioral assessment ("FBA"), or to fund independent evaluations; for DCPS to convene Student's IEP team to review the evaluations and other data and revise his IEP, including to provide a behavior intervention plan; and for DC-PCS to conduct

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[2] Since the complaint for due process was filed on September 10, 2012, Student has been allowed to return to school at DC-PCS.

[3] In her complaint for due process, Petitioner alleged that the March 29, 2012 IEC was also deficient because it lacks an appropriate transition plan, including measurable goals. *See* Prehearing Order, Sept. 20, 2012. At the due process hearing, Petitioner withdrew that issue because DCPS had agreed to fund an independent vocational assessment for Student. On September 26, 2012, DCPS issued an Independent Educational Evaluation letter for the vocational assessment. *See* Exhibit R-2.

a manifestation determination review. In addition, Petitioner seeks an award of compensatory education to compensate for the alleged denial of FAPE to Student by DCPS' failure to address his behavior issues in his IEP, and for academic services denied Student during the September 2012 disciplinary removal.

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 resident of the District of Columbia. He is enrolled in the GRADE at DC-PCS. Testimony of Mother.

2. Student was last found eligible as a student with a disability, who continued to need special education and related services, on June 9, 2009, under the disability category, Specific Learning Disability. Exhibit P-9. There has been no educational reevaluation of Student since the June 9, 2009 eligibility determination. Stipulation of Counsel.

3. Student's most recent Individualized Education Program ("IEP") was developed by the IEP team at DC-PCS on March 29, 2012. The March 29, 2012 IEP includes annual goals in Academic-Mathematics, Academic-Reading and Academic-Written Expression. Under the IEP, Student is to receive 15 hours per week of Specialized Instruction in the General Education setting. Exhibit P-9.

4. At the March 29, 2012 IEP meeting, Mother and FORMER EDUCATIONAL ADVOCATE requested that Student be assessed using a comprehensive psychological evaluation with a clinical component. Exhibit P-10.

5. DC-PCS reported that for the 2011-2012 fall term, Student had 18 unexcused class absences. Exhibit P-17. It appears from the report that Student only missed one full school

day, October 3, 2011. *Id.* Former Educational Advocate's meeting notes do not reflect that Mother or DC-PCS school staff raised Student's school attendance as a concern at the March 29, 2012 IEP meeting. Exhibit P-10.

6. By letter of April 4, 2012 to DC-PCS, Former Educational Advocate requested the school to provide funding authorizations for Student to obtain an IEE comprehensive psychological evaluation with clinical component and an IEE vocational II assessment. Exhibit P-8.

7. Student did not fail any classes for the 2011-2012 school year. Testimony of Educational Advocate. Student's grades for the year were 3 D's (English II, Geometry and Biology I), 1 D+ (Spanish I), 3 C's (Comp Application I, Sophomore Seminar and World History II) and 1 A (Art 2). Exhibit P-6.

8. Student was on summer vacation from on or about June 15, 2012 through August 24, 2012. Testimony of Mother, Exhibit R-3, Hearing Officer Notice of School Calendar.

9. On August 31, 2012, DC-PCS DEAN discovered that Student had brought a folding pocket knife to school. Mother was contacted and Student was sent home. DC-PCS provided Written Notice to Mother that Student had "violated rule three of [DC-PCS'] nonnegotiable. Rule three reads that: Students will not bring or possess weapons, electrical devices (including cell phones) or contraband in school. [Student] violated this rule by bring a knife to school." [*sic*] DEAN informed Mother that Student was not to return to school until a Multidisciplinary Team ("MDT team") meeting was scheduled. Exhibit R-10. In a telephone conversation, Dean told Mother that Student would not be allowed to return to school until DC-PCS VICE PRINCIPAL came back from a one-week vacation. Testimony of Mother.

10. DC-PCS school officials had communications with Mother and Mother's legal

representatives about convening a Manifestation Determination Review ("MDR") meeting. Exhibits P-4, R-4, R-5, R-6, R-7, R-8 and R-9. An MDR meeting was scheduled for September 14, 2012, but Mother was unable to attend. Testimony of Mother. An MDR meeting was convened at DC-PCS on September 24, 2012, which was attended by Educational Advocate. Mother did not attend and Educational Advocate stated that she could not remain for the meeting because Mother was not available. No MDR determination was made at the meeting. Exhibit R-4.

11. On September 14 or 15, 2012, Vice Principal instructed Mother to send Student back to school on Monday, September 17, 2012. Student did not return to school until September 19, 2012. Testimony of Mother.

12. At the Resolution Session meeting on September 26, 2010, DCPS agreed to conduct comprehensive psychological and functional behavioral assessments of Student. DCPS also agreed to issue a funding authorization for Petitioner to obtain an Independent Educational Evaluation ("IEE") vocational evaluation. Exhibit P-34.

CONCLUSIONS OF LAW

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

Burden of Proof

Under the D.C. Regs., on the appeal of an MDR decision, the burden of proof is the responsibility of DCPS. 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. D.C. Regs. tit. 5-B § 2510.16. In all other

respects, the burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner 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).

ANALYSIS

1. DID DCPS DENY STUDENT A FAPE BY FAILING TO CONDUCT A TIMELY MANIFESTATION DETERMINATION REVIEW AND/OR FAILING TO PROVIDE AN ALTERNATIVE INTERIM EDUCATION SETTING FOR STUDENT FOLLOWING HIS DISCIPLINARY REMOVAL FROM DC-PCS ON AUGUST 31, 2012?

On August 31, 2012, Dean discovered that, in violation of DC-PCS rules, Student had brought a folding pocket knife to school. Mother was notified and Student was sent home. Mother was informed that Student could not return to DC-PCS until an MDT team meeting was scheduled. Petitioner contends that DC-PCS' August 31, 2012 removal of Student triggered an obligation on the part of the school to conduct a Manifestation Determination Review ("MDR").

Under 34 CFR § 300.530(e), a manifestation determination must occur within 10 days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. *Id.* A change in a child's placement is deemed to occur if:

– The removal from school is for more than 10 consecutive school days; or

– The child has been subjected to a series of removals that constitute a "pattern."

A pattern would exist when the series of removals total more than 10 school days in a school year and when the child's behavior is substantially similar to his behavior in previous incidents. 34 CFR § 300.536(a).

In this case, the evidence does not establish that a decision was made to remove Student from DC-PCS for more than 10 consecutive school days, or that there had been a pattern of

removals in the 2012-2013 school year.[4] When Student was suspended on August 31, 2012, DC-PCS had not decided when Student would be allowed to return to school. At the time, Vice Principal was on a one-week vacation and Dean informed Mother that Student would not be allowed to return to school until the Vice Principal came back from leave. Ultimately, Vice Principal informed Mother that Student should return to school on September 17, 2012.

School personnel may remove a child to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 school days in a row—to the extent those alternatives are applied to children without disabilities. Schools do not have to provide students with disabilities with special education services during a removal of up to 10 school days in one school year—as long as they also do not provide educational services to children without disabilities who are similarly removed. 34 CFR § 300.530(d)(3). No evidence was proffered that DC-PCS or DCPS offers educational services to nondisabled children who are removed for not more than 10 school days. Student's disciplinary removal was for a total of 10 school days – from August 31, 2012 through September 15, 2012,. (Labor Day, September 3, 2012, was not a school day.) I find, therefore, that because DC-PCS did not remove Student for more than 10 consecutive school days following the August 31, 2012 incident, there was no change in placement. DC-PCS was not required by the IDEA to conduct an MDR. DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY NOT CONDUCTING A TIMELY TRIENNIAL SPECIAL EDUCATION REEVALUATION?

Counsel for the parties stipulated that Student's last special education reevaluation occurred on June 9, 2009. The IDEA regulations require that a public agency ensures that a

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[4] There was testimony at the due process hearing about DC-PCS' allegedly having removed Student from school the day before the due process hearing. That event is beyond the scope of this due process hearing.

reevaluation of each child with a disability occurs at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR § 300.303(b)(2). In the present case, Mother did not agree that a reevaluation was unnecessary. I find, therefore, that DCPS violated its procedural obligations under the IDEA by not reevaluating Student by June 2012. As discussed more fully below, I will order DCPS to promptly conduct a reevaluation to determine Student's current educational needs.

DCPS' failure to conduct a timely triennial reevaluation is not a *per se* denial of a FAPE to Student. Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *citing C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*). "If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations." *Lesesne, supra*, quoting *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir.2002). *See, also, Kruvant v. District of Columbia,* 99 Fed.Appx. 232, 233 (D.C.Cir.2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error.") In the present case, the Petitioner has not shown that DCPS' failure to conduct the triennial reevaluation by June 2012 resulted in a loss of educational opportunity or deprived Mother of her participation rights. When Student's last IEP was developed on March 8, 2012, his prior evaluation was still valid. Student was on summer vacation from on or about June 15, 2012 through August 24, 2012. If the reevaluation had been completed in June 2012, there would have been no change to Student's education program until the beginning of the current school

year. The Petitioner's evidence does not establish that in this short period of time, Student has lost educational opportunity as a result of DCPS' delay in conducting the triennial reevaluation. A compensatory education award is therefore not warranted. *See, e.g., Johnson v. District of Columbia*, 2012 WL 2775028, 3 (D.D.C. 2012) (Student not entitled to receive compensatory education when she was not denied a FAPE.)

There remains the issue of what would be appropriate relief for DCPS' failure to conduct the triennial reevaluation. Petitioner requests that I order DCPS to fund independent evaluations of Student, including a comprehensive psychological and an FBA. The U.S. Supreme Court has emphasized that IDEA relief depends on "equitable considerations." *Reid ex rel. Reid v. District of Columbia,,*401 F.3d 516, 523 (D.C. Cir.2005) citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Equity regards that as done which ought to be done. *Commonwealth of Pennsylvania v. Weinberger*, 367 F.Supp. 1378 (D.D.C.1973).

At the March 29, 2012 IEP meeting, Mother requested DC-PCS to conduct a comprehensive psychological evaluation of Student, with a clinical component. DC-PCS and DCPS failed to act on this request.[5] At the September 26, 2010 Resolution Session meeting in this case, DCPS agreed to conduct its own comprehensive psychological and functional behavioral assessments of Student. I find that this concession by DCPS comes too late. DCPS ought to have conducted the psychological evaluation when requested by Mother in March 2012. Its failure to conduct the evaluation kept Mother from then requesting an IEE at public expense.[6]

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[5] Whether Student was denied a FAPE by DCPS' failure to conduct this evaluation is not an issue in this case. *See* Prehearing Order, Sept. 20, 2012.

[6] Under the IDEA, a parent has the right to an independent educational evaluation, at public expense, if the parent disagrees with an evaluation obtained by the public agency. If a

I find that the appropriate equitable remedy in this situation is to order DCPS to provide, at public expense, a comprehensive psychological evaluation of Student, with a clinical component. Because the evidence does not establish that Mother had requested an FBA prior to the present school year, I will not order DCPS to also fund an independent FBA. Petitioner prevails on this issue.

3. IS DC-PCS' MARCH 29, 2012 IEP INAPPROPRIATE FOR STUDENT BECAUSE IT LACKS A BEHAVIOR INTERVENTION PLAN TO ADDRESS STUDENT'S TRUANCY ISSUES?

In her complaint for due process Mother contends that the March 29, 2012 IEP is inappropriate because it lacks a Behavior Intervention Plan ("BIP") to address Student's truancy issues. The well-established standard for determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit); *District of Columbia v. Barrie*, 741 F.Supp.2d 250, 253-254 (D.D.C.2010) (IEP must be formulated in accordance with the terms of the IDEA and should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.) The IDEA requires that, in the case of a child whose behavior impedes the child's learning, the IEP team must

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parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense

See 34 CFR § 300.502(b).

consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). In some circumstances, the IDEA may require the education agency to use such behavior interventions to address truancy issues. *See, e.g, Board of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 21 F.Supp.2d 862, 877 (N.D. Ill. 1998) (School District's truancy interventions insufficient to meet the *Rowley* test of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.)

The evidence in this case sheds little light on Student's alleged school attendance problem prior to the March 29, 2012 IEP meeting. From September 6, 2011 through December 13, 2011, Student had a total of 18 unexcused class absences at DC-PCS. It appears from the attendance record he may have missed only one full school day during that semester. Former Educational Advocate's notes from the March 29, 2012 IEP meeting do not reflect that truancy was raised as a concern either by school staff or by Mother. In her testimony at the due process hearing, Mother did not report that Student had a school attendance problem. I find, therefore, that Petitioner's evidence does not establish that Student's alleged truant behavior impeded his learning or warranted the use of a Behavior Intervention Plan in Student's IEP to address the concern. DCPS prevails on this issue.

SUMMARY

In this decision, I have determined that DC-PCS was not required to conduct a Manifestation Determination Review following Student's August 31, 2012 removal from school; that Student was not denied a FAPE by DCPS' procedural violation in failing to conduct a timely triennial evaluation, but DCPS should now be required to fund an IEE psychological evaluation of Student and that Student's March 29, 2012 IEP was not inadequate for failure to include a BIP

for truancy. Because I do not find a denial of FAPE, I do not reach Petitioner's request for a compensatory education award.

ORDER

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

1. Within 5 school days of entry of this order, DCPS shall issue an IEE authorization to Petitioner to obtain, at public expense, a comprehensive psychological evaluation, with clinical component, of Student; and

2. Upon receipt of the FBA, the IEE psychological evaluation, and the previously authorized IEE Vocational Assessment, DCPS shall, within 14 school days, convene Student's MDT/IEP team to determine whether Student continues to have a qualifying disability and his current educational needs, and shall ensure that Student's IEP is revised and updated as appropriate.

3. All other relief requested by Petitioner herein is denied.

Date: July 11, 2012

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).