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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

PARENT, on behalf of
[CHILD],[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 23, 2010

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: June 15,
Room: 4-B

HEARING OFFICER DETERMINATION

BACKGROUND

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. §1400 et seq., and Title 5-B, Chapter 25 of the District of Columbia Municipal Regulations ("D.C. Regs."). This expedited due process complaint arises out of a May 26, 2010 SCHOOL (the "School") Manifestation Determination Review ("MDR") determination that the Child's alleged violation of the School's Discipline Standards, possession of a pocket knife on School property, was not a manifestation of the Child's disability. The Parent further contends that the MDR was not valid because the School notified

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

her that the MDR would be held on June 1, 2010, but convened the MDR, without the Parent's participation, six days earlier on May 26, 2010.

The Child, an AGE boy at the time of the incident, was found eligible for special education services on August 31, 2009 under the primarily disability Other Health Impairment ("OHI") – ADHD. The Child's August 31, 2009 Individualized Education Program ("IEP") provided that the Child was to receive specialized instruction in the regular classroom for 15 hours per week and Behavioral Support Services outside the classroom for one hour per week.

The Parent's Due Process Complaint was filed on May 20, 2010 and the undersigned Hearing Officer was appointed on May 21, 2010. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-B, § 2510. A prehearing telephone conference was convened on June 2, 1010. In that hearing, the Hearing Officer ordered that the Parent's separate due process complaint in Case No. 2010-0614[2], seeking a stay put order during the pendency of this case, would be deemed a motion for a stay put order in the present case. On June 4, 2010, the Hearing Officer directed counsel for the Petitioner to obtain a hearing date to give evidence on whether the Child's interim placement at INTERIM SCHOOL violated the stay put provisions of 20 U.S.C. § 1415(j). As of the due process hearing date, the Parent had not set a hearing on her stay put motion.

The due process hearing was held before the undersigned impartial hearing officer on June 15, 2010 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an audio electronic recording device. The Parent appeared for part of the hearing and was represented by counsel. DCPS was represented by counsel.

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[2] On May 24, 2010, the Parent filed a separate due process complaint (Case No. alleging that the School and DCPS had violated the Child's stay put right to remain in his current educational placement during the pendency of this case. This Hearing Officer dismissed the separate complaint.

Counsel for both sides made opening and closing statements. Testifying for the Petitioner were the Parent, the Child, and PSYCHOLOGIST. The School SPECIAL EDUCATION COORDINATOR ("SEC") testified for DCPS. Petitioner Exhibits P-1 through P-48 and Respondent Exhibits R-1 through R-11 were admitted without objection. Both parties made oral closing statements in lieu of filing written memoranda.

ISSUES

The issues asserted by the Parent to be determined are as follows:

1. Whether the determination of the School's May 23, 2010 Manifestation Determination Review was invalid due to the Schools' failure to comply with 34 C.F.R. 300.530(e) and D.C. Regs. tit. 5-B, § 2510; and
2. Whether DCPS has demonstrated that the Child's behavior on May 13, 2010 was not a manifestation of his disability.

FINDINGS OF FACT

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

1. Child was born on BIRTHDATE. He is a resident of the District of Columbia.

2. On August 26, 2009, the Child's Multidisciplinary Team ("MDT") reviewed the Child's Comprehensive and Pschoeducational Evaluation from July 2009 and determined that the Child was eligible for special education services under the disability classification Other Health Impairment – Attention Deficit Hyperactivity Disorder ("OHI – ADHD").

3. For the 2009-10 school year, the Child was retained in the grade at School.

4. The Child's 2009-10 Grade IEP provided that he would received Specialized Instruction in the regular classroom for 15 hours per week, and counseling to address self-esteem and social skills for one hour per week.

5. During the 2009-10 school year, the Child had several disciplinary suspensions, including five days beginning December 18, 2009 for misbehavior during in-school suspension; one day suspension on March 17, 2010 for skipping a tutoring/detention session and cursing in class; and a suspension beginning March 23, 2010 for pulling a false fire alarm. The evidence does not establish how long the March 23, 2010 suspension continued.

6. On May 13, 2010, SPECIAL EDUCATION TEACHER found a small pocket on the Child's classroom seat and reported the discovery to the School administrators.

7. The Child testified at the hearing that he had carried the pocket knife, obtained from a friend, for a week or two. He carried the knife for protection because people "got jumped" walking across a bridge on his walking route to school. He kept the in his pocket, but on May 13, 2010, the fell out of his pocket and was discovered by his teacher. The Student knew of the School rule against carrying weapons on school property, but he believes that school rules are applied unevenly.

8. The pocket knife, which was exhibited at the due process hearing, has a $2^1/_4$ inch blade.

9. On the day the knife was found, the School Director of Student Affairs wrote the Parent that the Child was charged with possession of a pocket knife on school grounds – a violation of the School's discipline standards. The Child was placed on an immediate 10 day suspension and the School advised the Parent that the Principal would schedule an expulsion conference after the suspension was served.

10. On May 13, 2010, SPECIAL EDUCATION COORDINATOR (the "SEC") called the Parent in for a meeting at the School. The SEC provided the Parent with the procedural safeguards notice and offered her the choice of three days for an MDR meeting. The Parent chose May 21, 2010 at 10:00 a.m. After the Parent left, the SEC spoke to the Parent's attorney to advise him of the MDR meeting date. The Parent's attorney stated that he would inform the Parent's special education advocate who works for the same law firm.

11. On May 21, 2010, neither the Parent nor her advocate appeared for the scheduled MDR meeting. The SEC contacted the Parent and offered to reset the MDR meeting to May 26, 2010 or May 27, 2010. On May 24, 2010, the Parent's advocate responded that they were not available on May 26, 2010 or May 27, 2010 and offered alternative dates of May 28, 2010 and June 1, 2010.

12. On May 25, 2010, the School send a Confirmation of Meeting Notice to the Parent and her advocate stating that the CHILD's MDR meeting was scheduled for May 28, 2010 at 1:00 p.m. (Exhibit P-18) Also on May 25, 2010, the SEC wrote in a letter to the advocate that the full IEP team would not be available on May 28, 2010. The SEC confirmed June 1, 2010 at 9:30 a.m. for the MDR meeting. (Exhibit P-17)

13. The MDR was actually convened on May 26, 2010 with neither the Parent and nor her advocate in attendance. The team members present reviewed the facts of the incident, the Child's current IEP and his special education evaluations. The Child's special education teacher and school social worker gave statements. The MDR team determined that the Child's carrying a knife at school was not a manifestation of his ADHD disorder because the Child had admitted that he had been carrying the pocket knife for a while and that he brought it to school for his protection. The Child stated that he had obtained the pocket knife from another student in

trade for an armband. The MDR team concluded that the Child's carrying the pocket knife was not a result of ADHD impulsivity and that he understood the consequences of his behavior.

14. The MDR team further determined at the May 26, 2010 meeting that the School had been implementing the Child's IEP and that the pocket knife incident was not the result of a failure on the part of the School to implement the IEP.

15. The Psychologist testified that children with ADHD do understand right from wrong, but impulsivity may result in a Child's acting out before thinking. The Psychologist testified that she was not aware of the May 13, 2010 incident, which occurred after she evaluated the Child.

16. The SEC informed the Parent's advocate by email on May 28, 2010 that the MDR was held on May 26, 2010 "so as to be in compliance within 10 days of the incident." No evidence was offered that the School gave notice to the Parent or her advocate that the MDR meeting would be advanced from June 1, 2010 to May 26, 2010.

17. The School convened a Multi-Disciplinary Team ("MDT") meeting for the Child on June 1, 2010. The purpose of this meeting was to review a recently completed Comprehensive Psychological Evaluation, a Functional Behavioral Analysis and Speech Language Evaluations. At the June 1st meeting, the Parent's advocate stated that the Parent objected to the May 26, 2010 MDR determination because she and the advocate had not been present. The MDT Team did not revisit the MDR decision.

18. After the May 13, 2010 incident, the Child was removed from the School to an interim placement at INTERIM SCHOOL. The evidence does not establish if or when the Child actually attended the Interim School.

19. The last day of DCPS' 2009-10 school year was June 22, 2010.

CONCLUSIONS OF LAW

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

At the time of the disciplinary incident in this case, Child was identified as a "child with a disability" as defined in the IDEA. *See* 20 U.S.C. § 1401(3)(A). The IDEA sets forth particular processes by which a school may remove and/or discipline a child with a disability who violates a code of student conduct. *See Shelton v. Maya Angelou Public Charter School,* 578 F.Supp.2d 83, 93 -94 (D.D.C. 2008). The Act provides:

> If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to a violation of the school code is determined not to be a manifestation of the child's disability ... the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities ... although it may be provided in an interim alternative setting.

20 U.S.C. § 1415(k)(1)(C). School personnel under this section may remove a child with a disability who violates a code of student 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 (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under 34 C.F.R. § 300.536). 34 C.F.R. § 500.530(b). A change of placement occurs if--

> (1) The removal is for more than 10 consecutive school days; or
>
> (2) The child has been subjected to a series of removals that constitute a pattern--
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> (i) Because the series of removals total more than 10 school days in a school year;
>
> (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

> (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 C.F.R. § 500.536(a). The LEA makes the determination, on a case-by-case basis, whether a pattern of removals constitutes a change in placement. That determination is subject to review through due process and judicial determinations. 34 C.F.R. § 500.536(b).

When a child with a disability has been subjected to a series of removals exceeding 10 school days in a school year, and those removals are deemed a change of placement, the LEA must convene the child's IEP team to determine whether there is a relationship between the child's disability and the misconduct. The Code of Federal Regulations 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.
>
> (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

34 C.F.R. 300.530(e).

Following the May 26, 2010 MDR, which determined that the May 13th incident was not a manifestation of the Child's disability, the Parent filed an appeal pursuant to D.C. Regs. tit. 5-B, § 2510.14. 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. *Id.*, § 2510.16.

The Parent's first contention is that the manifestation determination conducted by the School on May 26, 2010 violated 34 C.F.R. § 300.530(e) because the MDR meeting was held without the Parent's participation. The evidence establishes that on May 13, 2010, the School placed the Child on an immediate 10-day suspension for an alleged violation of the School's Discipline Standards, namely having a on school grounds.[3] The Child had been subjected to a series of removals during the 2009-10 school year. With the May 13, 2010 suspension, the cumulative total of the Child's removals exceeded 10 days. The School evidently determined, pursuant to 34 C.F.R. § 500.536(b), that the pattern of removals constituted a change of placement because it scheduled an MDR meeting for May 21, 2010.

When the Parent failed to appear for the MDR on May 21st, the School rescheduled the MDR, first to May 28, 2010, then to June 1, 2010. However, without further notice to the Parent or her advocate, the School held the MDT Meeting, without the Parent present, on May 26, 2010, six days before the scheduled date. The participants at the May 26, 2010 meeting determined that the May 13, 2010 incident was not a manifestation of the Child's disability and was not the result of the LEA's failure to implement the Child's IEP. (Exhibit P-30).

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[3] Because the long it was not a "weapon" within the meaning of 34 C.F.R. § 300.530(g). *See* 34 C.F.R. § 300.530(i) (4) (Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code. "The term 'dangerous weapon' means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." *Id.)* Therefore the "Special circumstances" provision of 34 C.F.R.§ 300.530(g) does not apply. *See id.* (School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child carries a weapon to or possesses a weapon at school.)

The Code of Federal Regulations requires the LEA to take appropriate steps to insure parental participation in IEP meetings. The applicable provision requires that:

> Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including--
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place.

34 C.F.R. § 300-322(a). I find that the School's rescheduling the MDR meeting to a date when the Parent was unavailable, and especially its failure to notify the Parent of the changed date, violated § 300-322(a) and seriously deprived the Parent of her rights under 34 C.F.R. 300.530(e) to participate in the MDR review, including her right to provide input on members of the IEP Team, her right to access the Child's records, her right to provide information on the Child and the incident, and her right to participate in the ultimate determination of whether the incident was a manifestation of the Child's disability and whether the Child's conduct was the result of any failure to implement the Child's IEP. Parental participation in IEP meetings, including MDR's, is a fundamental requirement of special education law. The courts have held that "[t]he core of the [IDEA] statute ... is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct. 528 (2005). The IDEA provides a range of procedural safeguards to ensure parental participation in the process. "Indeed, 'Congress placed every bit as much emphasis on compliance with procedures giving parents ... a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.'" *Fitzgerald v. Fairfax County School Bd.*, 556 F.Supp.2d 543, 550-51 (E.D.Va. 2008) quoting *Bd. of Educ. v. Rowley,* 458 U.S. 176, 205-06, 102 S.Ct. 3034 (1982).

The LEA defends the School's changing the date of the MDR meeting by citing the requirement in 34 C.F.R. 300.530(e) that the LEA hold the MDR meeting within 10 school days. While the need to complete the MDR within the 10 school day period might justify proceeding without the parent in some circumstances – such as the refusal of a parent to attend – this excuse has no merit in the present case where the School provided written notice that the MDR would be held on June 1, 2010 and then failed to inform the Parent that it would hold the MDR six days before the noticed date.

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). Assuming that the School's failure to include the Parent in the manifestation determination was a procedural, not substantive, violation of the IDEA, I find that the School's rescheduling the MDR to May 26, 2010, without providing notice to the Parent, seriously deprived the Parent of her right to participate in the MDR and thereby deprived the Child of a Free Appropriate Public Education ("FAPE") during the days of his suspension. Accordingly, the School's May 26, 2010 MDR determination must be vacated.

The Parent also appeals the determination of the MDR team that the Child's conduct on May 13, 2010, when he had a pocket knife on school grounds, was not a manifestation of his OHI-ADHD disability. Having determined that the irregularities in the MDR review require that the May 26, 2010 determination to be vacated, I find that the issue of whether the MDR outcome was correct is now moot.

Finally, in her Due Process Complaint, the Parent sought compensatory education as a remedy. A decision to award compensatory education must be fact-specific and the ultimate

award must be reasonably calculated to remedy an educational deficit resulting from the LEA's failure to provide a FAPE. *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523-26 (D.C. Cir. 2005). In the present case, Petitioner offered no evidence as to any educational deficit or loss of educational benefit to the Child resulting from the School's MDR irregularities. Therefore, there is no factual evidence on which to base an award of compensatory education.

ORDER

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

1. The May 26, 2010 MDR determination that the May 13, 2010 disciplinary incident was not a manifestation of the Child's disability is vacated.
2. Pursuant to 34 C.F.R. 300.532(b)(2)(i), to the extent that the Child was removed from the educational placement set forth in his August 31, 2009 IEP, the Child shall be returned immediately to the placement.[4]
3. The Parent's request for an award of compensatory education is denied.

Date: June 23, 2010

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).

[4] The Child is presumptively entitled to stay put status under 34 C.F.R. § 300.518. Whether the transfer of the Child from the School he was attending to Interim School was a change of placement is not before the Hearing Officer. *See Alston v. District of Columbia*, 439 F.Supp.2d 86, 90 (D.D.C. 2006) (Change in educational placement is fundamental change in, or elimination of basic element of the educational program.)