

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

STUDENT, by and through
MOTHER, his Attorney-in-Fact,¹

Date Issued: October 18, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2015-0312

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: October 14, 2015

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Student, by and through Mother, his attorney-in-fact, 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 of the District of Columbia Municipal Regulations (DCMR). In his Due Process Complaint, Student asserted several alleged denials of a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools and NONPUBLIC SCHOOL including both discipline and non-discipline issues. By order of October 2, 2015, I bifurcated the case and set the discipline issue for an expedited due

¹ Personal identification information is provided in Appendix A.

process hearing on October 14, 2015. The regular due process hearing on the remaining issues is set for November 18, 2015.

Petitioner named both DCPS and Nonpublic School as parties respondent in this case and reportedly served the due process complaint on both entities. DCPS objected Nonpublic School's being named, on the grounds that it was an improper party and Nonpublic School did not file a response to the due process complaint. In the October 2, 2015 prehearing conference, I informed counsel that I considered it doubtful that the Hearing Officer had jurisdiction over Nonpublic School and I advised counsel that if Petitioner elected to file a motion for default adjudication against Nonpublic School, I would make a formal determination as to whether I had jurisdiction over the private school. Petitioner did not file any written motion with respect to Nonpublic School. At the beginning of the due process hearing on October 14, 2015, DCPS renewed its contention that Nonpublic School was an improper party under the IDEA and I granted DCPS' motion to dismiss Nonpublic School as a party respondent. *See, e.g., Smith v. James C. Hormel Sch. of Virginia Inst. of Autism*, 2009 WL 1081079, at 9 (W.D. Va. Apr. 22, 2009) report and recommendation adopted *sub nom. Smith v. James C. Hormel Sch. of Virginia Institute of Autism*, 2009 WL 1360657 (W.D. Va. May 14, 2009) (The regulations implementing the IDEA make clear that the IDEA applies only to public agencies, not to private schools.); *Bishop v. Oakstone Acad.*, 477 F.Supp.2d 876, 883 (S.D. Ohio 2007) (“[I]n an IDEA action, a plaintiff’s remedy is against the local school district who made the placement, not against the private school itself.”)

Student, an AGE adult, is a resident of the District of Columbia. By an educational power of attorney dated October 5, 2015, Student conferred educational decision making powers upon Mother, who initiated and prosecuted the present due process proceedings

on Student's behalf. Petitioner's Due Process Complaint was filed on September 22, 2015. The undersigned Hearing Officer was appointed on September 23, 2015. The parties were reportedly scheduled to meet for a resolution session on October 9, 2015. However, they did not resolve the due process complaint. On October 2, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The expedited due process hearing was held before the undersigned Impartial Hearing Officer on October 14, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. Mother appeared in person and Student was represented by PETITIONER'S COUNSEL, LAW STUDENT 1 and LAW STUDENT 2. LEGAL CLINIC DIRECTOR also appeared at the hearing. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called INDEPENDENT PSYCHOLOGIST as her only other witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-40, with the exception of some pages from P-12 were admitted into evidence. Exhibits P-7 through P-11, P-24, and P-29 through P-33 were admitted over DCPS' objections. DCPS' objection, for untimely disclosure, to those pages in Exhibit p-12, marked as P-12-20A through P-12-20K, was sustained. DCPS' Exhibits R-1 through R-3 were admitted into evidence without objection, with the exceptions of Exhibit Pages R-1-1 and R-2-3 which were withdrawn. Counsel for the respective parties made opening and closing statements. Neither party requested leave to file post-hearing written argument.

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.

ISSUE AND RELIEF SOUGHT

The issue to be resolved in the expedited part of this case, and relief requested, are:

- Whether DCPS and/or Nonpublic School violated the IDEA and denied Student a free appropriate public education (FAPE) by issuing a letter of expulsion on April 11, 2014 without affording Student the safeguards due to students with disabilities, including a Manifestation Determination Review (MDR) meeting.²

For relief, Petitioner seeks an award of compensatory education.

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 is an AGE adult. He resides in the District of Columbia with Mother. Testimony of Mother.
2. During the 2013-2014 school year, Student was eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibits P-6, P-5. Student's February 11, 2013 IEP provided that he would receive full-time, 29.5 hours per week, of Specialized Instruction and 1.5 hours per week of behavioral support services, all outside general education. Exhibit P-6.
3. At the beginning of the 2013-2014 school year, Mother enrolled Student in GRADE at Nonpublic School where his tuition expenses were paid by DCPS. Initially

² In my October 2, 2015 Prehearing Order, I misstated, as April 11, 2015, the date of the alleged letter of expulsion. At the due process hearing, Petitioner's Counsel clarified that the letter was dated April 11, 2014 and was issued in the 2013-2014 school year.

Student seemed to be doing well at Nonpublic School although he did exhibit some behavior issues. Student was suspended from school from October 18 through 22, 2013 for allegedly making threatening gestures to a teacher. Testimony of Mother, Exhibit P-18.

4. On Friday, April 11, 2014, the day before the private school's Spring Break, FOUNDER/CEO at Nonpublic School wrote a termination of educational services letter to Student stating,

This is to inform you that today I have decided to terminate the educational services that you, [Student], receive from [Nonpublic School]. This decision is due to the negative behavior you display as well as your lack of academic progress.

We have informed [DCPS] of our decision to terminate your educational services. Over the next 15 days, DCPS will work with you to find a new placement for service.

On the same day, Founder/CEO wrote Mother by email informing her,

After speaking with my staff about [Student] and his progress as well as his increasingly negative behaviors coupled with the increase of his verbal threats. We [*sic*] here at [Nonpublic School] are terminating his placement. We will work with the family to find a more suitable school for [Student]. . .

Founder/CEO attached a copy of the termination letter to the email to Mother.

Exhibit P-20.

5. On April 12, 2014, Mother responded by email to Founder/CEO informing him that she had advised Student to return to Nonpublic School after the Spring Break.

She wrote,

This is rather unfortunate that you, and your staff feels this way, and came to this conclusion without inviting [Student], and myself or anyone else for that matter, to have some kind of input as well as putting something in place for [Student]. This is a direct violation of my son's rights. In light of this breaking news so close to the end of the school year my son has the right to an education, and this matter has to be handled properly. . . .

Mother requested, *inter alia*, a meeting with Founder/CEO and his team.

Exhibit P-21. Mother received no response to her email from Founder/CEO or Nonpublic School. Testimony of Mother.

6. Also, on April 12, 2014, Mother wrote DCPS' LEA REPRESENTATIVE by email to express her disappointment to have received the termination email from Founder/CEO and to express her hope that "this matter can be handled in a professional manner, so that my son's rights are not further violated." Exhibit P-25. LEA Representative responded to Mother by email dated April 14, 2014. He noted that Nonpublic School was currently on Spring Break and offered to convene a meeting on April 21, 2014, focused on bringing resolution to the situation. He stated also that DCPS would be researching a new location of services for Student. Exhibit P-26. Mother does not recall whether she was available for the offered meeting. Testimony of Mother.

7. Neither Nonpublic School nor DCPS ever convened a Manifestation Determination Review (MDR) meeting, before or after Founder/CEO transmitted the April 11, 2014 termination of educational services letter to Student. Testimony of Mother.

8. After Mother notified Founder/CEO that she had advised Student to return to the private school after Spring Break, Nonpublic School neither revoked the April 11, 2014 termination letter nor attempted to keep Student from returning. Student returned to Nonpublic School on April 22, 2014, the first school day after Spring Break, and he was allowed to resume his studies there. Testimony of Mother. Student attended school at Nonpublic School from April 22, 2014 through May 5, 2014. Exhibit R-1.

9. On April 29, 2014, the Metropolitan police were summoned to Nonpublic School after Student allegedly made an oral threat to TEACHER 1. Initially, Student was

not arrested. Mother told Student to leave the school that day. Student returned to Nonpublic School on April 30, 2014. Testimony of Mother, Exhibit P-30. There was no evidence offered that Student was disciplined by the private school for the alleged April 29, 2014 incident.

10. On May 5, 2014, the Metropolitan Police were again summoned to Nonpublic School and Student was arrested for the April 29, 2014 incident. Exhibits P-31, P-32. Student was released from custody on May 6, 2014. In a Stay-Away Order issued May 6, 2014, the Superior Court of the District of Columbia ordered Student to remain at least 100 yards away from Teacher 1, the teacher's home and/or his place of employment, pending a June 2, 2014 court hearing. Exhibit P-33.

11. On May 5, 2014, Mother went to Nonpublic School and, on her own initiative, cleaned out Student's locker. She had decided at that point that Nonpublic School was not a good fit for Student. Student never returned to Nonpublic School. Testimony of Mother.

12. On May 13, 2014, DCPS offered to place Student at PRIVATE SCHOOL 2. Mother declined to send Student there because she recalled that in the 2008-2009 school year, Private School 2 had told her the school could not meet Student's needs. Exhibit R-2, Testimony of Mother.

13. Since the beginning of the 2014-2015 school year, Student has attended PRIVATE SCHOOL 3 as a DCPS-funded student. Student started at Private School 3 in its summer jobs program in the summer of 2014. Testimony of Mother.

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 normally 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 and/or Nonpublic School violate the IDEA and deny Student a FAPE by issuing a letter of expulsion on April 11, 2014 without affording Student the safeguards due to students with disabilities, including a Manifestation Determination Review (MDR) meeting?

The only issue before the Hearing Officer in the expedited part of this due process proceeding is whether Student was denied a FAPE by Nonpublic School's issuing a termination letter on April 11, 2014 without there being a Manifestation Determination Review (MDR) meeting convened. The events surrounding the issuance of the April 11, 2014 letter are not in dispute.

On April 11, 2014, the Friday before the start of Nonpublic School's Spring Break, the head of the private school issued a letter informing Student that he had decided to terminate Student's educational services at the private school. Mother rejected the termination letter as a violation of Student's rights and, on her insistence, on April 22, 2014, the first school day after Spring Break, Student returned to Nonpublic School. He was allowed to continue his studies there.

Student, by his Mother, argues that Nonpublic School's decision to terminate his educational services triggered a requirement for a Manifestation Determination Review (MDR) meeting to determine whether Student's conduct was related to his disability or

resulted from a failure to implement his IEP. DCPS responds that because the private school's termination letter was never implemented – and Student did not miss any school – an MDR meeting was not required.

The IDEA protects disabled students from being removed from the classroom because of their disability. 34 CFR §§ 300.530, 300.536. The Act 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).

If a student with a disability is suspended for disciplinary reasons for more than ten consecutive school days, or for ten non-consecutive days if the removals constitute a pattern, the Local Education Agency (LEA), in this case DCPS, must conduct a manifestation determination to decide whether the conduct at issue was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E); 34 CFR § 300.536(a)(1). To make this determination, members of the student's IEP team and others meet to review the student's educational file. 20 U.S.C. § 1415(k)(1)(E)(i); 34 CFR § 300.530(e)(1). If the review team determines that (1) the conduct in question was caused by, or had a direct

and substantial relationship to, the student’s disability; or (2) the conduct was the direct result of the district’s failure to implement the student’s IEP, then the student’s conduct “shall be determined to be a manifestation of the child’s disability.” 20 U.S.C. § 1415(k)(1)(E)(ii); see 34 CFR § 300.530(e)(2). If the review team determines that the student’s conduct was a manifestation of his disability, then the district is required to conduct a functional behavioral assessment, implement a new – or review an existing behavioral intervention plan – and return the student to the placement from which the student was removed. 20 U.S.C. § 1415(k)(1)(F); 34 CFR § 300.530(f). If the MDR team determines that the student’s conduct was not a manifestation of his disability, then the district may apply the same disciplinary procedures that apply to children without disabilities. 20 U.S.C. § 1415(k)(1)(C); 34 CFR § 300.530(c).

In the present case, it is undisputed that Student is a student with a disability, and as such, was at all times concerned, covered by the IDEA’s discipline procedures for students with disabilities. I find that Founder/CEO’s April 11, 2014 letter informing Student of the decision to terminate his educational services due, *inter alia*, to the increase in Student’s negative behaviors was tantamount to a decision by the private school to expel Student and if that decision had resulted in a change of placement, an MDR meeting would have been required. If an MDR meeting were required, it was the responsibility of DCPS – not Nonpublic School – to ensure that the meeting was conducted. *See, e.g., Hormel, supra*, 2009 WL 1081079, at 9. (“These regulations specifically provide that a public agency is responsible for ensuring that the rights and protections of the IDEA are given to disabled children placed in private schools by that public agency. 34 CFR § 300.2(c)(1); see also 34 CFR §§ 300.146, 300.149. ‘Even if a private school or facility implements a child’s IEP, responsibility for compliance with this

part remains with the public agency and the SEA.’ 34 CFR § 300.325(c).”) In the event the school district could not provide the child with his or her then-current educational placement, the school district would have an “obligation to provide a ‘similar’ placement, on an interim basis.” *Knight ex rel. Knight v. District of Columbia*, 877 F.2d 1025, 1029 (D.C.Cir.1989).

Therefore, the first issue in deciding whether an MDR meeting was required in this case is to determine whether Student suffered a change of placement as a result of the private school’s April 11, 2014 letter. *See M.N. v. Rolla Pub. Sch. Dist. 31*, 2012 WL 2049818, at 4 (W.D. Mo. June 6, 2012). The D.C. Circuit Court of Appeals has explained that if a parent cannot identify a “fundamental change in, or elimination of[,] a basic element of the education program,” there has been no change in “educational placement.” *D.K. v. D.C.*, 983 F. Supp. 2d 138, 145 (D.D.C. 2013) (citing *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C.Cir.1984)). I find as a matter of law that Student did not suffer a change of placement as a result of the April 11, 2014 letter. When Mother received the letter on the Friday before the 2014 Spring Break, she concluded that the private school’s termination of Student would violate his rights under the IDEA. Mother immediately informed Founder/CEO and DCPS that Student would return to Nonpublic School after Spring Break. Student did in fact return to Nonpublic School on the first school day after Spring Break without impediment from Nonpublic School or DCPS. As a result, Founder/CEO’s intention to remove Student was not implemented and Student did not miss a day of school.³ Therefore, no fundamental

³ If Nonpublic School had barred Student from returning after Spring Break, this would not necessarily have resulted in a change in educational placement. DCPS would have then had the duty to place Student at a different school that was capable of implementing his IEP. *See, e.g., Gore v. D.C.*, 67 F. Supp. 3d 147, 153 (D.D.C. 2014) (“Courts addressing the question have overwhelmingly determined that a change in

change in, or elimination of, any element of Student's educational program resulted from the April 11, 2014 letter. *See D.K., supra.* I conclude that Student did not suffer a change of placement as a result of the private school's April 11, 2014 letter for which an MDR meeting would have been required.

Petitioner also complains that Nonpublic School summoned the Metropolitan Police Department following an incident on April 29, 2014 – a week after Student had resumed his studies at Nonpublic School – when Student allegedly threatened Teacher 1 at the school. As a result of this incident, Student was arrested on May 5, 2014. As a condition to Student's release pretrial, a D.C. Superior Court judge ordered Student to stay away, at least 100 yards, from the teacher he had allegedly threatened. While this Stay Away Order was in effect, Student was effectively barred by the Court from returning to Nonpublic School. However, the IDEA's discipline procedures were not applicable to Nonpublic School's reporting Student's alleged threat against Teacher 1 to the Metropolitan Police. The Act provides, expressly, that agencies are not prohibited from reporting crimes committed by students with disabilities to law enforcement authorities. *See* 20 U.S.C. § 1415(k)(6)(A); 34 CFR § 300.535(a). Nor can DCPS or Nonpublic School be liable under the IDEA for acts of judicial authorities, such as the Court's entering the Stay-Away order in this case. *Id.*

For the foregoing reasons, I conclude that Student was not denied a FAPE by DCPS' not holding an MDR meeting following the issuance of Founder/CEO's April 11, 2014 letter purporting to terminate Student's services at Nonpublic School.

location of services, on its own, is not a fundamental change in the educational program and therefore, not a change in education placement under the IDEA.”)

ORDER

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

ORDERED:

- i. All relief requested by Petitioner for DCPS' and/or Nonpublic School's not implementing the IDEA's discipline procedures for students with disabilities, upon the issuance of Nonpublic School's April 11, 2014 termination letter to Student, is denied and
- ii. This order is without prejudice to Petitioner's rights and remedies, if any, pertaining to the non-expedited issues set forth in my October 2, 2015 prehearing order herein.

Date: October 18, 2015

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team