

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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STUDENT ¹ , by and through his Parent Petitioners, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION October 11, 2009 <u>Representatives:</u> Counsel for Petitioners: Christopher West Counsel for DCPS: Candace Sandifer <u>Hearing Officer:</u> Kimm H. Massey, Esq.
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

Petitioner filed its Complaint on July 29, 2009, and DCPS filed its Response on August 21, 2009. The prehearing conference for this matter was held on September 11, 2009, and the hearing officer issued the Pre-Hearing Order on September 15, 2009.

The due process hearing was convened on October 1, 2009, as scheduled, and the parties' disclosed documents were admitted into the record without objection.² Based on the parties' opening statements, it was clear to the hearing officer that the parties were in agreement that a meeting was needed to review Student's independent psychological evaluation, revise Student's IEP, update the behavior intervention plan ("BIP") and discuss placement. The hearing officer attempted to arrange a meeting date, but DCPS's counsel was unable to reach the necessary party. As a result, the hearing officer allowed Petitioner to propose three possible dates for a meeting, and determined to order DCPS to pick one of the dates as the IEP meeting date, notify Petitioner of same, and proceed with the meeting on the selected date. This course of action eliminated the need to address the first three of the four claims asserted by Petitioner, with the result that the rest of the hearing was focused on Petitioner's sole remaining claim and the requested remedy of compensatory education. After Petitioner presented testimony from its two witnesses, DCPS indicated that it did not intend to present any witness testimony, and closing statements were received. The hearing was then concluded.

III. ISSUE(S)

1. Did DCPS use the wrong criteria in determining whether certain incidents were a manifestation of Student's disabilities?
2. Is Student entitled to compensatory education as a result of missed instruction/class work during in-school and out-of-school suspensions?

IV. FINDINGS OF FACT

1. During the 2008/09 school year, Student attended a DCPS elementary school and he received many in-school and out-of-school suspensions. During the in-school suspensions, Student was placed by himself in a room next to the assistant principal's

² On September 24, 2009, Petitioner disclosed 38 documents (hereinafter Petitioner's Exhibits 1 - 38), and DCPS disclosed 10 documents (hereinafter DCPS-01 through DCPS-10).
HO Decision/Case # 2009-1087

office. No adult was present in the room during these in-school suspensions, and Student was given class work only once. Student spent numerous days in in-school suspension during SY 08/09.³

2. DCPS documentation indicates that Student was suspended the following days/time periods during the 2008/09 school year: November 10 – 17, 2008 (three days); December 1 – 5, 2008 (three days); February 18 – 24, 2009 (three days); April 1 – 3, 2009 (one day). Parent's advocate recalls additional suspensions of Student that were not documented by suspension notices, as well as many occasions when Student was sent home for the day without receiving official documentation of a suspension. DCPS documentation confirms that on at least one occasion, Student was sent home for the remainder of the day but was not formally suspended. Student only received a homework packet once during his out-of-school suspensions.⁴
3. Student's January 7, 2009 IEP indicated that Student's primary disability was specific learning disability ("SLD") and required Student to receive 15 hours of specialized instruction and 30 minutes of behavioral support services per week. Student's emotional, social, and behavioral development goals on the IEP required him to do the following: continue to improve his ability to accept authority; continue to improve his ability to follow directions; continue to improve his ability to decrease emotional outbursts; and improve his ability to accept responsibility for his behavior.⁵
4. Student's January 7, 2009 functional behavior assessment ("FBA") identified his behaviors of concern as the following: being out of seat, moodiness, physical aggression, verbal aggression, fighting, talking out, making excuses, and seeking attention. The FBA indicates that the behavior occurs in all settings and occurs for 30 to 45 minutes approximately 3 to 5 times a day.⁶
5. On April 17, 2009, DCPS held a manifestation determination review ("MDR") meeting to determine whether Student's behavior on April 1, 2009, when he kicked his homeroom class door, which struck another student who was standing by the door and caused that student's lip to bleed, was a manifestation of Student's disability. The school SEC and five other school staff members were present. The MDR meeting notes indicate that although the team determined that the behavior was not a manifestation of Student's disability, the team decided to increase Student's social emotional counseling from 30 minutes to one hour, and to set up "additional reinforcements during the week via either the gen ed social worker or psychologist." Accordingly, Student's April 17, 2009 IEP lists the same primary disability, hours of specialized instruction per week, and emotional, social, and behavioral development goals as his January 7, 2009 IEP, but the April 17th IEP increases to one hour the amount of weekly behavioral support services Student was to receive.

³ Testimony of Parent's Advocate.

⁴ Petitioner's Exhibits 13, 14, 15, 17; Testimony of Parent's Advocate.

⁵ Petitioner's Exhibit 25.

⁶ Petitioner's Exhibit 28.

In making its MDR determination, DCPS considered the following four factors: (1) whether Student's IEP and placement were appropriate; (2) whether Student's special education services, supplementary aids and services and behavioral intervention strategies were provided consistent with the Student's IEP and placement; (3) whether Student understood the impact and consequences of the behavior subject to disciplinary action; and (4) whether Student had the ability to control the behavior subject to disciplinary action.⁷

6. On May 27, 2009, DCPS convened an MDR meeting to determine whether Student's behavior when he struck a teacher from behind, thereby causing the teacher to drop and break his cell phone, was a manifestation of Student's disability. The school SEC and four other school staff members were the only parties present. The MDR meeting notes indicate that the group assembled reviewed Student's BIP, IEP, suspension notices, and emails describing other incidents and interventions prior to determining that the Student's behavior was not a manifestation of his disability. In making its determination, DCPS considered the same four factors it considered at Student's April 17th meeting.⁸
7. On June 3, 2009, DCPS held another MDR meeting to review the previous MDR that took place on April 17th. The school SEC, Student's advocate, Student's Guardian, Parent's Advocate, and five other school staff members attended the meeting. Student's advocate questioned whether the social/emotional goals on Student's IEP related to the infraction with respect to whether it was a manifestation of Student's disability, and the school social worker stated that the social/emotional goals were related to Student's behavior during the infraction. Nevertheless, DCPS upheld its previous decision that the infraction was not a manifestation of Student's disability. Parent and the advocate disagreed with the determination.⁹
8. Student's educational advocate has developed a compensatory education plan for Student to make up for the services he missed as a result of suspensions during the 2008/09 school year. The plan consists of the following items: 1) 28 hours of one-on-one tutoring to address Student's academic deficits; 2) 4 hours of counseling services to address Student's social/emotional deficits; and 3) funding, not to exceed \$105, for art equipment. In developing the plan, the advocate took Student's tolerance level into account.¹⁰
9. Student's June 2009 comprehensive psychosocial history evaluation report recommends, *inter alia*, the use of creative art therapy with Student as a complementary form of therapy given that Student enjoys drawing and the arts.¹¹

⁷ Petitioner's Exhibits 15, 34; DCPS Exhibit 2; Testimony of Parent's Advocate.

⁸ Petitioner's Exhibit 33.

⁹ Petitioner's Exhibits 23, 24; Testimony of Parent's Advocate; Testimony of Student's Advocate.

¹⁰ Petitioner's Exhibit 3.

¹¹ Petitioner's Exhibit 35.

V. CONCLUSIONS OF LAW

As the party seeking relief in this case, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

a. Manifestation Determinations

School personnel may remove a child with a disability who violates a code of conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days in a given school year. 34 C.F.R. § 300.530(b)(1). A “change of placement” occurs when a child with a disability is subject to a series of removals that constitute a pattern because the removals total more than 10 school days in a school year and certain other conditions are met. 34 C.F.R. § 300.536(a)(2). 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 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)(1). If either condition is met, the conduct must be determined to be a manifestation of the child’s disability, and the IEP team must (1) either (i) conduct an FBA unless one has already been conducted, and implement a BIP for the child, or (ii) if a BIP has already been developed, review same and modify it as necessary, and (2) return the child to his or her placement, unless the parent and the LEA agree to a change of placement or certain special circumstances exist. 34 C.F.R. § 300.530(e)(2), (f).

In this case, Petitioner argues that DCPS used the wrong criteria at the April 17 and May 27, 2009 MDR meetings, which resulted in incorrect manifestations determination because the behaviors at issue were related to Student’s disability when Student’s IEP goals and objectives in the area of social/emotional deficits are considered. DCPS does not dispute that it used old and outdated criteria at the MDR meetings, but DCPS maintains that the relevant information from Student’s file was reviewed and the team’s manifestation determinations were correct based on the information available at the time and the disability classifications assigned to Student at the time.

After a careful review of the evidence in this case, the hearing officer concludes that DCPS’s admitted use of outdated criteria in determining whether Student’s conduct was a manifestation of his disability resulted in incorrect manifestation determinations by allowing the team to focus on whether Student understood the impact and consequences of his behavior and had the ability to control his behavior, instead of limiting the team to consideration of the factors set out in the governing regulations. Hence, at the June 3, 2009 MDR, which was held to review the April 17th MDR and determination, the team upheld its decision that Student’s behavior was not a manifestation of his disability, even though the educational advocate and the DCPS social worker were of the opinion that Student’s behavior was related to areas of behavior covered by the social/emotional goals in his IEP.

b. Compensatory Education

Compensatory education is a form of equitable relief that may be awarded upon a finding of a violation of IDEIA. *See Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. 2005). In every case, however, 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. *Id.* at 524.

Based upon the above conclusion that DCPS's use of outdated factors resulted in incorrect manifestation determinations for Student, as well as the evidence demonstrating that DCPS failed to consistently provide Student with instruction and/or work packets during his numerous in-school and out-of-school suspensions, the hearing officer further concludes that an award of compensatory education is appropriate in this case. As Petitioner's proposed compensatory education plan was developed with the specific goal of compensating Student for the services he missed as a result of suspensions during the 08/09 school year, Student's tolerance level was taken into account in developing the plan, and one of Student's recent evaluations recommends creative art therapy for Student, the hearing officer will order DCPS to either implement or fund Petitioner's proposed compensatory education plan.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proof on its manifestation determination claim, and that an award of compensatory education is appropriate in this case.

VII. ORDER

1. DCPS shall select one of the following three sets of dates and times as the date and time for Student's next IEP meeting: Tuesday, October 27, 2009 at 10:00 am; Wednesday, November 4, 2009 at 10:00 am; or Tuesday, November 10, 2009 at 10:00 am. On or before, Monday, October 19, 2009, DCPS shall notify Petitioner, via Petitioner's counsel, of the date and time chosen for Student's IEP meeting.
2. DCPS shall assemble an appropriate IEP team and convene a full IEP meeting for Student on the date and time chosen pursuant to Paragraph 1, above. At said meeting, the team shall review Student's July 2009 independent psychological evaluation, revise Student's IEP, update Student's BIP, and discuss an appropriate placement for Student.
3. Within 30 days of the issuance of this Order, DCPS shall begin implementation of Petitioner's proposed compensatory education plan, which consists of: 28 hours of one-on-one tutoring to address Student's academic deficits; 4 hours of counseling services to address Student's social/emotional deficits; and funding, not to exceed \$105, for art equipment. Should DCPS fail to begin providing the necessary tutoring and counseling services within the 30-day time period specified, Parent shall have the right to hire an

independent tutor and an independent behavior support specialist/counselor at DCPS's expense.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 11th day of October, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).