

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

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

OSSE
Student Hearing Office
February 25, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: February 25, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for an expedited 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-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In her January 16, 2014 Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to provide him special

¹ Personal identification information is provided in Appendix A.

² The hearing began in Room 2004. After incurring problems with the electronic recording system, the hearing was moved to Room 2006.

education services at CITY HIGH SCHOOL since the beginning of the 2013-2014 school year and by failing comply with the IDEA's discipline requirements for a student with a disability.

Subsequent to the due process hearing held on February 18, 2014, this Hearing Officer bifurcated the original case into two cases, identified as Case No. 2014-0026 A and Case No. 2014-0026 B, so as to address the disciplinary issues asserted by Petitioner separately from the non-disciplinary issues. This Hearing Officer Determination addresses the disciplinary issues.³

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 16, 2014, named DCPS as respondent. On January 29, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the expedited due process hearing was convened before the undersigned Impartial Hearing Officer on February 18, 2014 at the Student Hearing Office in Washington, D.C. This Hearing Officer Determination must be issued within 10 school days after the hearing. 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. DCPS was represented by DCPS' COUNSEL.

Mother testified, and called as witness EDUCATIONAL ADVOCATE. DCPS called DEAN OF STUDENTS as its only witness. Petitioner's Exhibits P-2 through P-16 were admitted into evidence without objection. Exhibit P-1 was withdrawn. DCPS'

³ I have scheduled a supplemental hearing in Case No. 2014-0026 B for March 26, 2014 to receive additional evidence on the compensatory education remedy requested by Petitioner.

Exhibits R-1 through R-5 were admitted without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this part of the bifurcated case are:

– Whether during the 2013-2014 school year, DCPS violated the IDEA and denied Student a FAPE by not conducting an MDR meeting, not conducting a Functional Behavior Assessment (FBA) and implementing a Behavior Intervention Plan (BIP), and not providing interim educational services during periods of suspension, exceeding, cumulatively, more than ten days.

For relief, Petitioner had requested in her due process complaint that DCPS be ordered to fund Student's placement at an appropriate non-public therapeutic day school. At the due process hearing, Petitioner withdrew that request because she and the Student prefer that he remain at City High School for the rest of this school year. The parent has also requested an award of compensatory education to compensate Student for educational harm resulting from DCPS' alleged denials of FAPE during the 2013-2014 school year.

FINDINGS OF FACT

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

1. Student, an AGE young man, resides with Mother in the District of Columbia. Student has resided with Mother since August 2013. Before then, Student lived in Maryland for a period of years with his father and, later, with foster parents.

Student moved to the District in winter 2012 and was enrolled by his foster parents in CITY MIDDLE SCHOOL. Testimony of Mother.

2. Student is eligible for special education and related services as a student with a Emotional Disturbance (ED) disability. Exhibit P-12.

3. Before moving to the District, Student had an Anne Arundel County, Maryland Public Schools Individualized Education Program (IEP), which provided learning and behavioral goals. Under the Anne Arundel County IEP, Student's IEP services were provided in the general education setting. Exhibit P-15.

4. Student's IEP team at City Middle School revised his IEP on March 28, 2013. The March 28, 2013 IEP provided annual goals for Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. The IEP provided that Student would receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services. The City Middle School IEP team determined that the Least Restrictive Environment for Student was outside of the General Education setting because his behavioral concerns impeded his progress in general education and his "social emotional deficits warrant specialized instruction out of the general education setting." Exhibit P-12.

5. In August 2013, Mother obtained parental custody of Student and he began living with her. Mother enrolled Student at City High School, Student's new neighborhood school. When she enrolled Student, Mother provided City High School Student's transcript and his IEP from City Middle School. Testimony of Mother.

6. At City High School, from the beginning of the 2013-2014 school year until January 27, 2014, Student was placed only in general education classes. DCPS Response to Due Process Complaint. By the of the second grading period, January 24,

2014, Student was failing all of his courses except for Army Jr. ROTC. Exhibit P-9.

7. At City High School, Student was suspended from school from December 2 through December 13, 2013 for a total of ten school days. Exhibit R-3, Testimony of Dean of Students. (Dean of Students testified that this was a period of nine school days. I find that, based on the DCPS school calendar, the suspension period covered ten school days.) Mother testified that Student was also suspended from school from September 3 through 5, 2013. Dean of Students denied that Student had been suspended in September and the DCPS Attendance Summary for Student (Exhibit P-10) does not show that, on the days in September when Mother claims Student was suspended, he was absent for the entire school days. I find that Petitioner has not met her burden of proof to show that Student was suspended from school during the 2013-2014 school year, other than for the 10-day period from December 2 through 13, 2013.

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

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR 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

Did DCPS violate the IDEA and deny Student a FAPE by not conducting an MDR meeting, not conducting an FBA, not implementing a BIP, and not providing interim educational services during periods of suspension, exceeding, more than

ten days in the 2013-2014 school year?

The IDEA requires that, when a child with a disability is removed from his current educational placement for more than ten consecutive school days for violation of a code of student conduct, the child must continue to receive educational services, so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. *See* 34 CFR § 300.530(d). The Act permits children with disabilities to be removed from their current educational placement for not more than 10 consecutive school days at a time. Additional removals of 10 consecutive school days or less, in the same school year, would be permissible, provided any removal does not constitute “a change in placement.” *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46714 (August 14, 2006). A change in 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—
 - (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 CFR § 300.536(a). In this case, Petitioner has not met her burden of proof to establish that Student has been suspended for more than 10 school days in the 2013-2014 school year. Therefore, the IDEA's protections for a child with a disability who has been suspended for more than ten days, including a Manifestation Determination

Review, interim educational services, and an FBA/IEP,⁴ are not applicable. Mother has not shown that City High School's application of disciplinary procedures against Student violated the IDEA.

ORDER

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

All relief requested by Petitioner in Case No. 2014-0026 A is denied.⁵

Date: February 25, 2014

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).

⁴ See 34 CFR § 300.530(d), (e) and (f).