



## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened September 15, 2011, and concluded on September 22, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2007 and Hearing Room 2006 respectively.

## **BACKGROUND:**

Student or "the student" is age \_\_\_\_\_ and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including specific learning disability ("SLD") and other health impairment ("OHI") for the condition of Attention Deficit Hyperactivity Disorder ("ADHD"). During the 2011-2012 school year the student attended a District of Columbia public middle school hereinafter referred to as "School A." During the 2010-2011 school year, the student was in the \_\_\_\_\_ grade at School A.

On February 8, 2011, the student brought with him to school a bottle containing a liquid suspected by School A staff to be an \_\_\_\_\_ material and/or

These items were taken from the student and he was subjected to disciplinary action including removal to an alternative placement for 45 days. A manifestation determination review ("MDR") was held on February 15, 2011, to determine if the student's conduct was a manifestation of his disability. The DCPS representative determined the conduct was not a manifestation of the student's disability. The parent and her representatives attending the meeting disagreed. The student was given a long-term off-site suspension and was to attend the \_\_\_\_\_ from February 8, 2011, to April 14, 2011, and return to School A on April 15, 2011.

Petitioner filed the due process complaint challenging among other things the MDR determination. The complaint resulted in an order issued by another Hearing Officer on April 30, 2011. The April 30, 2011, order incorporated the terms of a settlement agreement between the parties and dismissed with prejudice some claims raised in the underlying complaint and dismissed other issues without prejudice. The order also directed that DCPS convene a multidisciplinary team individualized educational program ("MDT/IEP") meeting on May 19, 2011, to *inter alia* review independent evaluations, reconsider the February 15, 2011, MDR in light of the independent evaluations and review and revise the student's IEP if necessary and discuss the student's educational placement.

On July 29, 2011, Petitioner filed the current complaint to challenge, *inter alia*,<sup>2</sup> the May 19, 2011, MDR determination, as the DCPS members at the May 19, 2011, meeting determined that the student's February 8, 2011, conduct was not a manifestation of his disability.<sup>3</sup>

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<sup>2</sup> The remaining issues alleged in the complaint and claims for relief will be addressed in a subsequent decision as the decision has been bifurcated and the issue regarding the MDR is subject to the expedited

On August 9, 2011, a resolution meeting was held regarding the complaint and the matter was not resolved. A pre-hearing conference was conducted on August 11, 2011, that resulted in a pre-hearing order issued August 16, 2011. A second pre-hearing conference was convened on August 18, 2011, to review issues the parties were directed to brief. A second pre-hearing order was issued on August 23, 2011. On August 30, 2011, the Hearing Officer issued an order determining issues that were briefed by the parties.<sup>4</sup>

As a part of the settlement agreement incorporated into the April 30, 2011, order, DCPS was to provide the student compensatory education for the time missed during which the student was subject to the 45-day suspension for the February 8, 2011, incident. Thus, Petitioner is seeking as relief as to the MDR issue (1) a finding by the Hearing Officer that the student's February 8, 2011, conduct was a manifestation of his disability and (2) that the disciplinary action resulting from the February 8, 2011, incident be removed and or expunged from the student's school records and that the records reflect a determination that the conduct was a manifestation of his disability. DCPS asserts the student's February 8, 2011, conduct was not a manifestation of his disability and the disciplinary action and removal from School A was valid.

**ISSUE: <sup>5</sup>**

The issue adjudicated is:

Whether the student's February 8, 2011, conduct of bringing an alleged liquid into School A was a manifestation of his disability?<sup>6</sup>

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hearing provisions of 34 CFR § 300.530. The remaining issues are being adjudicated on the 75-day timeline under IDEA for due process hearings and the HOD will be issued for the remaining issues on before October 12, 2011.

<sup>3</sup> At the time of the February 12, 2011, MDR the student's disability classification was only SLI. After a review of the independent psychological evaluation at the May 19, 2011, IEP meeting the student's disability was amended to also include OHI for ADHD. Thus, both disability classifications were to be considered in the MDR.

<sup>4</sup> These issues were: whether Petitioner was prejudiced by DCPS' late written response and the remedy therefore, (2) the applicability of the two-year statute of limitations as to claims regarding the 2006-07 and 2007-08 school years, and (3) the ability of the Hearing Officer to grant declaratory relief only as to the MDR issue.

<sup>5</sup> The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. The Hearing Officer has restated the issue in this a manner based on the facts alleged in the complaint and in light of the relief sought.

<sup>6</sup> DCPS determined on February 12, 2011 that the student's conduct was not a manifestation of his disability. That decision was revisited on May 19, 2011, based upon the directive of the April 30, 2011, HOD. Again on May 19, 2011, DCPS determined the student's behavior was not a manifestation of his disability. The complaint challenges the May 19, 2011, MDR. The February 12, 2011, MDR is not at issue as the determination was considered anew based on the consideration of the independent evaluation and the student's additional disability classification of OHI.

## RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-33 and DCPS Exhibit 1-18) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

## FINDINGS OF FACT:<sup>7</sup>

1. The student is age \_\_\_\_\_ and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including specific learning disability ("SLD") and other health impairment ("OHI") for the condition of Attention Deficit Hyperactivity Disorder ("ADHD"). (DCPS Exhibit 4-1, 5)
2. During the 2011-2012 school year the student attended a District of Columbia public middle school, School A. During the 2010-2011 school year, the student was in the \_\_\_\_\_ grade at School A. On February 8, 2011, the student brought with him to school a bottle containing a liquid suspected by School A staff to be an \_\_\_\_\_ material and/or an \_\_\_\_\_. These items were taken from the student and he was subjected to disciplinary action including removal to an alternative placement for 45 days. (Parent's testimony)
3. A manifestation determination review ("MDR") was held on February 15, 2011, to determine if the student's February 8, 2011, conduct was a manifestation of his disability. The DCPS representative determined the conduct was not a manifestation of the student's disability. The parent and her representatives attending the meeting disagreed. The student was given a long-term off-site suspension and was to attend the \_\_\_\_\_ from February 8, 2011, to April 14, 2011, and return to School A on April 15, 2011. (Petitioner's Exhibits 19-1, 21-1)
4. The morning of February 8, 2011, the student's mother gave him a ride to school. The student was asleep in the car and was awakened by his mother when they arrived at the school. The student sleepily went into the school building and went through the security check. In searching the student's backpack the school security staff found a plastic bottle of liquid with tape around it. The bottle was confiscated along with a \_\_\_\_\_ and an \_\_\_\_\_. The parent was called back to school within thirty minutes or so of dropping the student off and informed about the incident. The liquid was supposedly tested by DCPS but the parent has never been provided a definitive determination that the liquid in the bottle was \_\_\_\_\_. The student is very interested in science and apparently had been researching and experimenting with substances at home

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<sup>7</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

and because he was asleep while riding to school and rushed sleepily into school he forgot the bottle was in his back-pack. Because of the student's ADHD he is often forgetful. (Mother's testimony)

5. Petitioner filed the due process complaint challenging among other things the February 12, 2011, MDR determination. The complaint resulted in an order issued by another Hearing Officer on April 30, 2011. The April 30, 2011, order incorporated the terms of a settlement agreement between the parties and dismissed with prejudice some claims raised in the underlying complaint and dismissed other issues without prejudice. The order also directed that DCPS convene a multidisciplinary team individualized educational program ("MDT/IEP") meeting on May 19, 2011, to *inter alia* review independent evaluations, reconsider the February 15, 2011, MDR in light of the independent evaluations and review and revise the student's EIP if necessary and discuss the student's educational placement. (Petitioner's Exhibit 33)
6. On May 19, 2011, DCPS convened a MDT/IEP meeting for the student at School A and reviewed two independent evaluations including a psychological and psycho-educational evaluation. After a review of the independent psychological evaluation at the May 19, 2011, IEP meeting the student's disability was amended to also include OHI for ADHD. At the time of the February 12, 2011, MDR the student's disability classification was only SLI. Thus, both disability classifications were to be considered in the reconsideration of the MDR ordered by the April 30, 2011, Hearing Officer's Order. (DCPS Exhibits 3, 4-1, 5, Petitioner's Exhibit 1, 2)
7. In reconsidering the MDR issue at the May 19, 2011, meeting the DCPS members of the team determined student's February 8, 2011, conduct was not a manifestation of his disability. The parent's representative at the meeting disagreed with the determination. (DPCS Exhibit 3-5)
8. The clinical psychologist who conducted the independent psychological evaluation of the student reviewed at the May 19, 2011, meeting concluded that the most significant diagnostic impression for the student remained his ADHD "which is of a Primarily Inattentive Type. There is no clear indicia of hyperactivity of significant problems with impulse control." The student's February 8, 2011, behavior was likely the result of inattentiveness due to his ADHD which resulted in him inadvertently bringing perceived dangerous materials to school. (Dr. Missar's testimony, Petitioner's Exhibit 1-12)<sup>8</sup>

#### CONCLUSIONS OF LAW:

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>9</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent

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<sup>8</sup> This witness was qualified as an expert in clinical psychology.

<sup>9</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

**ISSUE:** Whether the student's February 8, 2011, conduct of bringing an alleged liquid into School A was a manifestation of his disability?

**Conclusion:** The student's February 8, 2011, behavior was a manifestation of his disability of OHI for ADHD. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.530 regarding manifestation determination provides:

(e) (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...

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either-- (i) Conduct a functional behavioral assessment ("FBA"), unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan ("BIP") for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

Dr. Missar credibly<sup>10</sup> testified that the student's February 8, 2011, behavior was likely the result of inattentiveness due to his ADHD which caused in him inadvertently bring perceived dangerous materials to school. In addition, the parent credibly<sup>11</sup> testified that the student is often inattentive and forgetful and forgot that the substance was in his backpack. Based upon the expert testimony offered by Dr. Missar coupled with the credible testimony of the parent regarding the student's symptoms of forgetfulness related to his ADHD, the Hearing Officer concludes the student's February 8, 2011, conduct had a substantial relationship to the student's disability of OHI based on his ADHD. Although DCPS witnesses testified that they did not

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<sup>10</sup> The witness credibility was based on his professional experience and the extensive assessments that he conducted on the student.

<sup>11</sup> The parent's demeanor was basis of the credibility finding.

believe the student's conduct was a manifestation of his disability, the Hearing Officer gave greater weight to the testimony of the expert witness and his assessment that that the student's ADHD primarily manifests as inattentiveness and contributed to his inadvertently bringing an alleged dangerous material into school. The Hearing Officer also notes that there was no confirmed evidence presented that the liquid the student brought into the school was tested and was found be dangerous. For the foregoing reasons the Hearing Officer concludes that the May 19, 2011, MDR determination shall be reversed and pursuant to the Order below DCPS is to make certain the student's educational records reflect this reversal. Because the conduct is considered a manifestation of his disability, DCPS is to ensure that a FBA is conducted and a BIP developed pursuant to 34 C.F.R. § 300.530 (f). The Hearing Officer notes that parties have already agreed that Petitioner will obtain an independent FBA, thus the issue of whether DCPS conducted a FBA and developed a BIP was not an issue that was adjudicated in this expedited stage of the case.

**ORDER:**

DCPS shall within thirty (30) days of the issuance of this order remove from the student's educational records the disciplinary action resulting from the February 8, 2011, incident and ensure that the student's records reflect a determination that the February 8, 2011, conduct was a manifestation of his disability. DCPS shall also within thirty (30) calendar days provide Petitioner written communication confirming that DCPS has complied with provisions of this Order.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: September 29, 2011**